YOUNG ANDERSON
BARRISTERS & SOLICITORS

LOCAL GOVERNMENT AND FIRST NATIONS:

THE DUTY TO CONSULT

NOVEMBER 30, 2012

Reece Harding

LOCAL GOVERNMENT AND FIRST NATIONS:

THE DUTY TO CONSULT

I. INTRODUCTION

In 2004, we presented a paper at this seminar entitled "The Duty to Consult First Nations: Is Local Government Next?". At that time this truly was an open question as our B.C. Court of Appeal ("BCCA") had issued reasons in a case known as *Haida Nation v. B.C.*, 2002 BCCA 147 where a duty to consult was applied to a third party where a prima facie aboriginal title existed. At the time we speculated that a third party could include a local government.

In the intervening 8 years, our Courts have clarified the duty to consult and how it relates to non-Crown entities, or third parties, such as local governments.

In this paper we will review several landmark cases explaining the Crown's duty to consult First Nations. Once the duty to consult is explained, we will review how this legal principle has been applied in several recent B.C. cases dealing specifically with local government. Finally, a discussion of how local governments are affected, or may be affected, by this expanding jurisprudence will be undertaken.

II. THE DUTY TO CONSULT

A. First Principles

The notion that there is a Crown duty to consult First Nations before decisions are made which infringe their aboriginal title or rights is not a new concept. It is generally agreed to have been recognized in the Supreme Court of Canada's ("SCC") 1984 decision in *Guerin v. R.* 1984 2 S.C.R. 335. In this early case law the duty to consult only would arise if an aboriginal right (e.g., fishing or hunting) or aboriginal title was infringed by a Crown decision or action. In *Guerin*, the Court held that consultation was required as a result of the fiduciary relationships between Canada and First Nations originating from Canada's jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act*, 1867. This duty has taken on a further constitutional underpinning as a result of s. 35(1) of the *Constitution Act*, 1982 which reads:

> "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

At its core, the duty to consult is founded in Canada's constitution. As shown below, this should inform the reader of why First Nations have, for the most part, been successful in their arguments challenging Crown decisions before our Courts – these are constitutionally protected rights.

Since the duty to consult was first described by our Courts, it has led to confusion. Quite literally, what did it mean and how was it to be applied? The answers to these questions were not entirely clear the in the early Court decisions. In *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 Chief Justice Lamer had this to say about the duty to consult:

> "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 suggest 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 common law: Guerin. [emphasis added]
>
> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

Therefore, as *Delgamuukw* explains the duty to consult varies depending upon the seriousness of the infringement. It will also vary depending upon whether the infringement relates to an aboriginal right or aboriginal title.

Even after landmark cases such as *Delgamuukw* were decided, fundamental questions such as when does the duty to consult arise remained (e.g., was there a duty to consult before or after an infringement is proven by the First Nation). This question was addressed head-on in two landmark B.C. cases (*Taku River Tlingit First Nation v. Ringstad*, 2002 BCCA 59 ("*Taku River*") and *Haida Nation v. B.C. and Weyerhaeuser*, 2002 B.C.C.A. 147 ("*Haida No. 1*") and 2002 B.C.C.A. 462 ("*Haida No. 2*")). Until these decisions, the Province of British Columbia had always maintained that the duty to consult arose only after a court declared that a First Nation had an aboriginal right, or a treaty had been concluded, which recognized an aboriginal right. In fact, this position of the Province had been accepted by our Courts. See *Westbank First Nation v. B.C.* (2000), 191 D.L.R. (4th) 180 (B.C.S.C.).

On the other hand, First Nations argued that such a position was inconsistent with their constitutional rights – if the aboriginal right had to be proven before a duty to consult would arise, then the Crown would be allowed to infringe such rights, without remedy to the First Nation, until the First Nation proved its rights through litigation. Obviously, this would take a lengthy period of time.

