DEEP CONSULTATION AT A HIGHER LEVEL: *WII'LITSWX v. BRITISH COLUMBIA (MINISTER OF FORESTS)*

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On August 22, 2008, the B.C. Supreme Court issued lengthy reasons for judgment in *Wii'litswx v. British Columbia (Minister of Forests)*.[1] Neilson J. (as she then was) took perhaps the most detailed approach yet to measuring the adequacy of both consultation and, more importantly, the accommodation of Aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, by examining the scope of "deep consultation" and the reasonableness of Crown accommodations. Notwithstanding the existence of several "accommodation"-type agreements and mountains of correspondence between the parties, Neilson J. ultimately held that the Crown had consulted inadequately and had not accommodated the Gitanyow's Aboriginal interests.

BACKGROUND FACTS

Wii'litswx involved a decision by the Ministry of Forests under the *Forest Act* to approve the replacement of six forest licences. The forest licences at issue lay within the traditional territory of the hereditary chiefs of the Gitanyow Nation in north-central British Columbia. A significant effort had been made by the Crown to consult and accommodate, but the Gitanyow nevertheless applied to quash the decision.

The Gitanyow were accepted into the federal treaty negotiation process in 1980 and have participated in the British Columbia Treaty Commission ("BCTC") process since 1994, but have yet to conclude an agreement-in-principle.[2] In prior litigation, the court held that the Gitanyow have a good prima facie claim of Aboriginal title and a strong prima facie claim of Aboriginal rights to the territory in question. Neilson J. relied on these findings in determining the required level of consultation.[3]

The Gitanyow and the Ministry of Forests engaged in further negotiations after the previous litigation. The Gitanyow raised four main concerns: recognition of their s. 35(1) rights, the sustainability of forest resources including silviculture, the implementation of joint land use planning, and economic accommodation through revenue sharing or other

means.[4] With respect to land use planning, the parties developed a draft landscape unit plan ("LUP") for the Gitanyow traditional territories and created a joint resources council ("JRC") to administer and implement the plan.[5] With respect to Gitanyow reforestation and silviculture concerns, the Ministry of Forests created and funded a program to identify and address areas harvested prior to 1987.[6] With respect to the recognition of Aboriginal rights, the Ministry of Forests relied on the "New Relationship" documents of March 2005 as having the potential to advance the Gitanyow's Aboriginal interests.[7] The parties concluded a forest and range agreement ("FRA") in August 2006 which sought to address, to varying degrees, the Gitanyow's four main concerns.[8] The FRA included as an appendix a consultation protocol, setting out a four-stage process.[9]

Specific consultation about the forest licence replacements began on September 29, 2005,[10] and concluded with the regional director's decision of February 27, 2007, to issue the replacements. In his August 28, 2006, letter to the Gitanyow, the regional director acknowledged the Gitanyow's four main concerns.[11] With respect to the recognition of Aboriginal interests, he was unable to include acknowledgement of such interests in the forest licence replacements for "practical reasons".[12] With respect to the LUP process, he said that it could not be used by the ministry regarding the operational plans of licencees because the LUP had not been empowered through legislation.[13] With respect to outstanding silviculture obligations, he suggested that existing compliance and enforcement mechanisms under the *Forest Act* were sufficient to address the Gitanyow's concern.[14] With respect to economic accommodation, he took the position that the funding provided under the FRA was sufficient.[15] These positions were not acceptable to the Gitanyow, and significant consultation efforts were made by the parties during the remaining six months. The Gitanyow tabled a draft forest licence replacement accommodation agreement in October 2006,[16] to which the Ministry of Forests never responded.[17] The parties developed terms of reference for a forest benefits sharing working group ("FBSWG") in November 2006.[18] Yet on November 16, 2006, the regional director wrote that he believed the accommodations set out in his letter of August 28 "met the Crown's legal obligations".[19] The JRC met several times, culminating in draft JRC recommendations of February 19, 2007, that partially addressed the Gitanyow's concerns.[20]

