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THE TSILHQOT'IN NATION AND WHISTLER CASES:

WHAT DO THEY MEAN FOR LOCAL GOVERNMENT?

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I. INTRODUCTION

This paper deals with the Supreme Court of Canada's recent landmark decision in the *Tsilhqot'in v. British Columbia,* the first case in which a court has granted a declaration of aboriginal title in British Columbia and thus a case with truly enormous implications for British Columbia. It also deals with the related issue of the Crown's constitutional duty to consult First Nations in the face of credible, but as yet unproven, claims to aboriginal title or rights. Part A, dealing with the Tsilhqot'in case, is essentially a reprint, which a few minor amendments, of Gregg Cockrill's recent newsletter article. In Part B, Reece Harding discusses the duty of consultation, particularly as it applies to local governments, noting and discussing the most significant cases, including the leading Supreme Court of Canada case, *Haida Nation v. British Columbia*, which established the basic framework of the duty, the British Columbia Court of Appeal decision in *Neskonlith Indian Band v. Salmon Arm,* denying that the duty extends to local governments, and the recent Supreme Court of British Columbia decision, *Squamish Nation v. British Columbia,* in which the court set aside Whistler's new official community plan on account of the Province's failure to adequately consult the First Nation regarding the potential impacts of the plan before approving it.

A. The Tsilhqot'in Case – Aboriginal Title Proven

In March 1861, James Douglas, the Governor of the Colony of Vancouver Island, sent a petition to the Duke of Newcastle from the House of Assembly in Victoria requesting 3000 pounds from the Imperial government to complete the treaty process that had begun on Vancouver Island. The Duke's reply, denying the request and suggesting that the Colonial government find funds elsewhere, changed the course of aboriginal title matters in British Columbia. Despite the modest sum apparently required by Governor Douglas to complete treaties on Vancouver Island, the Colonial government chose instead to abandon the treaty process altogether in favour of a system involving the unilateral establishment of reserves, together with a policy, reflected in a series of land ordinances, of making other lands available for settlement without regard to any interest the First Nations may have had in such lands.

The significance of this shift in colonial policy cannot be overstated. It left to the courts a number of very important questions: (1) Did aboriginal peoples have aboriginal title to lands in British Columbia at the time the British asserted sovereignty over the Colonial territory? (2) If aboriginal peoples did have aboriginal title to lands in British Columbia, had such aboriginal title been extinguished by the Colonial government prior to British Columbia joining Canada in 1871 (as a result of the unilateral reserve creation and land settlement process employed by the Colonial government), as the Province maintained for many years? Or did it continue to exist as

the federal government and First Nations contended? (3) If aboriginal title continued in relation to Crown lands in British Columbia, despite British Columbia's pre-Confederation reserve creation and land settlement measures, what was the nature of it and what degree of occupation needed to be proven to confirm it?

Most of these questions were answered by the Supreme Court of Canada in its landmark decision in *Delgamuukw v. British Columbia* in 1997. While the pleadings in that case prevented the Supreme Court from deciding the underlying title claim of the Gitskan and Wet'suwet'en (a claim to title to some 58,000 square kilometres of land), the Supreme Court confirmed that aboriginal title continued to exist in British Columbia. It described the nature of aboriginal title, confirming that while such title differs from a common law fee simple (it is a communal title that is inalienable unless first converted to non-title land by prior surrender to the Crown and remains subject to an inherent limitation preventing its use by the aboriginal group for uses incompatible with the historical occupation that gave rise to it), it is also similar to a fee simple in that it confers on the aboriginal group a right to exclusive use and possession of the land. The Supreme Court also described the elements that needed to be proven for aboriginal title to be established:

> In order to make a claim for aboriginal title, the aboriginal group asserting the claim must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