In *Taku River*, our BCCA reviewed a decision to issue a Provincial approval to allow for a mine development in claimed aboriginal territory. At the time of issuance of this approval, the First Nation had not proven its aboriginal title in the land at issue. The mine approval was issued before any consultation with the First Nation had taken place. The Crown took the position that it had no duty to consult before a determination was made that an aboriginal right existed. The majority of the BCCA disagreed with this proposition and held that s. 35(1) of the *Constitutional Act* imposed a pre-judicial determination obligation on the Crown to consult with the First Nation before making a decision which may infringe on aboriginal title or rights. Madam Justice Rowles speaking for the majority of the court stated:

> "To accept the Crown's proposition that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court had said, not only in *Sparrow* but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) and *Nowegijick v. R.,* [1983] 1 S.C.R. 29 (S.C.C.). Indeed, if the Crown's proposition were accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance."

In *Haida No. 1*, our BCCA dealt with a similar issue to that in *Taku River*. The Haida First Nation challenged the issuance of a tree farm licence based on an argument that the Crown had failed to adequately consult the Haida prior to renewing the licence. As in *Taku River*, the Province of British Columbia argued that the duty to consult did not arise until a Court had determined that

the Haida's aboriginal rights and title existed. As expected, our BCCA held that the duty to consult arose out of the existence of an aboriginal right or title and that no court order was necessary to give those rights substance. The result was that the Crown owed the Haida First Nation a duty to consult meaningfully before renewing the tree farm licence to a third party. It further ordered the Crown to engage in such consultation.

As discussed above, it is the Crown who owes the First Nations the duty to consult and accommodate. However, in *Haida No. 2*, the BCCA dealt with the question of the degree to which the holder of the tree farm licence at issue could be made subject to the Crown's duty to consult. In the case at issue, it was argued that Weyerhaeuser was also under an obligation to consult with the Haida. Further, the Haida First Nation argued that Weyerhaeuser was bound by the same duty to consult as the Crown given that it held the tree farm licence on behalf of the Crown. Weyerhaeuser argued, quite simply, that the duty to consult is that of the Crown and cannot be placed upon a private party.

In a split decision, our BCCA held in favour of the Haida noting the practical problem which would flow from the absence of a remedy against Weyerhaeuser. The BCCA reasoned there was little point in consulting with the Crown if it could give away its rights to a private party. In what became some of the most talked about reasons released by our BCCA in many years, Mr. Justice Lambert, reasoned that Weyerhaeuser, as a third party, owed a fiduciary duty to the Haida First Nation. Mr. Justice Lambert stated:

> "In my opinion, MacMillan Bloedel and Weyerhaeuser must have been aware of the provincial Crown's fiduciary duty to the Haida people, including a duty to consult the Haida people before renewing or transferring T.F.L. 39, and must have been aware of the strong *prima facie* case of the Haida people to aboriginal title and aboriginal rights in at least a significant part of the land area of T.F.L. 39, and must have been aware, or at least, could have become aware on reasonable and necessary inquiry, of the Crown breach of its fiduciary duty to the Haida people, particularly in the Crown's failure to consult the Haida people and to seek reasonable accommodations with them in the renewal and transfer of T.F.L. 39.
>
> In those circumstances, the principles of "knowing receipt" apply and Weyerhaeuser, in taking title to T.F.L. 39, must be regarded as a constructive trustee, owing a third party fiduciary duty to the Haida people, a duty which was breach immediately, as it was acquired, at the time of the renewal and transfer of T.F.L. 39, and a fiduciary duty which continues throughout the period that Weyerhaeuser is a licensee of T.F.L. 39 and which applies to

> Weyerhaeuser's management, administration, and operation of T.F.L. 39."

Not surprisingly both the *Taku River* and *Haida Nation* cases ended up at our SCC. From a local government's perspective, the SCC clarified the role of the third party and its duty to consult obligations. In short, the SCC expressed clearly that the honour of the Crown cannot be delegated to a third party and had this to say in fully reversing our BCCA on this point:

> "It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm License No. 39, Haida Tree Farm License, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."

