

First Nations and Local Government Legal Update:

What's New?

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Introduction

- Last year the message would have been negative; 2 out of 3 cases had been lost.
- Now local governments are 3 for 3 and the law has turned around.
- Talk about 3 duty to consult cases and how they affect local governments in future.

Adams Lake Indian Band

■ Facts

- In 2003, residents of Sun Peaks began investigating the possibility of incorporating a municipality
- The Band claimed land in area to be incorporated, but the claim was not the subject of litigation or treaty negotiations at the time

Adams Lake Indian Band

■ Facts

- The Province consulted with the Band leading up to the incorporation
- In May 2010, the Province dissolved Sun Peaks Resort Improvement District and incorporated the Sun Peaks Resort Municipality.
- The Adams Lake Indian Band claimed the Province's action had a serious effect on their claims to aboriginal title in the area

Adams Lake Indian Band, 2011 BCSC 266

- BC Supreme Court
 - Local governments are not burdened by the Crown's duty to consult when making decisions which could affect aboriginal rights or title
 - The degree of consultation necessary depends on the Band's strength of claim – ranging from notice to “deep consultation”
 - A Provincial decision to change local government jurisdiction that may affect aboriginal rights triggers the duty to consult
 - The Province did not adequately consult the Band

Adams Lake Indian Band, 2012 BCCA 333

- BC Court of Appeal
 - The trial judge erred in considering land use issues related to the MDA when determining whether consultation related to incorporation had been adequate
 - The analysis should have been confined to whether the Band was consulted only with regard to incorporation
 - Incorporation only replaced one local government with another, so the impact on the Band's rights was insubstantial
 - In the circumstances, the Band was adequately consulted

Adams Lake Indian Band, 2012 BCCA 333

- Considerations for local governments in future? (e.g., boundary expansions; new local governments)
- Leave to appeal to the SCC pending

Halalt First Nation v British Columbia

■ Facts

- District planned to install three pumps on land it purchased near the Chemainus River to address turbidity problems in its drinking water
- The aquifer under the proposed project extends under the Halalt's reserve, the river ran through their reserve
- The Halalt claimed aboriginal title to the area and were negotiating with the Province

Halalt First Nation v British Columbia

■ Facts

- The Halalt participated in the required environmental assessment, expressed concerns about aquifer levels and effects on fishing rights
- The District, Province, and Halalt reviewed the project for 6 years
- In response to expert concerns, the District revised the project from three pumps to two which would not operate during summer months
- The revised project was approved, but the Halalt claimed they were not adequately consulted and sought to quash the District's authorization

Halalt First Nation v British Columbia, 2011 BCSC 945

- BC Supreme Court
 - The Halalt were not adequately consulted
 - Trial judge assessed the adequacy of consultation with regard to the original project because she suspected the pumping would eventually be permitted without consultation to aboriginal groups
 - In the circumstances, the consultation was not adequate
 - The Halalt should have been consulted in decision to revise the project

Halalt First Nation v British Columbia, 2012 BCCA 472

- BC Court of Appeal
 - The adequacy of consultation must be assessed with regard to the decision made – here, the winter project approved
 - The Province fulfilled its duty to consult with regard to the revised project
 - It was not unreasonable for the Province to refuse to financially compensate the Halalt as a way of meeting the duty to consult and accommodate – the adverse effects of the project had been addressed

Halalt First Nation v British Columbia, 2012 BCCA 472

- Considerations for local governments in future? (e.g., local governments dependent upon Crown; groundwater ownership)
- Leave to appeal to SCC pending

Neskonlith Indian Band v Salmon Arm

■ Facts

- The Shopping Centre's project was sited on private land in a sensitive riparian area upstream of the Neskonlith's reserve
- The Neskonlith considered the affected area their territory, but were not involved in litigation nor negotiations for aboriginal title

Neskonlith Indian Band v Salmon Arm

■ Facts

- The Shopping Centre applied to the City for an Environmentally Hazardous Area development permit
- The City notified the Neskonlith and provided information
- The City issued the development permit
- The Neskonlith claimed they were not adequately consulted

Neskonlith Indian Band v Salmon Arm, 2012 BCSC 499

- BC Supreme Court
 - The Neskonlith claimed the Crown's duty to consult becomes an obligation of anyone who makes decisions that might affect claims to aboriginal title or rights
 - The court disagreed
 - The duty to consult can only be delegated by express statutory language, ie. s.879 of the *Local Government Act*
 - The City had no duty to consult before issuing the DP

Neskonlith Indian Band v Salmon Arm, 2012 BCCA 379

- BC Court of Appeal
 - Local governments only possess those powers and responsibilities expressly provided by statute
 - Besides s.879 of the *Local Government Act*, local governments have neither the authority nor duty to consult with First Nations
 - Practically speaking, local governments do not have the resources to consult with FNs every time a decision affects their rights

Neskonlith Indian Band v Salmon Arm, 2012 BCCA 379

- BC Court of Appeal
 - Local governments need only fulfill their statutory obligations when issuing DPs or building permits, or amending Official Community Plans or zoning bylaws
 - In the absence of a statutory obligation, local governments have no duty to consult
 - Reconciliation of aboriginal rights or title are not the responsibility of the Crown, not local governments

Neskonlith Indian Band v Salmon Arm, 2012 BCCA 379

- Considerations for local governments in future? (e.g., statutory consultation only: s.855 *LGA*)
- No leave to appeal to the SCC sought