While *Delgamuukw* made it clear that an aboriginal group could establish aboriginal title by proving that it was in exclusive occupation of the land when the British asserted sovereignty in British Columbia (determined by the Court to be the date of the Oregon Boundary Treaty in 1846), the Court in *Delgamuukw* said little about the nature of the occupancy sufficient to ground title. In *Delgamuukw* it was unclear whether the Supreme Court of Canada was speaking of occupancy of the kind associated with village sites and other areas that had been in regular, intensive, and geographically well-defined use by the aboriginal group, or whether the occupancy to which it referred might include more transitory or intermittent use of the land, for hunting, fishing and other activities. The Court's failure to address this issue in detail left it unclear whether the Court in *Delgamuukw* contemplated proof of aboriginal title to very large areas (essentially the full territories claimed by aboriginal groups) or very small areas within those territories (essentially village sites and not much more). That question has now been answered by the Supreme Court of Canada in its most recent landmark decision, *Tsilhqot'in Nation v. British Columbia.*

The Tsilhqot'in Nation, a group comprising six bands, claimed aboriginal title to a portion, about 5%, of its traditional territory (presumably leaving it to another day to claim title to further parts of that territory when its evidentiary basis for doing so was solidified). The area to which

they sought title comprised a large area of mostly undeveloped Crown land in a remote part of the Chilcotin. The trial judge declined to grant a declaration of title, though he concluded the evidence was sufficient to establish that the Tsilhqot'in had been in exclusive occupation of roughly 40% of the claim area. He held that the claim had been advanced as an "all or nothing" claim, such that he could grant a declaration of title only if the Tsilhqot'in had succeeded in proving exclusive occupancy in 1846 of the entire claim area. He dismissed the claim without prejudice to the Tsilhqot'in's right to pursue geographically smaller claims within the claim area. His conclusions with respect to the area to which he would have found title had been proven (had the claim not been advanced on an all or nothing basis) were nevertheless based on his view that the occupancy necessary to ground title was not limited to intensive occupation of specific sites, but included a more territorial and nomadic occupancy that could be established by hunting, trapping, fishing, and other activities at places within the claim area. In short, he accepted a view of the nature of occupancy necessary to ground aboriginal title that would result in very large portions of the province being subject to aboriginal title.

The British Columbia Court of Appeal disagreed with the trial judge's conclusion that it was not open to him to make an actual declaration of aboriginal title simply because the claim had been framed as a claim to a larger area than that to which the trial judge had found title to have been proven. However, the Court of Appeal also disagreed with the trial judge on the nature of occupancy necessary to establish title. The Court of Appeal adopted a much narrower view, holding that aboriginal title could be proven only by showing intensive use of definite tracts of land. This narrower view on the nature of occupancy necessary to establish aboriginal title would result in only specific sites, and thus a very small part of the province, being subject to aboriginal title.

In its decision released in June, 2014, the Supreme Court of Canada rejected the Court of Appeal's approach in favour of an approach very similar to that of the trial judge. The Court concluded that the Tsilhqot'in had proven "sufficient" occupancy of the areas designated by the trial judge (areas comprising approximately 1700 square kilometres of land). The Court disagreed with the trial judge's "all or nothing" rationale for refusing to issue an actual declaration of title to that area and issued the declaration itself. While there are a number of important aspects of the *Tsilhqot'in* decision, clearly the most significant is the Supreme Court's adoption of the broad view of the nature of occupancy necessary to ground title. On this issue, the Court said the following:

> For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

> The first requirement – and the one that lies at the heart of this appeal – is that the occupation must be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?
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> To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.
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> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is 'sufficient' use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

The Court's conclusion on the degree of occupation issue (and its resulting declaration of Tsilhqot'in title) is a massive victory for First Nations and an extremely significant decision for the Province generally, as it makes it likely that a very large portion of the Province is subject to aboriginal title. It puts an end to the narrow view of title advanced by the Province, and accepted by the Court of Appeal, and creates the reality that a vast amount of unoccupied Crown land in British Columbia is aboriginal title land.