In summary, these cases can be distilled down to the following principles:

1. the duty to consult arises through the honour of the Crown and its constitutional obligations to First Nations;

2. the duty to consult is a pre-judicial determination on the Crown to consult First Nations where the Crown decision <u>may</u> infringe aboriginal title or rights; and

3. the duty to consult cannot be delegated from the Crown. Procedural aspects (eg., meetings or public hearings) may be delegated to a third party but the honour of the Crown cannot be delegated.

III. HOW HAS *HAIDA NATION* BEEN APPLIED TO LOCAL GOVERNMENT?

Since the SCC released its landmark 2004 decision in *Haida Nation*, local government lawyers have debated openly whether the duty to consult and accommodate subscribed to the Crown in *Haida Nation* might apply to local governments and their decisions.

The obligation of the local government as "third party" was first explored in *Musqueam Indian Band v. Richmond (City)*, 2005 BCSC 1069. This case reviewed the B.C. Lottery Corporation and City of Richmond's decisions to approve the relocation of a gaming facility onto Provincial Crown lands over which the Musqueam asserted aboriginal title. In commenting on the statutory consultation process under the *Gaming Control Act* the Court stated:

> "The petitioners argue that consultation process with Richmond was a sham because Richmond had already made up its mind that it wanted to pursue the casino at the Bridgepoint site. It is apparent from the evidence before me that Richmond was keen to pursue the casino development at the Bridgepoint site. This does not mean that the consultation process was a sham. The consultation process allowed the Musqueam to advise Richmond of their concerns. The Musqueam might have raised concerns that Richmond would have chosen to address. For example, an adjacent municipality or a First Nation may be concerned with traffic flow or adequacy of parking. These matters which Richmond could respond to and which Richmond may be inclined to respond to, given that the Lottery Corporation had yet to reach its final conclusion as to whether it would develop the casino in its proposed location.
>
> There is some force to the petitioner's argument that by the time their input was sought, many of the development decisions were already taken by Richmond in that the property had been rezoned and development permits issued. This argument may have had some force, had the issues raised by the Musqueam been issues which would be addressed in the zoning application or development permit process. So, for example, were the Musqueam concerned with traffic flow or adequacy of parking, these would be issues that could have been addressed in the zoning and development permit process.
>
> However, in this case, the issues raised by the Musqueam were not of this type. Rather, the Musqueam's concerns were of a larger nature; if the Richmond casino were substantially expanded as contemplated, then it would be less likely that the Musqueam

> would be able to have a casino of their own or that any casino that the Musqueam did develop would be as financially successful; that development of a casino on the Bridgepoint site would infringe Musqueam aboriginal title and rights, and would prejudice Musqueam treaty negotiations with respect to the land and in respect of gaming. These concerns are of a higher order and are properly addressed to either the Lottery Corporation with respect to its decision as to where it chose to place its casino, or with the provincial or federal governments with respect to treaty negotiations. They are not matters over which Richmond had jurisdiction or which could be addressed by Richmond. Essentially, the Musqueam were asserting that Richmond must become the Musqueam's advocate with respect to Musqueam interest. This cannot be the type of consultation contemplated by the Act."

Later, the Court commented on the *Haida Nation* duty to consult and the role of the City of Richmond in this regard:

> "The Supreme Court of Canada has dealt with the issue of the duty to consult and accommodate in two recent decisions: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550. The SCC confirmed the obligation of the Federal and Provincial Crown to consult and determined that a third party in the position of Great Canadian or Richmond did not have a duty to consult. In Haida the court said at paras 16-17:
>
> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown… It is not a mere incantation, but rather a core precept that finds its application in concrete practices."

In the writer's opinion, the *Musqueam Indian Band* case stands for two important propositions. First, that a statutory consultation process engaging First Nations and a local government is not to include issues of aboriginal rights and aboriginal title as they are the responsibility of the Federal and Provincial Crown. Second, that the local government decision-maker is considered to be a "third party" for the purposes of the *Haida Nation* analysis and has no independent duty to consult First Nations.

