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## CLIENT BULLETIN

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### **The Constitutional Duty to Consult First Nations**

In Reasons for Judgment delivered yesterday in the case of *Adams Lake Indian Band v. British Columbia*, the British Columbia Supreme Court for the first time expressly addressed the issue of whether local governments are bound by the constitutional duty to consult First Nations that arises as an aspect of the honour of the Crown.

In *Adams Lake*, the Band sought to have the Court set aside the Order in Council incorporating the new Sun Peaks Mountain Resort Municipality on the basis that the Province failed to meet its constitutional duty to consult with the Band in respect of the decision to incorporate the Municipality.

Before the Municipality was incorporated, three local government bodies had jurisdiction at Sun Peaks: the Sun Peaks Resort Improvement District, the Thompson Nicola Regional District, and the Province itself. With the incorporation of the Municipality, the Improvement District was dissolved and the Municipality took over its jurisdiction, the Municipality became a member of the Regional District, continuing as a participant in a number of area wide services and functions and assuming jurisdiction over all of the local services and functions previously performed by the Regional District, and the Municipality assumed some of the Province's jurisdiction.

The Band argued that the incorporation of the Municipality had a potential for immediate and future adverse impacts on the Band's aboriginal title and claim to Sun Peaks. The Band argued that, because the Municipality now has a distinct influence and authority over the nature of the development at Sun Peaks, and the process by which decisions about development will be made and implemented, incorporation may have a serious impact on the Band's aboriginal rights. The Band also argued that the incorporation had an impact on the Band's ability to consult with government about proposed decisions that affect the Band's interests because the Municipality now has jurisdiction over a broad range of matters, only one of which is land use. In this regard, the Band itself advanced the legal proposition that a municipality has no constitutional duty to consult First Nations.

The Court accepted the Band's arguments and held that the Province had a constitutional duty to consult with the Band in respect of the incorporation of the Municipality. For local governments, the Court's acceptance of the last point made by the Band is of significant import. On that point, the Court stated:

[162] . . . Where a change in local government interferes with the Band's ability to demand consultation occurs before decisions that potentially affect its rights are made, then that change triggers the duty to consult. From this broader perspective, the incorporation of the Municipality created a new mechanism for making decisions that could potentially impact the ability of the Band to engage in a meaningful consultation about their affected rights and interests.

[163] Section 879 of the *Local Government Act* requires the Municipality to consider whether consultation with First Nations is required when developing its official community plan. Pursuant to the letters patent, the Municipality's official community plan and interim land use by-laws must also be approved by the Province. However, there is no requirement to consider whether it is necessary to consult directly with aboriginal groups on issues other than land use and the municipality has no independent constitutional duty to consult with the Band. In *Gardner v. Williams Lake (City)*, 2006 BCCA 307 [Gardner], the British Columbia Court of Appeal addressed the scope of s. 879 of the Local Government Act and, specifically, whether it conferred on the municipal council a constitutional duty to consult with First Nations groups. At para. 24 of Gardner, Saunders J.A. held that the honour of the Crown is not engaged by local governments:

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.

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[165] The Attorney General argues the change in local government does not interfere with the Province's obligation to consult with the Band and it will also have a duty to assess the Municipality's consultations with the Band to ensure they meet the standards set by the Province. However, in practical terms this division of responsibility creates a number of additional hurdles for the Band. First, as outlined above, the Municipality now exercises control over many aspects of local government that are not subject to a duty to consult with First Nations and that are beyond any supervisory jurisdiction exercised by the Province. Second, if the Municipality decides to consult with First Nations in regard to its official community plan, the Band will be required to expend its own resources to carry out the consultation because the Municipality has no authority to provide funding to aboriginal groups for this purpose. Third, if the Band is dissatisfied with the consultation afforded by the Municipality, it would then be required to compel the Province to commence consultations pursuant to its constitutional duty. This two tiered system of consultation creates obvious impediments to the exercise of the Band's right to consult. In addition to the increased time and delay, there is the cost of engaging in two consultation processes. As occurred in this case, a significant and often unresolved issue in the consultation process is the provision of adequate funding to permit meaningful participation by the Band in the consultation process.

[Underlining Added for Emphasis]

The finding that local governments do not have an independent constitutional duty to consult directly with first nations was a fundamental underpinning to the Court's conclusion that the Province had a constitutional duty to consult the Band in relation to the incorporation of the Municipality. In the absence of this finding, the Court would not have been in a position to accept the Band's argument that incorporation may have had a serious impact on the Band's aboriginal rights. The Court's decision, unless overruled by the British Columbia Court of Appeal, will be binding on future cases to be decided on this issue. In this regard, it is ironic that in this case it was the Band that argued that local governments do not have an independent constitutional duty to consult directly with First Nations; that position being the opposite from the position being taken by other First Nations in at least two other cases currently before the British Columbia Supreme Court, and in numerous demand letters that have been received by local governments over the past several years.

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