While the Court's decision in *Tsilhqot'in* on the title question itself is undoubtedly the most significant aspect of the case, the Court did temper to some degree the impact of that decision, by holding that provincial land use regulations may continue to apply to aboriginal title lands, despite such lands being "lands reserved for the Indians" under section 91(24) of the

Constitution Act, 1867. This conclusion runs counter to prior court rulings to the effect that the federal government has exclusive legislative jurisdiction to regulate the *use* of lands reserved for the Indians (with only generally applicable Provincial laws, not aimed at *use*, having potential applicability to such lands). In *Tsilhqot'in* the Court swept aside the previous jurisprudence on the division of powers issue, in what appears to be an obvious attempt to avoid the otherwise sweeping elimination of Provincial regulatory power over much Crown land in the Province. The Court simply concluded that, in this area, the traditional inter-jurisdictional immunity model is "at odds with modern reality" and should not be applicable. The Court held that section 35 of the *Constitution Act, 1982* should be the exclusive lens through which both Provincial and Federal jurisdiction to deal with aboriginal title land is decided.

Section 35 of the *Constitution Act, 1982* provides that aboriginal rights are "recognized and affirmed." This section protects aboriginal rights (including title) against governmental action by both the federal and provincial governments. However, that protection is not absolute. In numerous prior cases, the Supreme Court has interpreted section 35 as allowing governmental interference with aboriginal rights, but only if the governmental measure at issue meets a strict justification test. The Court in *Tsilhqot'in* appears to simply affirm the established section 35 jurisprudence, noting that to justify a governmental action that infringes aboriginal title the government will typically be required to show that it has consulted the affected aboriginal group prior to enacting or otherwise undertaking the infringing action, that the governmental action is "backed by a compelling and substantial legislative objective in the public interest", and that the government has reasonably accommodated the aboriginal title interest.

Reasonable accommodation will usually require the government to show that it has chosen a means of achieving its objective that infringes aboriginal title as little as possible and, where appropriate, that it has adequately compensated the aboriginal group. Given the implications of *Tsilhqot'in* respecting the territorial reach of title claims in British Columbia, it may be expected that governmental decision-making respecting areas subject to title claims will routinely involve much more vigorous prior consultation with affected First Nations and much greater emphasis on accommodating the interests asserted by such First Nations. Once title or rights are proven, governments may be required to abandon contemplated legislative measures that are not sufficiently compelling or substantial to justify the infringement of aboriginal rights that would result from their implementation, alter contemplated legislation to lessen its impact on aboriginal rights, or compensate the affected First Nation when an important governmental objective cannot be achieved without infringing aboriginal rights or title.

While the *Tsilhqot'in* case leaves open the possibility that local government regulations, including land use regulations, could apply to aboriginal title land, any such regulation would have to pass the extremely high justification bar under section 35. While certain land use regulations might be seen as promoting a legislative objective that is sufficiently compelling and substantial to pass the section 35 test, presumably most local government land use regulation would not.

B. The Duty of Consultation[1]

The duty to consult with a First Nation arises when (1) the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal claim or right (2) the Crown contemplates a decision in conduct that engages the Aboriginal claim or right; and (3) the contemplated Crown decision or conduct may already affect the Aboriginal claim or right: *Haida Nation v. British Columbia (Minister of Forests)*[2].

When the Supreme Court of Canada released its landmark 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*, many First Nations within the Province of British Columbia asserted that local governments were obliged to consult with them on decisions that First Nations say have the potential to infringe claimed aboriginal rights or title. Such obligations have been said to be based on the "honour of the Crown" being exercised by local governments through delegated Crown authority. First Nations had taken that position despite the Supreme Court of Canada making it clear that third parties are not responsible for the Crown's duty to consult[3].

The "honour of the Crown" refers to the Supreme Court of Canada's conclusion in *Haida Nation* that there is a duty on the part of the Crown to consult with First Nations regarding decisions that may impact aboriginal rights or title after claims to such rights or title have been made and before they are resolved through the courts as in *Tsilhqot'in v. B.C.* or in a treaty-making process. This is part of a process of fair dealing and reconciliation that began with the Crown's assertion of sovereignty over the land that is now British Columbia. The honour of the Crown precludes the Crown from ignoring aboriginal interests while aboriginal claims are being settled. If consultation identifies potential infringements of claimed aboriginal interests, the honour of the Crown may also require accommodation of those interests.

