the Spirit and Intent
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The Right to Consultation in the Disposal of lands affecting Treaty Rights

Can the terms of a modern treaty abrogate the duty of the Crown to consult with First Nations?

In *Little Salmon/Carmacks First Nation*, the Yukon Court of Appeal found on August 15, 2008 that the Yukon government had a constitutionally entrenched duty to consult with Little Salmon/Carmacks. The Court found that the duty to consult was not extinguished by the Little Salmon/Carmacks nation when they signed *the Yukon Final Agreement*, because the duty to consult informed all aspects of treaty relationships, including modern treaties and lands claims agreements.

At issue in the case was the protection of rights of Little Salmon/Carmacks members to be consulted about government disposals of Crown lands which affect trapping rights (which the Court held to be commercial rights) that were not protected by the Final Agreement. At issue was also the significance of the local resource-use plan which was facilitated by the Final Agreement but which the Court held did not form part of the Final Agreement.

The Court concluded that:

1. The duty to consult is triggered at a low threshold whenever the Crown proposes to take action that may have potential adverse effects on treaty rights.
2. The onus is on the Crown to inform the First Nation of a proposed action by the Crown that has the potential to impact treaty rights.
3. The content of the duty will be at a low level when treaty rights are only "minimally" affected. (The Court ruled that a commercial trapping licence issued by the Yukon government did not amount to the traditional harvesting rights protected under the modern treaty, and therefore an infringement upon a registered trapline would be considered a "minimal" impact).
4. The duty to consult was satisfied by attendance before a Final Agreement implementation committee meeting.
5. The duty to consult does not apply to individual First Nations members but only to the First Nation government.

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>><< IN THIS ISSUE: >><<

The Belief in the Right to Blockade

In *R. v. Manuel*, an April 3, 2008 decision of the B.C. Court of Appeal, the Court ruled against a defence of "colour of right" raised by protesters blockading the development of a ski resort on First Nations aboriginal title lands.

We get asked about what happens if people blockade a development or government action on First Nations land, which usually seems to arise when the client perceives that the court system is not adequately recognizing First Nations title and self-government. *R. v. Manuel* is one of the few cases that deals with this question.

Does the belief then in Aboriginal title give rise to a right to occupy indigenous lands, free from prosecution in Canadian law?

If it is not found to be an honest belief under scrutiny in trial, the Court found that there is no defence to the Criminal Code charges.

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What is the nature of the duty to consult?

On November 4, 2008 in the case of Hupacasath First Nation v. British Columbia the B.C. Supreme Court distinguished "deep consultation" from "lower levels of consultation." In allowing a petition by the First Nation for the appointment of a mediator the Court discussed the balancing required to determine if the duty to be consulted and accommodated has been met.

What are the duties of the Crown in the consultation process? Are there varying levels of consultation?

The extent of the consultation that is required will vary depending upon the strength of the First Nation's claim, and depending upon the extent of the potential infringement of First Nations rights. Deeper consultation may be required to find a satisfactory interim solution to First Nations concerns where a) a strong *prima facie* case for the claim is established, b) the right and potential infringement is of high significance to the Aboriginal peoples, or c) the risk of non-compensable damage is high.

Justice Smith found that based on the Supreme Court of Canada's ruling in *Mikisew*, even a "lower level of consultation" requires the Crown to "solicit and listen carefully" to a First Nation's concerns and "attempt to minimize adverse impacts" on their rights, prior to a proposed development.

Elsewhere in the same decision Justice Smith characterizes this kind of "low level" consultation in these words:

> "It does require informed discussion between the Crown and the [First Nation] in which the [First Nation] has the opportunity to put forward their views and in which the Crown considers their position in good faith and where possible integrates them into its plan of action."

The Crown must be involved in a process that focuses on the possible impacts of a decision on the First Nation. If other public review processes are engaged but do not address impacts on the First Nation, the duty to consult is not met. If a decision of the Crown has already been made, and a duty to consult is owed but not acted upon, then accommodation of a First Nation's concerns is required.

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