The regional director decided to issue the replacement licences on February 28, 2007,[21] and advised the Gitanyow accordingly on March 8, 2007.[22] In that letter, he advised the Gitanyow that the consultation conducted through the JRC had provided them with adequate opportunity to identify any interests impacted by the decision and that further consulta-

tion was not necessary. He set out his assessment of the nature and scope of the Gitanyow's Aboriginal interests and of the adverse impacts of the replacement licences on those interests.[23] With respect to the recognition of Aboriginal interests, he supported the JRC recommendation that "whereas" clauses acknowledging Gitanyow Aboriginal interests be added to the replacement licences and that forest districts be instructed to tell licensees about the internal "Wilp" or Gitanyow house boundaries.[24] With respect to sustainability and land use planning, he supported the JRC strategy to have the LUP designated as a higher-level plan but did not make compliance with the LUP a condition of the replacement licences.[25] With respect to reforestation and silviculture concerns, he relied on the existing compliance and enforcement measures under the *Forest Act*.[26] With respect to economic measures, he supported the JRC recommendation that the parties work through the FBSWG to identify alternative models for sharing forest benefits.[27]

Further discussions were held after the February 28 decision, including requests to overturn the decision.[28] However, the licensees received their replacement licences on September 1, 2007.[29]

THE COURT'S ANALYSIS

Madam Justice Neilson held that the existence or extent of the duty to consult or accommodate is a question of law, in the sense that it defines a legal duty. It is based on the Crown's assessments of the strength of the claim and the potential seriousness of the impact of the infringement. Those assessments are questions of law to be judged on the standard of correctness.[30] The adequacy of the consultation process is governed by a standard of reasonableness, however.[31]

To reconcile this apparent conflict, the court must follow a two-staged analysis, each stage being governed by a standard of reasonableness. First it must address the adequacy of the consultation process. Second, if the process is found to be reasonable, the court must examine the end result by considering whether the consultation had identified a duty to accommodate Aboriginal concerns and the adequacy of any resulting accommodations.[32] The second, more subtle step is to assess whether the consultation was meaningful. In order for it to be meaningful, the Crown must make genuine efforts to understand the First Nation's concerns and to attempt to address them with the ultimate goal of reconciliation in mind. "Meaningful consultation is thus necessarily linked to an assessment of whether interim accommodation was required, and if so, whether it was provided."[33]

Madam Justice Neilson held that the Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on Aboriginal interests must be made at the outset of the proposed

consultation if it is to inform and scope and extent of the process.[34] In this specific case, there was no evidence that the regional director addressed the nature of the Gitanyow's interests and potential adverse impacts at the outset of the process. This is relevant to First Nation consultations generally, in the sense that each First Nation should make reference to this preliminary step when being consulted by the Crown and demand access to the materials relied upon by the Crown when making its preliminary assessment.

While Madam Justice Neilson's discussion about the nature of the alleged but unproven Aboriginal rights is interesting, the fact is that she affirmed the earlier court decision that the Gitanyow have a good prima facie claim of Aboriginal title and a strong prima facie claim of Aboriginal rights to the territory in question. Thus, the Gitanyow were entitled to "deep consultation" by the Crown.[35] It is important to note that not every First Nation is automatically entitled to this level of consultation.[36]

What may be of wider relevance to First Nations is the court's view about the assessment of potential impacts. Madam Justice Neilson held that the replacement of the forest licences was a "strategic first step in permitting the continuing removal of a claimed resource in limited supply from Gitanyow traditional territory", a step which was "superimposed on a troubled history of over-logging and unfulfilled silviculture obligations".[37] Subsequent opportunities for consultation respecting operational-level decisions over specific cutting do not significantly reduce the potential impacts of the high-level strategic decision to replace the forest licences.[38] In part, this is because the measures to protect Aboriginal interests at the operational level are largely discretionary or may be supplanted by competing interests.[39] The strategic-level decision and the associated likelihood of ongoing extraction of limited resources from the First Nation's traditional territory represented a potential significant infringement on those Aboriginal interests.[40] This language speaks directly to two issues that directly affect most First Nations: high-level strategic plans are potentially significant infringements of Aboriginal or treaty rights, and the cumulative effects of historical resource development on the landscape must be taken into account in the consultation process. These are factors the Crown must consider when making its preliminary assessment of potential impacts.