In British Columbia, many subsequent cases to *Haida Nation* have dealt with the duty of the Crown to consult with and, if necessary, accommodate First Nations in its decision-making processes. Most of these cases have dealt with Crown decisions resulting in access to and use of Crown resources, such as minerals and forests, that are subject to aboriginal claims. It was assumed by local governments that local government decisions dealing with the use of private land, such as enacting official community plans and zoning bylaws, did not fall within that duty, especially given the Supreme Court of Canada's finding in *Haida Nation* that a third party (i.e., a local government) could not be responsible for the Crown's duty to consult.

[1] Part B of this paper is an updated reprint of "British Columbia Court of Appeal clarifies Relationships between Local Government and First Nations", Reece Harding, The Digest of Municipal and Planning Law (2013) 6 DMPL (2d) Issue 10.

[2] 2004 SCC 73 at para 35

[3] 2004 SCC 73 at Para 53

These assumptions were directly tested in 2012 in both the *Neskonlith Indian Band v. Salmon Arm (City)*[4] and *Adams Lake Indian Band v. LGI*[5] cases, which will be discussed in detail below. These concepts were also recently discussed in *Squamish Nation v. British Columbia.*[6].

II. A BRIEF REVIEW OF THE CASES

A. Neskonlith Indian Band v. Salmon Arm (City)

In *Neskonlith*, there was a direct assertion that a development permit authorizing the construction of a large retail store on private land in an area subject to flooding was issued improperly, because the City had not consulted the First Nation about the permit in the manner required under the *Haida Nation* case. Statutory consultation conducted pursuant to s.879 of the *Local Government Act*[7] was alleged to be insufficient to meet that standard.

The First Nation had obtained an opinion from a geoscientist that if the building at issue was built, and was subsequently flooded, flood protection works would likely be constructed to protect the building from further flooding, and those works would harm the First Nation's reserve lands nearby. The City and the developer had relied upon advice they received from professional engineers pursuant to other authority in the *Local Government Act*[8], rather than attempting to accommodate the First Nation's concern. The First Nation sought declarations that would have, through the City's development approval processes, brought asserted claims to aboriginal rights and title into direct collision with the rights of a private property owner to develop its land within the City's development approval process. This case was the first time in British Columbia such a direct collision had occurred.

In the B.C. Supreme Court, the First Nation's petition to set aside the development permit for failure to consult with the First Nation in the manner mandated by the *Haida Nation* case was dismissed. The Band's argument was that the development permit power, and indeed all powers in Part 26 of the *Local Government Act,*[9] must be interpreted in a manner that is consistent with the honour of the Crown, and with s.35 of the *Constitution Act, 1982*, which protects existing aboriginal and treaty rights. Those powers, it was argued by the First Nation,

[4] 2012 BCCA 379

[5] 2012 BCCA 333

[6] 2014 BCSC 991

[7] Section 879 of the *Local Government Act* lists various matters that must be considered when adopting or varying an OCP (which includes development permit guidelines) including "whether consultation is required with … First Nations".

[8] Section 920(11) of the *Local Government Act*.

[9] Part 26 of the *Local Government Act* is entitled "Planning and Land Use Management".

must be interpreted to require that the City consult with and accommodate aboriginal people who have unresolved claims to such rights.

This argument was rejected on the basis of the Supreme Court of Canada's previous decision in *Haida Nation*, in which the Court stated that the honour of the Crown cannot be delegated, and a more recent Supreme Court of Canada decision in a case called *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,*[10] in which the Court noted that the Crown could expressly or implicitly delegate procedural aspects of consultation to agencies of the Crown.

The B.C. Supreme Court observed that, while the City could potentially be the Province's delegate for the purpose of conducting constitutionally-required consultation with aboriginal people, there was nothing in Part 26 of the *Local Government Act* that expressly or implicitly delegated such powers, other than s.879 of the *Act* which requires consideration with various parties, including First Nations, in relation to the adoption and amendment of OCPs. The B.C. Supreme Court found the City was under no legal or constitutional duty to consult with the Band before issuing the development permit. The First Nation appealed this decision.

