

Haida in the City

Consultation and Accommodation of Aboriginal Claims in an Urban Setting

This paper was prepared by John J.L. Hunter Q.C. of the Vancouver law firm of Hunter Voith, Litigation Counsel for the annual meeting conference of the Canadian Corporate Counsel Association, August 15, 2005, Vancouver, B.C.

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In recent years there have been significant developments in the law relating to the obligations of consultation with Aboriginal people in relation to projects that will or may interfere with aboriginal rights or title. The case law on this subject has dealt almost exclusively with resource development in rural areas far from population centres and with unalienated Crown land used for forestry or mining activities.

Recently, there have been efforts to transfer the legal principles of consultation and accommodation to activities in more densely populated urban areas. The complexity of land use in an urban setting has created unusual problems of applying this resource-based law to the cities. The purpose of this paper is to review the current state of the law in relation to consultation and accommodation with Aboriginal people and to explore how the principles the courts have developed can be applied in a more densely populated and intensively used environment.

A. Background to the Consultation Question

I. The *Delgamuukw* Test for Justification

To explain where the law in relation to consultation comes from, it is necessary to review the law in relation to aboriginal rights and the role of consultation in that legal regime.

The obligation of the Crown to consult aboriginal people before authorizing action that will interfere with their aboriginal rights originated in the infringement/justification analysis explained in *R. v. Sparrow*¹.

Sparrow was the judgment which set out the justification analysis in relation to aboriginal rights. The Court explained that aboriginal rights are not absolute; they may be lawfully

¹ [1990] 1 S.C.R. 1075

infringed by the Crown so long as the infringing act meets the Court's test of justification². One of the elements of justification is whether the Aboriginal people who possess the rights have been adequately consulted. Thus, consultation in the *Sparrow* sense is part of the justification analysis, which presupposes that the aboriginal right has been established (as it had in fact been established in *Sparrow*). *Sparrow* does not discuss accommodation of aboriginal rights, or even mention accommodation.

The passage in which consultation is raised reads as follows:

Within the analysis of justification, there are further questions to be answered, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether in a situation of expropriation, fair compensation is available; and **whether the aboriginal group in question has been consulted** with respect to the conservation measures being implemented.³

The role of consultation was elaborated upon in the leading aboriginal title case of *Delgamuukw v. The Queen*.⁴ In *Delgamuukw*, the oft-cited passage in the judgment of Lamer, C.J.C. explained the significance of consultation in meeting the test for justifying infringement of aboriginal title as well as aboriginal rights:

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. **There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified**, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at

² This analysis has since been extended by the Court to all rights which are protected by section 35 of the *Constitution Act*, whether they are aboriginal rights (*Sparrow*) aboriginal title (*Delgamuukw*, *infra.*) or treaty rights (*R. v. Badger*, [1996] 1 S.C.R. 771).

³ *Sparrow*, p. 1119 at (f)-(g) (emphasis added).

⁴ [1997] 3 S.C.R. 1010.

common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances....⁵

Thus it is clear that once aboriginal rights or title have been established, the Crown may validly infringe such rights only when there is adequate consultation. What has been unclear is whether there is a similar obligation in relation to claimed rights which have not yet been proven. This is in many ways more important since there have been no instances in Canada where judges have been prepared to hold that aboriginal title exists over a designated piece of land,⁶ but there are a great many unproven claims of aboriginal title.

II. The Problem of Unproven Claims

The application of the consultation principles to unproven claims was addressed in two British Columbia cases which were resolved in the Supreme Court of Canada.

In *Haida Nation v. British Columbia*, the Haida challenged the statutory replacement of a tree farm licence over lands claimed by the Haida to Weyerhaeuser Company Ltd. on the ground (among others) that the Crown had an obligation to consult the Haida concerning the replacement licence and had failed to do so. The Ministry of Forests had taken the position that it was not obliged to consult the Haida in such a circumstance. The judge of first instance agreed⁷, but the Court of Appeal reversed⁸, holding that when the Crown was aware of a *prima facie* claim for aboriginal title, even if unproven, it was under an obligation to consult the

⁵ *Delgamuukw* at para. 168 (emphasis added).

⁶ As of July 2005 there has not been an instance, including the *Delgamuukw* decision, where a British Columbia court has held that an aboriginal nation has aboriginal title over a particular plot of land. Individual appellate judges in Nova Scotia and New Brunswick had held that the Mi'kmaq have aboriginal title to large tracts of land in those provinces, but these judgments have been reversed by the Supreme Court of Canada: see *R. v. Marshall*; *R v. Bernard*, 2005 SCC 43.