When reviewing whether the consultation process itself was reasonable, Madam Justice Neilson concluded that "from a procedural perspective" the four-step process outlined in the consultation protocol attached to the FRA was "a satisfactory framework for reasonable consultation that complied with the guidelines in *Haida*".[41] The four-step process in this case is similar to the default consultation processes set out in other agreements between the Crown and First Nations.[42]

However, following a process is *not* enough. Consultation must be meaningful. Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other's concerns and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the s. 35(1) rights at issue.[43] An assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached.[44]

Madam Justice Neilson was not satisfied that any of the accommodations offered by the Crown in the decision to replace the forest licences was reasonable.[45] The Crown's reliance on the FRA for economic accommodation respecting all forestry activity was misplaced, as the FRA made no mention of replacement licences and kept open for the Gitanyow the right to seek "additional accommodation for forest resource development" during the term of the FRA.[46] Such reliance on the FRA was deemed to be unreasonable.[47]

Madam Justice Neilson then reiterated her views about the regional director's reliance on subsequent operational decisions to accommodate the Aboriginal interests at issue. She held that while consultation at the operational level is desirable, reliance on future discretionary decisions cannot be viewed as reasonable accommodations for the strategic-level decision. Meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels.[48] While this, to some extent, is only an application of the Supreme Court of Canada's decision in *Haida*, it is by far the strongest language from the courts to date about the requirement to consult First Nations at the strategic level. First Nations with strong claims or proven Aboriginal or treaty rights can now insist that they have a meaningful voice in higher-level planning and decision making, and can better resist efforts by the Crown to push down such participation to the operational level.

Madam Justice Neilson then observed that, notwithstanding adherence to the consultation process, the Crown had not modified its positions on the four main concerns advanced by the Gitanyow.[49] The Crown had not changed its positions with respect to accommodating the Gitanyow's concern about recognition.[50] No substantial progress was made respecting the LUP issue.[51] There was no accommodation of the Gitanyow's concern respecting reforestation and silviculture.[52] And the consultation process produced no economic accommodation beyond the payments previously negotiated in the FRA.[53] Essentially, the accommodation measures set out in the regional director's letter of August 28, 2006, were the "overall offer of accommodation", the adequacy of which had to be assessed against the potential infringements of the Aboriginal interests.[54]

Even though it was acknowledged by the court that the Crown may be justifiably wary of dealing with revenue sharing on an individualized basis, given the wide-ranging repercussions of this for all citizens of British Columbia,[55] the court found the overall package to be unreasonable.[56] Some of the reasons for this were as follows:

1. The Crown's reluctance to acknowledge Aboriginal interests in the tenures themselves due to unexplained "practical reasons" was deemed to be unreasonable.[57] (This ruling could be useful to First Nations encountering a refusal by Crown authorities to acknowledge Aboriginal or treaty rights.)
2. The Crown's reluctance to rely on a land use plan jointly prepared by the parties because of its lack of legislative force, which was deemed to be unreasonable.[58] (This could be used by First Nations to counter arguments from Crown authorities that jointly prepared management plans are necessarily limited because they do not have legislated force, or that any decisions/plans made by collaborative management boards under such plans or agreement are not binding on the Crown due to the lack of enabling legislation.)
3. The Crown's reliance on existing compliance and enforcement mechanisms to deal with silviculture problems (i.e., the "trust us" approach) and its reluctance to discuss alternatives for outstanding and future liabilities, which was also deemed to be unreasonable.[59] (First Nations may find this ruling useful to persuade Crown authorities to consider creative solutions outside current regulatory schemes to long-standing environmental issues.)

Notwithstanding the inadequacy of the accommodations as a package, the court did not order any relief at this stage. The relief sought by the Gitanyow was complicated. Madam Justice Nielson required further submissions, given her conclusions as to the inadequacy of the consultation process.[60]

SUMMARY

Wii'litswx is a detailed examination of "deep consultation" in the context of First Nations with good-to-strong prima facie claims to Aboriginal rights and title. The success of deep consultation will depend on the degree to which the accommodations provided by the Crown are reasonable in light of the Aboriginal rights and title potentially to be infringed.