In dismissing the appeal of the First Nation, the B.C. Court of Appeal also found that the City had no duty to consult and accommodate the First Nation. The Court made several findings in this regard. Following the *Haida Nation* and *Rio Tinto* authority, it found that the ultimate legal responsibility for consultation and accommodation rests with the Crown and that the honour of the Crown cannot be delegated, even to a governmental organization such as a local government. The Court accepted that, while procedural aspects of the duty to consult can be delegated, the Province had simply not delegated the duty to local governments. The B.C. Court of Appeal stated:

> …As the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs, grant benefits to First Nations or indeed to consider matters outside their statutory parameters…[11]
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> …
>
> …And while it is true that First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one, it is also true that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific

[10] 2010 SCC 43

[11] 2012 BCCA 379 at para. 68

> group in making the day-to-day operational decisions that are the diet of local governments.[12]

In recognizing the impracticalities of such consultation between local governments and First Nations the Court commented:

> …Daily life would be seriously bogged down if consultation – including the required "strength of claim" assessment – became necessary whenever a right of 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*.[13]

The Court dismissed the appeal on two other grounds, finding that the adverse impact alleged by the First Nation in this case was too speculative to give rise to a duty to consult and that, even if a duty to consult did exist, the City had adequately consulted. This decision was not appealed to the Supreme Court of Canada.

B. *Adams Lake Indian Band v. LGIC*[14]

At the same time as the *Neskonlith* case was working its way through the B.C. courts, local governments took particular interest in the *Adams Lake* case. In this case, the First Nation asserted that the incorporation of the new Sun Peaks Mountain Resort Municipality was a decision that had the potential to infringe upon unproven aboriginal rights and title. The Adams Lake Indian Band argued that the new local government would have no constitutional duty to consult it on such matters as the enactment of local bylaws. It was argued that the incorporation of the local government itself deprived the First Nation of future opportunities for consultation and accommodation of its interests with the Crown. Interestingly, this argument was contrary to the position that many other First Nations had been taking with local governments around the province, including the Neskonlith.[15]

[12] 2012 BCCA 379 at para. 70

[13] 2012 BCCA 379 at para. 72

[14] 2012 BCCA 333

[15] See *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379. Of note, the Adams Lake and Neskonlith Bands together (with one other Band) form the Lakes Division of the Secwepemc Nation.

In the *Adams Lake* case, the B.C. Supreme Court did conclude that the Province had failed to adequately consult the Band. The incorporation of Sun Peaks was held to be one act by the Crown in a series of activities that had the potential to affect aboriginal rights and title in the area, including activities of the resort developer both before and after local government incorporation pursuant to a "master development agreement" with the Province. The B.C. Supreme Court did not, as the First Nation had requested, quash the new local government's letters patent, but instead ordered the Crown to conduct further consultation with the Band.

However, the B.C. Court of Appeal reversed the B.C. Supreme Court decision and allowed the Crown's appeal. The Court relied upon comments of the Supreme Court of Canada in *Rio Tinto*[16] to the effect that the duty to consult aboriginal people concerns "the specific Crown proposal at issue" and not the "larger adverse impacts of the project of which it is a part". As such, the B.C. Court of Appeal found that the only matter that was properly before the Court was the adequacy of consultation regarding the incorporation itself of Sun Peaks Mountain Resort Municipality.

In regard to the effect of incorporation itself, the B.C. Court of Appeal was satisfied that the impact of incorporation on the Band's claims of aboriginal rights and title was "insubstantial", as the incorporation of Sun Peaks merely substituted one form of local government for another. The B.C. Court of Appeal found that the Crown had provided sufficient information to the Band about the proposed structure of the local government and the legal effects of incorporation, and gave the Band "more than sufficient opportunity to respond". In summarizing its reasoning, the Court stated:

> The causal connection between the incorporation of the Municipality and the assertion of an adverse impact in this case is difficult to see. I have not been able to discern it clearly in the evidence or in the arguments advanced.[17]
>
> …
>
> It is also correct that incorporation of the Municipality leaves the Province with the same bundle of obligations under *Haida Nation* and the other authorities as existed prior to incorporation. I do not see that the incorporation has changed in any material way either the obligation of the Province to consult or the right of Adams Lake to be consulted, as and when

