



Eagle Law Group

Consultation in the context of modern treaties

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The duty to consult and, where appropriate, accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of Treaties. The Crown's efforts to consult and, where appropriate accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation.

Remember where the duty to consult arises...*Haida Nation v. British Columbia (Minister of Forests)*



Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

Justice Binnie, writing for the majority of the Court (decision was a 7-2 split)

- LSC FN members have a treaty with Canada and Yukon Territory entered into in 1997
- Under treaty LSC FN has a right of access for hunting and fishing subsistence in their traditional territory
- Paulsen applied to YT for an agricultural land grant in the traditional territory of the LSC FN and within the trapline of a member
- Treaty contemplated lands being taken up for agricultural purposes

Little Salmon Carmacks

- LSC FN argued that in considering the land grant the YT proceeded without consulting the FN
- SCC dismissed the appeal
- Land Application Committee had considered Paulsen's application at a public meeting
- LSC FN had been invited to the meeting and had submitted a letter of opposition but had not attended
- SCC concluded that YT had met the duty to consult on the facts of the case

Little Salmon Carmacks

- SC said where a modern treaty has been concluded first step is to examine the provisions of the treaty including obligations to consult in the treaty
- BUT Crown cannot contract out of the duty to consult and its general duty of honorable dealing with FNs
- A duty to consult did exist in the Little Salmon/Carmacks case but in the case the duty was met by giving the FN notice and appropriate information and considering the written submission

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- Justice Binnie, writing for seven of the nine judges, held that the duty to consult is external to the Treaty and is required to uphold the honour of the Crown, furthering the ultimate goal of reconciliation.
- Although it was undisputed that the LSCFN Treaty is the "entire agreement" between the parties, the Treaty does not exist in isolation: the duty to consult is part of the legal framework in which it is to be performed so as to uphold the honour of the Crown.

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- Justice Binnie said that it may be possible to negotiate a different mechanism within a treaty, other than consultation, stating: "*the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.*"
- However, the LSCFN Treaty does not describe the process of how Crown lands can be surrendered, or whether consultation would be required, and thus, the majority was unwilling to interpret that silence as implying no consultation was required.
- The Court additionally clarified that the trapper himself was exercising a "derivative benefit based on the collective interests of the First Nation" (para. 35) and therefore was not entitled to be consulted individually.

Little Salmon Carmacks



“Consultation”

...in modern treaties

"Consult" or "Consultation" means to provide:

- (a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- (b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
- (c) full and fair consideration by the party obliged to consult of any views presented.

Definition of “Consultation” in the UFA (1992)

“consultation” means

- (a) the provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
- (b) the provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and
- (c) full and fair consideration by the party obliged to consult of any views presented;

Gwich'in Comprehensive Land Claim Agreement (1992)

"consultation" means

(a) the provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;

(b) the provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and

(c) full and fair consideration by the party obliged to consult of any views presented;

Definition of “Consultation” in the Sahtu Final Agreement (1993)

“Consult” means provision to a party of:

- a. notice of a matter to be decided;
- b. sufficient information in respect of the matter to permit the party to prepare its views on the matter;
- c. a reasonable period of time to permit the party to prepare its views on the matter;
- d. an opportunity for the party to present its views on the matter; and
- e. a full and fair consideration of any views on the matter so presented by the party;

Definition of “Consultation” in the Tsawwassen First Nation Final Agreement (2006)

CONSULTATION

45. In respect of a Section 35 Right of Tsawwassen First Nation, the following is an exhaustive list of the consultation obligations of Canada and British Columbia:

- a. as provided in this Agreement;
- b. as may be provided in federal or provincial legislation;
- c. as may be provided in an agreement with Tsawwassen First Nation other than this Agreement; and
- d. as may be required under the common law in relation to an infringement of that right.

46. For greater certainty, the exercise of a power or authority, or an action taken, by Canada or British Columbia that is consistent with or in accordance with this Agreement is not an infringement of the Section 35 Rights of Tsawwassen First Nation and will not be subject to any obligation to consult except as set out in subclause 45.a, 45.b or 45.c.

Limits to “Consultation” in the TFNFA (similar clause in Nisga’a Final Agreement)

- Reconciliation
- Acting Honourably
- Good Faith
- Balance concerns

**Treaties describe relationships
between Canada's Aboriginal People
and the Crown**

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