⁷ 2000 BCSC 1280

⁸ *Haida Nation v. British Columbia and Weyerhaeuser* (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147

aboriginal group making the claim and to seek to accommodate their interests. The Court of Appeal also held that the licensee Weyerhaeuser was under a similar obligation⁹.

The second case, *Taku River Tlingit v. British Columbia*, concerned the environmental assessment of a mine project. In this case, there had been extensive consultation of the potentially affected aboriginal nation, but the consultation had been truncated towards the end of the process and the aboriginal nation had opposed the project going ahead on the terms set by the Crown agency. Here, the judge of first instance held that the Crown was under an obligation to consult the Tlingit and that the obligation had not been met, with the result that the project approval certificate was set aside¹⁰. The Court of Appeal agreed¹¹.

The Court of Appeal also added a substantive element to the obligation, holding that the purpose of the consultation was to seek to accommodate the aboriginal concerns.

Both cases were heard on appeal by the Supreme Court of Canada. That Court held that the Crown must consult and if appropriate accommodate aboriginal people whenever the Government has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.¹² This is an obligation of the Crown only, not of Crown licensees. Thus the first *Haida* decision concerning the Crown's obligations was affirmed, while the second *Haida* decision concerning the obligations of Weyerhaeuser was reversed.

At the same time, the Court reversed the decision in *Taku River Tlingit*, holding that while the Crown was under an obligation to consult, it had done so adequately¹³. The mining certificate that had been set aside was restored.

⁹ *Haida Nation v. British Columbia and Weyerhaeuser*, 2002 BCCA 462.

¹⁰ (2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001

¹¹ *Taku River Tlingit First Nation v. Ringstad*, (2002), 89 B.C.L.R. (3d) 98, 2002 BCCA 59.

¹² *Haida* (SCC), para. 35

¹³ *Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74, [2004] S.C.R. 550

B. The *Haida* Principles

I. When must Aboriginal people be consulted?

The threshold here is a low one. The Crown must consult whenever the Government has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it.¹⁴

This is a concept similar to that proposed by the Court of Appeal. The difference in approach seems to be this: the Court of Appeal appears to set a slightly higher standard for when consultation is necessary, but then imposes a greater substantive obligation to seek an accommodation of Aboriginal concerns. The Supreme Court on the other hand requires consultation in virtually any case where it might be necessary, but does not necessarily require any substantive element of accommodation.

The Supreme Court does acknowledge the difficulty in addressing rights that have been asserted but not yet proven, and puts some onus on the Aboriginal claimants to clearly outline their claims:

It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.¹⁵

¹⁴ *Haida* (SCC), para. 35

¹⁵ *Haida* (SCC), para. 36. For an earlier expression of this obligation, see *Husby Forest Products v. British Columbia*, 2004 BCSC 142 at paras. 94 and 96: "It was incumbent on the Haida, if they did object to the granting of the cutting permits, to clearly define the nature and scope of the aboriginal right they claimed was being infringed.... The Haida must delineate whether they claim the right to red cedar and specifically what that means in relation to these cutting permit application, or the right to harvest cedar, or the right to preserve CMTs, or the right to preserve what they call the archaeological forests or some other right not yet encompassed in the various claims mentioned. They must do so in a site specific way."

II. Who must be consulted?

The problems of authority and conflicting claims were not addressed. In both *Haida* and *Taku River Tlingit*, the political organization of the relevant aboriginal nation was obvious and there were no overlapping claims to resolve.

The thrust of the decision appears to be that any aboriginal group that makes a credible claim for aboriginal title should be consulted but that those groups with a weak case for title need only receive a low level consultation effort.

III. What is the Content of the Consultation Obligation?

The source of the duty to consult is identified as the honour of the Crown rather than any fiduciary obligation. This appears to be the first time that the honour of the Crown has been used as the source of an obligation rather than an interpretive principle. It does suggest that a technical approach to this duty will not be favoured by the Court.

The Supreme Court offers no bright line test for the content of consultation, but instead uses the by now familiar spectrum approach to determining what must be done.

The content of the duty to consult and accommodate varies with the circumstances. The scope of the duty will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. If the claim is weak or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. If the claim is strong, the potential infringement significant and the risk of non-compensable damage high, deep consultation, aimed at finding a satisfactory interim solution, may be required. The approach is to be one of balance and compromise on all sides.