[16] 2010 SCC 43

[17] 2012 BCCA 333, para. 75

> required by law. The impact of incorporation of the Municipality was more formal than substantive.[18]

The First Nation sought leave to appeal to the Supreme Court of Canada but leave was denied.[19]

C. Squamish Nation v. British Columbia[20]

The Squamish and the Lil'wat Nations successfully challenged the decision of the Minister of Community, Sport and Cultural Development made under s.11 of the *RMOW Act* to approve Whistler's 2011 OCP. Whistler is one of a few municipal jurisdictions within British Columbia that require this ministerial approval before adopting an OCP.[21] This made this case unique in that the "honour of the Crown" was engaged as it related to the approval of a municipal bylaw.

Whistler conducted extensive and lengthy statutory engagement with the Nations under s. 879 of the *Local Government Act* before requesting Ministerial approval. In describing the consultation between the Province and the Nations as "short and unproductive", the Court ultimately found the Crown's consultation to be inadequate and stated:[22]

> Once the Ministry received Whistler's engagement record, I am of the view that the consultation process engaged in by the Province relied almost exclusively on Whistler's engagement record. The Province made little attempt to engage in its own consultation: it held no face to face meetings with representatives of the Nations; it made no attempt to involve any other ministry with whom the Nations dealt in other ongoing negotiations; and it denied requests for further consultations because time constraints imposed by the upcoming election.

[18] 2012 BCCA 333, para. 77

[19] Leave to Appeal dismissed April 11, 2013

[20] 2014 BCSC 991

[21] Only Whistler, the Islands Trust and Sun Peaks Mountain Resort require this Ministerial approval

[22] 2014 BCSC 991 at para 93

In many ways the *Squamish* case is just another Crown consultation case where the Court found as a fact that the Crown did not adequately consult. However, there are a couple of troubling aspects of the decision, from a local government perspective, that should be mentioned. For example, the court says:

> I do not accept Whistler's argument that the OCP is simply a policy document rather than a regulatory one, (underlining added) which does not engage the duty to consult. *Haida Nation* does not stand for the proposition that the duty to consult only arises when the Crown contemplates new law or regulation; the judgment and subsequent authorities say the duty to consult is engaged upon when the Crown contemplates conduct or a decision. In *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, MacTavish J. observed:
>
> > If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Ministry of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R (4th) 280 at para 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.

This conclusion that an OCP is a regulatory document is troubling given that there are numerous other B.C. Supreme Court and Court of Appeal decisions that state the opposite. [23] The Court failed to mention these cases in its judgment and the writer is not aware of another B.C. case that described an OCP as "regulatory". The implications of an OCP being considered "regulatory" could be significant.

Further the Court comments:

> The approval process of the OCP by the Minister may be the only opportunity the First Nations have for consultation with the Crown on potential infringements on their s. 35 rights. The Court of Appeal made it clear in *Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379 at paras. 68, 70 that the honour of the Crown which gives rise to the duty to consult with First Nations does not apply to municipalities:

[23] *Ratepayers of Central Saanich*, 2011 BCCA 484; *Western Eagle Properties Ltd. v. Burnaby*, 1999 CanLII 7008 (BCSC); *Western v. Belcarra*, 199 CanLII 5178 (BCSC); *Tuwanek Ratepayers Association v. Sechelt*, Victoria Registry S140469, Oct. 6, 2014 (BCSC).

> …as the third *order* of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs, grant benefits to First Nations or indeed to consider matters outside their statutory parameters.
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> …
>
> *A fortiori,* local governments lack the authority to engage in the nuanced and complex constitution process involving "facts, law, policy and compromise" *referred* to in *Rio Tinto.*
>
> …while it is true that First Nations may experience difficulty seeking appropriate remedies in the courts in cases like this one, it is also true that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making day-to-day operational decisions that are the diet of local governments.
>
> The OCP obliges Whistler to make decisions regarding OCP amendments or zoning and development decisions in the best interests of Whistler. The Ministerial approval of the OCP as required under the *RMOW Act* was the point in time when the Crown, in the right of the Province, was engaged through this statutory decision making process. Such a decision must maintain the honour of the Crown.[24]

Although the Court in *Squamish* follows the B.C. Court of Appeal's decision in *Neskonlith*, it is unclear why the Court suggested that "the approval process of the OCP by the Minister may be the only opportunity the First Nations have for consultation with the Crown on potential infringements of their s. 35 rights." It would seem there would be many future opportunities for the Crown and the First Nations to consult despite an OCP being adopted.

