**Case brief: Squamish Nation v. British Columbia (Community, Sport and Cultural Development), 2014 BCSC 991**

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There are two key threads running through this judgment: the extent of the Crown’s duty to consult as it relates to land use planning involving municipalities and their duty to consult on potential adverse impacts on the economic component of Aboriginal Title.

This case involved the Resort Municipality of Whistler (“Whistler”)’s 2011 Official Community Plan (“OCP”), which covers land subject to the Aboriginal title claims of the Squamish and Lil’wat Nations (the “Nations”). Unlike most municipalities, Whistler’s OCP must be approved by the Province. Prior to approval, the Nations were concerned with the OCP’s restricted number of “bed units” (effectively its accommodation capacity), and the OCP’s potential to adversely impact the Nations’ economic development abilities by essentially “freezing future development” on those lands [para. 74].

Leading up to this case, and prior to the Vancouver 2010 Winter Olympics, the Province and Whistler entered into a series of agreements with the Nations that provided 300 acres of fee simple lands “for the Nations to pursue economic development opportunities within their shared territories” [para. 25]; as well as land use planning agreements. These agreements acknowledged and supported the Nations’ economic development, especially as it related to the tourism economy bolstered by the Olympics.  The court held that these agreements “demonstrate that the Crown and the Nations have, in the past, been involved in various relationships where they have engaged in consultations which have led to an accommodation of their respective interests” [para. 53].

The Nations alleged that the Province did not fulfill its duty to consult in the lead-up to the approval of the OCP, and that the Crown took into account an improper consideration (the impending provincial election).

In this case, the Court addressed three main legal issues: first, whether the honour of the Crown required the Minister to consult with the Nations prior to approving the OCP; second, if there was a duty to consult, what scope of consultation was required; and third, whether the Province’s consultation process had fulfilled its duty to consult.

First, the Court reaffirmed the Minister’s obligation to maintain the honour of the Crown during the statutory decision-making process and applied the test laid out in *Haida Nation*, finding that the Province had a duty to consult prior to approving the OCP. The Court also confirmed that “lands held pursuant to Aboriginal title have an inescapable economic component” [para. 153] and that the potential adverse impact on future development is a real infringement that brings with it the duty to consult.

Second, the Court applied the test from *Haida Nation* to determine the requisite level of consultation on the consultation “spectrum”.  The Nations’ strong Aboriginal title claim and the moderate potential for impact led the Court to conclude that a mid-range level of consultation was required. The Court relied heavily on the BC Supreme Court case*Da’nazada’xw*to determine that a finding of irreversible harm is not necessary to conclude that a potentially adverse impact is serious. In this case, the OCP approval by the Minister may be the only opportunity for the Nations to be consulted on potential infringements to their section 35 rights, as future municipal decisions do not carry with them the duty to consult.

Third, the Court found that the Province’s heavy reliance on the municipality’s consultation record was an error.  It found that the Minister had taken improper considerations into account when approving the OCP: notably, the Minister had apparently planned to issue the approval prior to the calling of the provincial election.

Ultimately, the Court quashed the approval, finding that (1) the Province was incorrect in its assessment that the decision required a low level of consultation and rather that it required mid-level consultation, and (2) the Province did not fulfil this duty to consult. The Court ordered the Minister to consult with the Nations at a mid-range level of consultation and accommodate, if necessary.

This case is a strong reminder that First Nations have an economic component to their section 35 rights that cannot be ignored. It also emphasizes that every stage of the Province’s interaction with First Nations carries with it a duty to consult – and previously entered agreements do not constitute adequate consultation if subsequent approvals do not align with those original agreements.

However, as most municipalities do not require provincial approval for their land use plans, the development of these plans usually does not carry a legal duty to consult – so First Nations’ consultation may not occur at all, or will arise during any subsequent provincial approvals.