YOUNG ANDERSON
BARRISTERS & SOLICITORS

April 4, 2012

CLIENT BULLETIN

Supreme Court Rejects Local Government Duty to Consult First Nations

Since the Supreme Court of Canada's 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*, First Nations around the province have been asserting that municipalities and regional districts are obliged to consult with them on decisions that First Nations say have the potential to infringe on claimed aboriginal rights and title. Such obligations have been said to be based on the "honour of the Crown". That language refers to the Court's finding in *Haida Nation* that 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 a treaty-making process, 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, said the Supreme Court of Canada, precludes it from running roughshod over aboriginal interests while aboriginal claims are being settled. If consultation identifies likely infringements of claimed aboriginal rights, the honour of the Crown may also require that the decision accommodate aboriginal interests in some manner.

The *Haida Nation* case, and most of the subsequent cases that have dealt with the duty of the Crown to consult with and, if necessary, accommodate First Nations in its decision-making processes, dealt with decisions resulting in access to and use of Crown resources such as forest land that were subject to aboriginal claims. Local government decisions dealing with the use of private land, such as OCP and zoning bylaw amendments, do not fall within that spectrum. However, in *Neskonlith Indian Band v. Salmon Arm (City)*, there was a direct assertion that a development permit authorizing the construction of a large retail store on private land in an area that is subject to flood hazards was issued improperly, because the City had not consulted with Neskonlith about the permit in the manner required under the *Haida Nation* case. Consultation conducted pursuant to s. 879 of *the Local Government Act* was alleged to be insufficient to meet that standard. Neskonlith had obtained an opinion from a geoscientist that the professional engineers' opinions on the level of flood protection required for the store building were incorrect, and that if the building 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 Band, whose Reserve was situated nearby. The City and the DP applicant chose to stick with the advice they had received from professional engineers pursuant to s. 920(11) of the Act, rather than attempting to accommodate the Band's concern (which could have entailed imposing development permit conditions that had no support in the applicable DP guidelines). The Court declaration that the Band was seeking would have, through the instrument of local government

development approval processes, brought asserted claims to aboriginal rights and title into direct collision with the rights of owners of fee simple land throughout the province.

The Neskonlith Band's petition to set aside the development permit for failure to consult with the Band in the manner mandated by the *Haida Nation* case was dismissed on April 4, 2012. The Band's argument was that the development permit power and indeed all powers in Part 26 of the *Local Government Act* 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 the existing aboriginal and treaty rights of aboriginal people. Those powers must in particular be interpreted to require that local governments exercising Part 26 powers 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 decisions in *Haida Nation*, in which the Court stated that the honour of the Crown cannot be delegated, and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, in which the Court observed that the Crown could expressly or implicitly delegate procedural aspects of consultation to agencies of the Crown (in that case the B.C. Utilities Commission). Mr. Justice Leask observed that, while the City could potentially, like the BCUC, 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 which requires consideration, in relation to the adoption and amendment of OCPs, of consultation with various parties including first nations. (Consultation under s. 879, according to the Court of Appeal's decision in *Gardner v. Williams Lake*, does not have to be conducted in the manner described in *Haida Nation* because it does not engage the honour of the Crown.)

Many local governments in B.C. are familiar with the Province's "Guide to First Nations Engagement on Local Government Statutory Approvals". The consultation that is the subject of the Guide is consultation that the Province is itself constitutionally obliged to undertake when exercising powers that have not been fully delegated to local governments – usually the approval of some type of local bylaw such as a regional district OCP. In the discharge of those obligations, the Province enlists the assistance of the local government that is seeking the provincial approval, in undertaking on the Crown's behalf the "engagement" described in the Guide. It is not delegating generally its duty to consult, and could not do so without amending the legislation in which it has delegated the powers that could, when exercised, infringe claimed aboriginal rights or title – Part 26, in the case of the powers that were in issue in the *Neskonlith* case.

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