The Court does state that there is no duty to agree, a theme the Court returns to in its discussion of accommodation. The Court also adopts a proposition developed in the British Columbia courts that Aboriginal claimants “must not frustrate the Crown’s reasonable good faith

attempts, nor should they take unreasonable positions to thwart government from making decisions in cases where, despite meaningful consultation, agreement is not reached.”¹⁶

IV. When must the Crown Accommodate unproven aboriginal claims?

One of the significant changes in approach coming out of the Supreme Court’s decision in *Haida* is the treatment of accommodation, which has been de-linked somewhat from consultation. Consultation is required at any time when government-approved action may interfere with claimed aboriginal rights, but whether the Government needs to accommodate aboriginal concerns will depend on the result of the consultation process. If the consultation process indicates the need to take steps to avoid irreparable harm or to minimize the effects of infringement, a duty to do so may arise.

The Court explained the requirement in this passage:

When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.¹⁷

V. What is meant by Accommodation?

The Court spends some time on the definition of accommodation. It is clear that accommodation does not mean meeting the concerns raised, but rather altering the decision to balance the aboriginal concerns with other non-aboriginal interests. Accommodation refers to reconciling and compromising interests.

¹⁶ *Haida* (SCC), para. 36

¹⁷ *Haida* (SCC), para. 47

Accommodation does not mean the aboriginal group has a veto. This is made very clear in the following passage:

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.¹⁸

The Court took this concept of “accommodation” from the dictionary sense of the word:

This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *The Concise Oxford Dictionary of Current English* 9th ed. 1995) at p. 9.¹⁹

In British Columbia, a practice has developed of equating “accommodation” with some form of compensation for Aboriginal claimants prior to establishing their claims. The term “economic accommodation” has been used to refer to the basket of incentives offered to Aboriginal claimants who challenge government-approved projects on land they claim. This practice seems very much at odds with the concept of accommodation as explained by the Supreme Court.

No British Columbia court has yet required that the Government make a payment to accommodate unproven aboriginal rights claims. In a recent decision concerning the transfer of golf course lands in an urban setting, Hall J.A. suggested but did not direct that economic accommodation may be appropriate:

I should think there is a fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis. . . . While I have observed that having regard to the nature and location of these lands, this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation, I would not wish to limit the parties from

¹⁸ *Haida* (SCC), para. 48

¹⁹ *Haida* (SCC), para. 49

engaging in the broadest consideration of appropriate arrangements.²⁰

On the other hand, in the same case Lowry J.A. expressly declined to join in these comments²¹:

I do not wish to be taken to endorse what my colleague suggests may be appropriate forms of interim accommodation in this case. ... There is little in the decided cases from which assistance can be drawn with respect to the measure of interim accommodation that may be required in the circumstances that prevail in this case. **Where, as here, no aboriginal title has been finally established, there may well be questions about whether and to what extent economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate.**

In *Haida*, the Supreme Court seems to have been careful to relate accommodation to a modification of the Government's plans in order to harmonize those plans with Aboriginal interests or concerns whenever reasonably possible, rather than a cash payment for an uncertain claim. Some care is spent on this part of the judgment, even to the point of looking at dictionary definitions of "accommodate". The result is an emphasis on harmonization rather than compensation:

The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.²²

In understanding further what is meant by accommodation in this context, it is significant that in the *Taku River Tlingit* decision, the Supreme Court held that the consultation had been adequate even though there was no real accommodation of the Tlingit's concerns and certainly

²⁰ *Musqueam v. BC (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at paras 98-100

²¹ *ibid.*, paras. 104-105 (emphasis added)

²² *Haida* (SCC), para. 49

no “economic accommodation.” There had, however, been a significant degree of consultation, even though in the end the Tlingit felt that their concerns had not been met.

The significance of the *Taku River Tlingit* decision is that it demonstrates that not only is financial payment not required in order to meet the Crown’s obligations prior to proof of title, there may be no need for any real accommodation at all if that is what the consultation reveals. Accommodation in other words is distinct from *justification*.

VI. Position of the Private Sector

The B.C. Court of Appeal had held that the obligation to consult and accommodate aboriginal interests extended to third party licensees operating on Crown land, either generally as an independent obligation (per Lambert J.A.) or at least on some occasions when it was necessary in order to provide an effective remedy against the Crown (per Finch, C.J.B.C.).