But this case may stand for more than that. The court articulates a need to involve First Nations in decision making at the strategic level. In this

case, the impugned decision involved the replacement of existing forest licences. But in other situations the decision could involve, for example, pre-tenure sales or Crown land dispositions. Consultation solely at the operational level may no longer be a reasonable approach to discharging the Crown's obligation to consult.

Thus, the key principles articulated in this case are as follows:

1. Mere adherence to a process may not satisfy the Crown's duty to consult. Where the duty is one of "deep consultation", there must be meaningful consultation which ultimately seeks reconciliation. An assessment of whether consultation was meaningful inevitably leads to an examination of the accommodations reached. In other words, results achieved count for more than steps taken.
2. High-level strategic plans and decisions are themselves potentially significant infringements of treaty rights, particularly in the context of the cumulative effects of historical resource development on the landscape.
3. The Crown must make a preliminary assessment of potential impacts in order to define the scope and content of the consultation process. That assessment must occur prior to initiating consultation.
4. The refusal of the Crown to modify its position in a consultation process, on the basis of reliance on existing statutory regimes or unspecified "practical" considerations, may be evidence of an unreasonable approach to the duty to consult and accommodate.

ENDNOTES

1. 2008 BCSC 1139 [*Wii'litswx*]; also available online at <http://www.courts.gov.bc.ca/Jdb-txt/SC/08/11/2008BCSC1139.htm>.
2. *Ibid.* at para. 24.
3. *Ibid.* at paras. 39, 153, 154, and 168.
4. *Ibid.* at paras. 47 and 48; see also paras. 61, 150, 154 and 155.
5. *Ibid.* at paras. 51 and 52.
6. *Ibid.* at para. 56.
7. *Ibid.* at para. 57.
8. *Ibid.* at paras. 67–81.
9. *Ibid.* at paras. 82–85.
10. *Ibid.* at para. 148.
11. *Ibid.* at para. 86.
12. *Ibid.* at para. 87.
13. *Ibid.* at para. 88.
14. *Ibid.* at para. 89.
15. *Ibid.* at para. 90.
16. *Ibid.* at para. 100.
17. *Ibid.* at para. 117.
18. *Ibid.* at para. 102.
19. *Ibid.* at para. 103.
20. *Ibid.* at paras. 110–114.
21. *Ibid.* at para. 122.
22. *Ibid.* at para. 124.
23. *Ibid.* at para. 125.
24. *Ibid.* at paras. 126 and 111.
25. *Ibid.* at para. 127.
26. *Ibid.* at para. 128.
27. *Ibid.* at para. 129.
28. *Ibid.* at paras. 132–136 and 138–140.
29. *Ibid.* at para. 137.
30. *Ibid.* at para. 15.
31. *Ibid.* at para. 16.

32. *Ibid.* at para. 17.
33. *Ibid.* at para. 145.
34. *Ibid.* at para. 147.
35. *Ibid.* at para. 169.
36. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], at paras. 43–45.
37. *Wii'litswx*, *supra* note 1 at para. 157.
38. *Ibid.* at paras. 159–160.
39. *Ibid.* at para. 161.
40. *Ibid.* at para. 169.
41. *Ibid.* at para. 172.
42. See examples of bilateral agreements addressing consultation processes online at <http://www.gov.bc.ca/arr/treaty/key/default.html>.
43. *Wii'litswx*, *supra* note 1 at para. 178.
44. *Ibid.* at para. 179.
45. *Ibid.* at para. 180.
46. *Ibid.* at paras. 181–183.
47. *Ibid.* at para. 185.
48. *Ibid.* at para. 186.
49. *Ibid.* at para. 194.
50. *Ibid.* at para. 198.
51. *Ibid.* at paras. 199–201.
52. *Ibid.* at para. 206.
53. *Ibid.* at para. 213.
54. *Ibid.* at para. 221.
55. *Ibid.* at paras. 239–240.
56. *Ibid.* at paras. 222–241 and 242.
57. *Ibid.* at paras. 225–227.
58. *Ibid.* at paras. 229–231.
59. *Ibid.* at paras. 236–238.
60. *Ibid.* at paras. 242–260.