These concepts were further discussed in *Gardner v. Williams Lake (City)*, 2006 BCCA 307. In *Gardner*, it was argued that the Haida Nation duty to consult should be used when addressing the meaning of "consultation" in section 879 of the *Local Government Act ("LGA"):*

> "Mr. Gardner's first submission addresses the meaning of the word "consultation" used in s.879. He urges us to assess the adequacy of consultation on the basis that compliance with the duty to consult is an issue for the courts, as in *Haida Nation*, supra.
>
> *Haida Nation* addressed the issue of governmental compliance with the duty, grounded in the principle of honour of the Crown, to consult Aboriginal peoples in cases involving issues of Aboriginal right, claim to title, or potential for infringement of a right or title.
>
> …
>
> Local governments, however, are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honour of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions. Rather it concerns the content of the requirement to consult that is found in s.879 of the *Local Government Act*. The case simply requires consideration of the language of the section in its context."

As such, *Gardner* confirms, again, that it is inappropriate to use the *Haida Nation* duty to consult as it relates to a statutory consultation scheme involving a local government as local governments are creatures of statute. This case clarifies that the *Haida Nation* duty to consult analysis has no place in local governments' consultation efforts under s. 879 of the *LGA*.

The third and most important case dealing with the duty of consult and how it affects local government is the recently released *Neskonlith Indian Band v. Salmon Arm (City),* 2012 BCCA 379. The issues on appeal were described succinctly by our BCCA as follows:

> "This appeal tests the principles confirmed in *Haida* and *Rio Tinto*, but in a very different context. Here, the third party said by the petitioner First Nation to be under a duty to consult is a municipality, the City of Salmon Arm. The impugned conduct or decision of the City is the issuance of an "Environmentally Hazardous Area Development Permit" required under Salmon Arm's official community plan ("OCP") with respect to the construction of a shopping centre on privately-owned land. This land neighbours the Neskonlith Reserve #3, which the Neskonlith regard as part of their traditional territory, although they have not entered into treaty negotiations for Aboriginal title, nor instigated a claim in a court of law. The Band's particular objection in this

> case is to the siting of the proposed shopping centre, which they say should be built at an elevation 1.5 metres higher than the elevation allowed by the terms of the permit."

For its part, the First Nation set out their position as follows:

> "As for the notion, expressed at para. 53 of *Haida*, that "the honour of the Crown cannot be delegated", the Band notes that the statement was made in the context of the argument that a private party, the forestry contractor which held that tree farm license in that case, itself owed a duty to consult to the Haida. Here, however, the "third party" is a local government, which is said to have the statutory authority to affect Aboriginal rights and title through the exercise of its authority. While the Neskonlith acknowledge that the Province may have a "residual" obligation to ensure that the honour of the Crown is discharged, they also say that the "constraint" (i.e., the duty to consult founded in the honour of the Crown) attaches "automatically" to any governmental body exercising the authority of the Crown. This, they say, makes practical sense – the local government is in the best position to assess the effect of its decisions on First Nations.

Our BCCA recognized that this was a strong argument. However, it also found that the SCC's statement in *Haida Nation* that the honour of the Crown cannot be delegated was not limited or qualified. In short it applied to all third parties, including local governments. The Court rejected the argument that a duty to consult could attach automatically to local government decisions, noting that as statutory creatures, local governments have only those powers delegated to them. The Court observed that local governments lack the remedial powers from which a delegation of the duty to consult might be inferred. The Court reasoned:

> "There are, however, even more powerful arguments, both legal and practical, that in my view militate against inferring a duty to consult on the part of municipal governments. First, the Neskonlith's position seems to run clearly contrary to *Haida* and *Rio Tinto*. In *Haida*, the Court stated expressly that while the Crown may delegate "procedural aspects" of consultation, the "ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated." (Para. 53.) While it is true that this statement was made in a particular context, the Court did not limit or qualify its words. It rejected the notion that third parties who are in a position to provide an 'effective remedy' should for that reason alone be held to the duty; and in any event, it was not persuaded

> the Crown in the right of the Province lacked the ability to provide "sufficient remedies to achieve meaningful consultation and accommodation" in that case. As I will explain below, municipalities do lack that ability."