The Supreme Court of Canada decisively rejected this proposition. Industry does not have an obligation to consult or accommodate aboriginal interests:

The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests.²³

The Court pointed out that it was open to the Government to delegate procedural aspects of consultation to industry proponents seeking a particular development, and references the terms of Weyerhaeuser’s licence approvingly. It is clear, however, that this is a matter between the Crown and the licensees. It does not give rise to an obligation enforceable by Aboriginal people against licensees, who “cannot be held liable for failing to discharge the Crown’s duty to consult and accommodate.”²⁴

As a practical matter of course, industry has a considerable interest in ensuring that the Government conducts the consultation properly. The reality is that while Courts have been

²³ *Haida* (SCC), para. 53

²⁴ *Haida* (SCC), para. 56

reluctant to set aside permits granted to third parties because of the Government's failure to consult properly, that is always a possible outcome, and the impact of such a remedy would fall on the permit holder.

VII. The Fee Simple Question

One point not dealt with by the Supreme Court in *Haida* (as it was not dealt with in *Delgamuukw*) is the status of fee simple lands. None of the cases to reach the highest court have dealt with private interests, or with Crown interests in Crown granted fee simple lands. This remains an area of uncertainty.

The underlying question is whether aboriginal title subsists in relation to fee simple lands. Assuming that over the past 150 years there have been at least some Crown grants to private owners of land burdened by aboriginal title, the open question is whether those lands remain burdened by an aboriginal title claim, or whether the effect of the Crown grant is to convert what would be a property claim into a damages claim.

If aboriginal title may subsist over private landownings, it would seem to follow that before the Crown could authorize any activity over those lands that might adversely affect the aboriginal title, it would be necessary to consult the aboriginal group that claims the title. This could have a significant impact over zoning or other land use decisions not obviously within the realm of aboriginal rights claims.

On the other hand, if the Crown grants have the effect of so infringing aboriginal title that only a damages claim can be maintained²⁵, different aboriginal nations will have very different remedial options available to them.

²⁵ It does not seem possible to argue that the Crown grants extinguished the aboriginal title, as the Supreme Court has already held that provincial governments do not have the constitutional capacity to extinguish aboriginal title.

C. Bringing *Haida* to the City

After the consultation principle in relation to unproven claims was articulated by the British Columbia Court of Appeal, several claims of inadequate consultation were brought by urban Bands, particularly the Musqueam Band, in relation to land use decisions in and around Vancouver. These cases, several of which are still working their way through the courts, raise difficult questions about the application of principles developed in a resource exploitation setting to an urban environment.

Some of the issues that are being played out in these cases include:

- (i) Is it likely that individual lots will be subject to aboriginal title?
- (ii) Does aboriginal title continue to exist on fee simple lands in a city?
- (iii) How should overlapping claims to urban lands be handled?
- (iv) What is the relevance of the treaty process and in particular, the problem of a shrinking pool of Crown land available for treaty selection?
- (v) If consultation is required, how should accommodation be handled?
- (vi) Do the Haida principles apply generally to municipal zoning and land use decisions?

I Is it likely that individual lots will be subject to aboriginal title?

To date the issue of aboriginal title has been raised in relation to large areas of rural land. In the municipal context, it is more likely that development projects will be limited to lots or at most, city blocks. Whether it is likely that these projects will engage aboriginal title claims depends on the scope of aboriginal title.

A recent decision of the Supreme Court of Canada may assist in narrowing the scope of consultation required in smaller urban plots of land. In *R. v. Marshall; R. v. Bernard*²⁶, the Supreme Court resolved an uncertainty about the scope of aboriginal title and in so doing, appears to have made it less likely that the consultation obligation will be applicable to single lot dispositions by the crown in an urban environment.

One of the outstanding legal issues arising from the *Delgamuukw* decision was whether aboriginal title is intended to encompass the entire traditional territory of an Aboriginal nation, or is intended to cover just the areas actually occupied by the members of the group, such as village sites or lands regularly visited by the Aboriginal people. The Supreme Court has resolved that issue, holding that to establish aboriginal title it is necessary to show physical occupation giving rise to effective control of the land²⁷:

In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights.

The effect of this decision is that aboriginal title will be restricted to areas over which the Aboriginal people had effective control by regular use or actual physical occupation, as opposed to occasional or seasonal use. These will presumably be smaller areas than the traditional territory of the Band, which it makes it less likely that a specific piece of municipal land will be subject to aboriginal title.

It is of course possible that Aboriginal people will have aboriginal activity rights over Crown land even if they cannot meet the physical occupation test for aboriginal title. The *Marshall/Bernard* decision does seem to encourage an approach focusing on rights claims rather than title claims. However in an urban environment there are few traditional activities that can still effectively be practiced, so that if aboriginal title is not provable, it seems less likely that any section 35 rights will be engaged.

