

## Brian MacDonald: Yukon First Nations

- Consultation truly is like a marriage; the courts use this type of language. These processes get very technical, with lawyers and technicians involved, but it is fundamentally about people, relationships, and how we interact. Most people are generally trying to do what they believe is the right thing, but there are challenges.
- *Haida vs BC: Duty to consult.*
- Fair dealing and reconciliation.
- *Beckman vs. Little Salmon/Carmacks.* Good foundation for a lot of the policy getting generated.
- In that case – 1997 – history back and forth – FN and Gov - but rec FN had their own capacity issues.
- Land application. Agr land grant. Went back and forth for a while.
- First Nations required consultation – they didn't feel they had a technical win.
- The duty to consult and, where appropriate, accommodate, is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty by the Crown and continues beyond formal claims resolution through to the application and implementation of Treaties. The Crown's efforts to consult and, where appropriate, accommodate Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected should be consistent with the overarching objectives of reconciliation.

Remember where the duty to consult arises...*Haida Nation v. British Columbia (Minister of Forests)*

- *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 Honourable – history behind these terms.
- Some governments believe the treaty is everything. But it does involve the relationship.
- Little Salmon Carmacks First Nation (LSC FN) members have a treaty with Canada and Yukon Territory entered into in 1997.
- Under the treaty LSC FN has a right of access for hunting and fishing subsistence in their traditional territory.
- Paulsen applied to Yukon Territory (YT) for an agricultural land grant in the traditional territory of the LSC FN and within the trapline of a member.
- Treaty contemplated lands being taken up for agricultural purposes.
- LSC FN argued that in considering the land grant the YT proceeded without consulting the FN.
- The Supreme Court of Canada (SCC) dismissed the appeal.
- Land Application Committee had considered Paulsen's application at a public meeting. LSC FN had been invited to the meeting and had submitted a letter of opposition, but had not attended. The Supreme Court of Canada concluded that YT had met the duty to consult on the facts of the case.
- The SCC said where a modern treaty has been concluded the first step is to examine the provisions of the treaty with regard to obligations to consult. *But* Crown cannot contract out of the duty to consult or its general duty of honorable dealing with FNs.
- A duty to consult did exist in the Little Salmon/Carmacks case but in this case the duty was met by giving the FN notice and appropriate information and considering the written submission.
- Justice Binnie, writing for seven of the nine judges, held that the duty to consult is external to the treaty and is required to uphold the honour of the Crown, furthering the ultimate goal of reconciliation.
- Although it was undisputed that the LSCFN Treaty is the "entire agreement" between the parties, the Treaty does not exist in isolation: the duty to consult is part of the legal framework in which it is to be performed so as to uphold the honour of the Crown.
- Justice Binnie said that it may be possible to negotiate a different mechanism within a treaty other than consultation, stating: "*the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.*"

- However, the LSC FN Treaty does not describe the process of how Crown lands can be surrendered, or whether consultation would be required. Thus, the majority was unwilling to interpret that silence as implying no consultation was required.
- The Court additionally clarified that the trapper himself was exercising a "derivative benefit based on the collective interests of the First Nation" (para. 35) and therefore was not entitled to be consulted individually.

### **Definitions of Consultation**

- **"Consult" or "Consultation" as defined in the the UFA (1992) means to provide:**
  1. To the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
  2. A reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and
  3. Full and fair consideration by the party obliged to consult of any views presented.
- **"Consultation" as defined by the Gwich'in Comprehensive Land Claim Agreement (1992) means:**
  1. The provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
  2. The provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and
  3. Full and fair consideration by the party obliged to consult of any views presented;
- **"Consultation" as defined in the Sahtu Final Agreement (1993) means:**
  1. The provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
  2. The provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and
  3. Full and fair consideration by the party obliged to consult of any views presented;
- **"Consultation" as defined in the Tsawwassen First Nation Final Agreement (2006) means:**
  1. Notice of a matter to be decided;
  2. Sufficient information in respect of the matter to permit the party to prepare its views on the matter;
  3. A reasonable period of time to permit the party to prepare its views on the matter;
  4. An opportunity for the party to present its views on the matter; and
  5. A full and fair consideration of any views on the matter so presented by the party;

### **Limits to "Consultation" in the TFNFA (there is a similar clause in Nisga'a Final Agreement):**

- **CONSULTATION**
  - 45. In respect of a Section 35 Right of Tsawwassen First Nation, the following is an exhaustive list of the consultation obligations of Canada and British Columbia:
    - a. As provided in this Agreement;
    - b. As may be provided in federal or provincial legislation;
    - c. As may be provided in an agreement with Tsawwassen First Nation other than this Agreement; and
    - d. As may be required under the common law in relation to an infringement of that right.
  - 46. For greater certainty, the exercise of a power or authority, or an action taken, by Canada or British Columbia that is consistent with or in accordance with this Agreement is not an

infringement of the Section 35 Rights of Tsawwassen First Nation and will not be subject to any obligation to consult except as set out in subclause 45.a, 45.b or 45.c.

- Treaties describe relationships between Canada's Aboriginal People and the Crown. They require:
  - Reconciliation
  - Acting Honourably
  - Good Faith
  - Balance concerns

It is time to create an effective consultation process that allows Aboriginal signatories to interject their views about how a given activity will impact them.