In summary, the *Squamish* case is a surprising result but demonstrates, again, the ever evolving nature of duty to consult cases where the interests of the Crown, First Nations and local government intersect. Of note, the case was not appealed.

[24] 2014 BCSC 991 at para. 143-144

III. WHAT DO THESE CASES MEAN?

The B.C. Court of Appeal's *Neskonlith* decision is the leading case in Canadian jurisprudence relating to a local government's duty to consult a First Nation. In short, a local government does not have a *Haida Nation* duty to consult First Nations. As the British Columbia Court of Appeal confirmed:

> A *fortiori*, local governments lack the authority to engage in the nuanced and complex constitutional process involving "facts, law, policy and compromise" referred to in *Rio Tinto*…[25]
>
> …By virtue of *Haida* and *Rio Tinto* alone, then, it seems to me this appeal must fail as a matter of law. It is not for this court to create an exception to or modification of the very clear statements the Supreme Court has made.[26]

The *Neskonlith* case is clear legal authority for local governments that their consultative obligations to First Nations when dealing with permit issuance or bylaw enactment are rooted in their statutory obligations as determined by their governing legislation and bylaws. Reconciliation of aboriginal rights and title are not the responsibility of local governments but of the Crown.

Further, the reasoning in *Adams Lake* and *Squamish* is supportive of the *Neskonlith* decision. In essence, these decisions stand for the proposition that, whether it is the legislative act of incorporating a local government or the more administrative function of issuing a development permit or adopting an OCP, none of these attract any local government duty to consult First Nations.

Instead, it is the writer's interpretation that what the B.C. Court of Appeal is effectively saying in *Neskonlith* and *Adams Lake* is that these types of local government actions do not impact a First Nation's aboriginal rights or title. In other words, ask yourself this: how does the incorporation of a local government degrade a First Nation's aboriginal right or title? In the same manner, how does the issuance of a development permit degrade a First Nation's aboriginal right or title? In the author's view, neither of these actions can degrade a First Nation's claims to its aboriginal rights or title. If the First Nation proves its aboriginal rights or

[25] 2012 BCCA 379 at para.68

[26] 2012 BCCA 379 at para. 70

title, they will be unaffected by the incorporation of new local governments, the issuance of permits, and the enactment of bylaws.[27]

The Court's conclusion in *Squamish* that an OCP may have an adverse impact on aboriginal title[28] rights runs somewhat contrary to this conclusion. However, given the unique facts and unique statutory requirement that the Crown approve Whistler OCP in this case it does not take away from the larger legal principle in *Neskonlith* that local governments do not owe a *Haida Nation* duty to consult First Nations. In that regard, the *Squamish* decision has changed nothing.

Despite these important court decisions and a conclusion that perhaps First Nations have "lost" something, it is again the writer's interpretation that the *Neskonlith and Adams Lake* decisions are not only legally correct but are ultimately beneficial for local governments and First Nations, as they confirm that the responsibility for the ongoing reconciliation of historic disputes is with the appropriate level of government – the Provincial and Federal Crown. Local governments will always have an important relationship with First Nations. However, these cases signify that this relationship should be built around local matters that this "third level of government"[29] is equipped and prepared to deal with.

[27] The author recognizes that a small number of local government bylaws may infringe an aboriginal right, such as a Firearm Bylaw. Such an infringement is not dealt with by way of a duty to consult analysis but in the more traditional "constitutional exemption" analysis. as per Section 35 of the *Constitution Act, 1867*.

[28] 2014 BCSC 991 at para. 148; "I find that the decision to approve the OCP was a land use planning decision that had the potential to infringe the Squamish and Lil'wat Nations title claims."

[29] As described by the BCCA in *Neskonlith, supra,* para. 68.

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