²⁶ 2005 SCC 43

II. Does aboriginal title continue to exist on fee simple lands in a city?

The fee simple issue is not limited to urban environments, but it is easier to avoid it in a rural area where most of the land is still Crown-owned and has never been the subject of Crown grant. To date, aboriginal nations have generally not made claims for aboriginal title to fee simple land owned by private parties, either because of legal uncertainty as to their entitlement or political sensibilities. The problem is more difficult to avoid in the city.

While it is a little difficult to reconcile this conclusion with the constitutional reality that provinces cannot extinguish aboriginal title, it seems most likely that a court would conclude that a Crown grant of land would constitute an infringement of aboriginal title entitling the group holding the title to compensation, rather than a present or reversionary interest in the land itself.

If this is so, what does it mean for the obligation of consultation and accommodation? It does not seem realistic to create a legal regime where the Crown cannot make any land use decisions over privately held land in a city without consulting the aboriginal group that may have aboriginal title to the land. It seems more probable that this requirement will exist only in respect of land vested in the Crown.

What of land that has been the subject of a Crown grant to private interests but has subsequently been reacquired by the Crown in fee simple? The approach to date has been to treat such land as Crown land for purposes of the consultation obligation, but if the Crown grant converted aboriginal title land into private land subject to a potential damage claim against the Crown for unjustified infringement, it is difficult to see why reacquisition by the Crown would revive the proprietary right. This is not an academic question as most land owned by Government in a city will be owned in fee simple, having been acquired from a private landowner at some time in the past.

²⁷ *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 70

III. How should overlapping claims to urban lands be handled?

Overlapping claims are by no limited to cities, but because of the high land values in cities overlapping claims raise particular difficulties. In Vancouver for instance, both the Musqueam and the Squamish Bands have made strong (and independent) claims that downtown Vancouver is part of their traditional territory. There has already been extensive litigation between them over one eighty acre parcel²⁸.

Both of these claims have been accepted by the B.C. Treaty Commission for treaty negotiation. That in and of itself is probably sufficient to trigger a consultation obligation on the part of the Crown in respect of both Bands²⁹.

In addition, other Bands have also made claims that downtown Vancouver is part of their traditional territory. Under the B.C. Treaty Process, such overlapping claims were intended to be resolved by the Bands themselves, but that has not happened. As a result, there is a patchwork of overlapping claims throughout British Columbia, but particularly in the more valuable urban areas.

On the authority of *Haida*, at least these two Bands must be consulted on any decision by the Crown that may adversely affect their potential aboriginal title. What if the Bands have different interests? What happens if one wants the project to go ahead and the other does not? The *Haida* decision contemplates a strength of claim analysis, but where overlapping claims are concerned this can be very difficult. Even a brief perusal of the *Mathias* decision³⁰ in which the two claims (and the claim of the Burrard Band) to one parcel of land took many months to explore gives a sense of the dimension of the problem.

²⁸ *Squamish Indian Band v. Canada*, 2001 FCT 480

²⁹ See *Taku River Tlingit First Nation v British Columbia*, [2004] S.C.R. 550, 2004 SCC 74, at para. 26.

³⁰ *Squamish Indian Band v. Canada*, 2001 FCT 480

IV. What is the relevance of the treaty process and in particular, the problem of a shrinking pool of Crown land available for treaty selection?

There is clearly not very much Crown-owned land available in urban centres for settlement in treaty negotiations. In recent litigation, Bands have taken the position that the Crown should not be permitted to sell land to private interests because the effect of such sales will be to take the land out of the limited pool of Crown land available for treaty selection³¹. Is this the type of “adverse effect” referred to by the Supreme Court that triggers the consultation, and perhaps accommodation, obligation?

The context of the development of the Haida principles would suggest that reduction of the available land pool is not the type of adverse effect of concern to the Court. Both *Haida* and *Taku River Tlingit* concerned objections to the use of the claimed land that would impact negatively on the aboriginal claimants’ potential use of the land. In *Haida*, the Haida objected to the rate of harvesting that they felt would leave them with little more than a land of stumps if and when their claim to aboriginal title was accepted. The Taku River Tlingit objected to the creation of a road through their traditional territory that would interfere with their hunting and alter the landscape in ways incompatible with their culture.