This is an important conclusion for local governments as there was significant concern expressed in advance of this appeal that if the appeal were successful, that local governments would be seriously impacted by the expansion of the duty to consult and accommodate being applied to their decisions. In recognizing this practical limitation, our BCCA stated:

> "Finally, I consider that the 'push-down' of the Crown's duty to consult, from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licenses, permits, zoning restrictions and local bylaws, would be completely impractical. These decisions, ranging from the issuance of business licences to the designation of parks, from the zoning of urban areas to the regulation of keeping animals, require efficiency and certainty. Daily life would be seriously bogged down if consultation – including the required "strength of claim" assessment – became necessary whenever a right or interest of a First Nation "might be" affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger "upstream" objectives described in *Haida*."

IV. CLOSING COMMENTS

As we know, there are statutory provisions within the *LGA* (and other Provincial legislation) which mentions "consultation" with First Nations. In this regard we refer specifically to ss. 855 and 879. Sections 855(1) and (2) reads:

> (1) During the development of a regional growth strategy,
>
> (a) the proposing board must provide opportunity for consultation with persons, organizations and authorities who the board considers will be affected by the regional growth strategy, and
>
> (b) the board and the affected local governments must make all reasonable efforts to reach agreement on a proposed regional growth strategy.

> (2) For the purposes of subsection (1)(a), as soon as possible after the initiation of a regional growth strategy, the board must adopt a consultation plan that, in the opinion of the board, provides opportunities for early and ongoing consultation with, at a minimum,
>
> …
>
> (c) first nations,

Further, s. 879 of the *LGA* reads:

> 879 (1) During the development of an official community plan, or the repeal or amendment of an official community plan, the proposing local government must provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected.
>
> (2) For the purposes of subsection (1), the local government must
>
> (a) consider whether the opportunities for consultation with one or more of the persons, organizations and authorities should be early and ongoing, and
>
> (b) specifically consider whether consultation is required with
>
> …
>
> (iv) first nations,

After the *Haida Nation* decision in 2004, if a regional growth strategy or official community plan ("OCP") had, for example, designated Crown land for certain purposes it would have been arguable that a First Nation who claimed to be affected by such designation (i.e., where that First Nation has made an aboriginal claim to such land) could have argued that "consultation" in these legislative provisions imported with it a duty to consult and seek meaningful accommodation before implementation of a regional growth strategies or OCP.

In the writer's view, such arguments are now bound to fail as a result of the *Musqueam, Gardner* and, particularly, the *Neskonlith* case. Currently, the law will require local governments to carry out its statutory consultation only and not concern itself with the *Haida Nation* duty to consult. Further, even if a local government permit or approval does not specifically flow from a statutory consultation provision (such as a development permit in the

Neskonlith case) the BCCA has rejected the notion that a duty to consult could attach automatically to local government decisions, noting that as creatures of the statute, local governments have only those powers delegated to them. Clearly, the duty to consult First Nations regarding their aboriginal title and rights has not been delegated to local government

In the end, despite such complex legal conclusions, local government and First Nations are neighbours. In this regard, local governments will continue to work with First Nations to build positive relationships around the servicing of lands, community planning, and the natural environment as examples. Certainly, where the *LGA* calls for consultative efforts, local governments will seek out, and obtain, input from its neighbouring First Nations. However, these consultative efforts, as of now, should be driven by statutory or bylaw requirements, if any, and not in a manner which seeks to replace or supplement the duty to consult obligations owed by the Provincial and Federal Crown. It seems both legally and practically appropriate that when issues of aboriginal title and aboriginal rights are involved, First Nations should engage with the Crown and not local governments.

Please note that at the time of writing this article no decision has been made by the Neskonlith Indian Band whether they will seek leave to appeal to the SCC.