These are considerations that make sense in a resource extraction context, but not in the context of developed land. In the cities, most land has been unavailable for traditional uses for more than a century. It is difficult to see how the sale of developed land, or a change of use of that land from one commercial purpose to another, can reasonably be said to adversely affect the aboriginal title claim. But the courts appear uncertain as to the approach to take to adapt the *Haida* principles to urban problems.

The recent trial level decision concerning the relocation of the Richmond casino does seem to accept that not only diminishing the value of the land (e.g. through clearcutting the timber) but also *increasing* the value of the land through redevelopment may adversely affect the

³¹ A recent example can be found in *Musqueam Indian Band v. City of Richmond*, 2005 BCSC 1069, where the Musqueam argued, and the chambers judge appeared to accept, that the potential adverse effects of the proposed development, a casino relocation, included the consequence that it would be “less likely that the lands will be included in a Musqueam treaty settlement”: para. 115

aboriginal title claim, since “the development itself may make the land more valuable and more difficult for Musqueam to acquire.”³²

V. If consultation is required, is accommodation also required?

The nature of the accommodation requirement becomes quite important in assessing urban land use decisions. If the thesis in this paper is correct – that accommodation refers to altering contemplated activities to meet the concerns of the Aboriginal people, not the payment of compensation that would be required in a justification process – there seems to be very little scope for accommodation in an urban land use decision. Accommodation in this sense presupposes that the Aboriginal people are co-users of the land and accordingly have uses of the land that should be impaired as minimally as possible by the contemplated activity. Where land has been used for general commercial (or residential) purposes for many decades, the concerns about the use that Aboriginal people may have for the land seem artificial.

The approach taken to date by the urban Bands has been to concentrate on obtaining money, or what is euphemistically referred to as “economic accommodation” to acquiesce in the Government’s development plans for urban lands owned by the Government. The suggestion in this paper is that “economic accommodation” is not the type of accommodation intended by the Supreme Court. Justice Lowry’s comments seem apposite:

Where, as here, no aboriginal title has been finally established, there may well be questions about whether and to what extent economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate.³³

³² *Musqueam Indian Band v. City of Richmond*, 2005 BCSC 1069 at para. 115

³³ *Musqueam v. BC (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at para. 105

VI. Do the *Haida* principles apply generally to municipal zoning and land use decisions?

One question that flows from these uncertainties is whether the *Haida* principles of consultation and accommodation apply to municipal zoning and land use decisions.

As a matter of logic, municipalities are emanations of the Crown and it might be argued that as delegates of Crown authority they attract the same obligations of honour that apply to other statutory decision-makers. On the other hand, the authority exercised by municipalities has a partly legislative, occasionally adjudicative quality that makes it difficult to adapt to the types of decisions under consideration in *Haida* and *Taku River Tlingit*.

Should municipalities be characterized as akin to private sector licensees, so that they might take advantage of the conclusions in *Haida* that Weyerhaeuser and other licensees did not have an obligation of consultation? The type of obligation discussed in *Haida* does seem to fit the senior levels of government more naturally.

A recent judgment of the B.C. Supreme Court³⁴ has held that statutory obligations of consultation found in municipal legislation is not to be equated with the consultation obligations described in *Haida*, but the question whether municipalities may be regarded as the Crown for purposes of the *Haida* test was not addressed.

The most recent decision in this area characterized (though without discussion) the relevant municipality as a “third party” which did not have an obligation to consult on the authority of *Haida*.³⁵ The *Marshall/Bernard* judgment from the Supreme Court of Canada may lend some force to this conclusion. If aboriginal title does not extend over the whole of the traditional territory of an aboriginal nation but rather only over the village sites and areas frequented on a regular basis by the Aboriginal people, it is less likely that municipal powers will be engaged. This conclusion will be further enhanced if it is determined that Crown grants to private parties have the legal effect of converting a property claim into a damages claim.

³⁴ *Gardner v. Williams Lake*, 2005 BCSC 706 at para. 63

³⁵ *Musqueam Indian Band v. City of Richmond*, 2005 BCSC 1069 at para. 105

D. Conclusion

The principles developed in *Haida* and *Taku River Tlingit* may reasonably be applied in low population areas where the principal activity is resource extraction, but they are much more difficult to adapt to an urban setting. Recent clarification of the scope of aboriginal title appears to make it less likely that the consultation principles will provide a significant constraint on municipal development, but the Crown will nonetheless be required to consider its consultation obligation in any urban development program which takes place on Crown land.

John J.L. Hunter Q.C.

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