# Aboriginal Caselaw Summary: Ahousaht First Nation v. Canada (Fisheries and Oceans)

by Ruth A. Johnson

**Lawson Lundell LLP**

Published July 20, 2007 - British Columbia, Canada
WSG Submission July 20, 2007



The Federal Court of Canada recently released its decision in Ahousaht First Nation v. Canada (Fisheries and Oceans)(1). Tl considered an application by 14 First Nations represented by the Nuu-chah-nulth Tribal Council ("NTC") for judicial review c of the Minister of Fisheries and Oceans regarding the implementation of a commercial groundfish pilot plan on the British C coast (the "Pilot Plan"). The NTC challenged the Minister's decision on the grounds that the Minister failed to fulfil his duty t and accommodate the NTC before implementing the Pilot Plan. After reviewing the process leading up to the Plan's introduc Federal Court dismissed the application, finding that, although the consultation was not perfect, the flaws did not warrant c the Minister's decision.

The decision is significant in that it emphasises the reciprocal duty of First Nations in the consultation process, clarifies the that duty and provides commentary on what comprises adequate and appropriate consultation. In particular, the decision c consultation with Tribal Councils or similar groups, as opposed to individual First Nations can be an acceptable method of c

Brief Background

In developing the Pilot Plan, the Department of Fisheries and Oceans (DFO) proceeded through a series of increasingly focu processes designed to gather input from a range of potential stakeholders. Early in the process an integrated advisory com struck. An NTC member participated as the designated representative of the Aboriginal Fisheries Commission. In proceedin next level of decision making, stakeholder consultation was formally initiated. DFO distributed information to those deemec potentially affected by the Pilot Plan including all British Columbia coastal First Nations. Community meetings were held an First Nations were engaged in bilateral discussions with DFO. DFO did not include the NTC in these bilateral discussions as consider their asserted aboriginal rights to be adversely impacted by the Pilot Plan. That said, when the NTC expressed the enter into bilateral discussion, DFO accommodated the request and arranged for meetings to be held. After the first two m between NTC and DFO, NTC insisted on diverting discussions from the substance of the Pilot Plan to the particular consulta they wanted to follow. NTC in fact refused to consider the Pilot Plan until DFO committed to the NTC consultation protocol. urgency of the situation (DFO needed the Pilot Plan to be in place before the scheduled opening of the fishery); the NTC pr process further by forwarding an extensive and somewhat irrelevant list of questions to DFO. As a consequence of the dela to implement the Pilot Plan before all stages of the NTC's desired consultation protocol were completed. As a result the NTC application for judicial review of the decision.

The Decision and Its Implications

The Federal Court considered the scope of the duty to consult and whether or not the steps taken by the Minister were suff meet that duty. The decision makes a number of notable points.

Essential that the aboriginal right be established and the potential impacts upon that right be clearly articulated

The Court referred to the Haida(2) decision confirming that in order for the duty to consult to be triggered there must be a established aboriginal or treaty right. Furthermore, it is essential that the right be specifically defined. Once the right is est the scope and content of the duty to consult may be determined. In this case, the relevant right was the aboriginal right to commercially.

The Court reviewed the broad claims of the NTC and considered only those concerns that were directly related to the aborig fish commercially. Any concerns that failed to demonstrate a potential adverse impact on this right were disregarded. Furth Court emphasized the need to clearly articulate any anticipated impact the proposed decision would have on the asserted a right in order to determine the extent of consultation required. In this case, the Pilot Plan was aimed at conservation of the fisheries, for the benefit of all Canadians, including NTC. DFO had concluded that the aboriginal right to fish commercially, i context of a plan designed to preserve a commercial fishery, would not be negatively affected. The Court pointed out that, attempting to refute this position, NTC did not articulate what, if any, potential impacts the Pilot Plan would have on their a aboriginal right.

While the definition of rights and articulation of impacts is not a novel concept, the Ahousaht decision emphasises that First

cannot assert vague and undefined aboriginal rights and demand consultation without providing more specific information c at issue and the impact the contemplated decision might have on those rights..

Where impacts are limited, the scope of the duty to consult is on the lower end of the spectrum

The Court found that any infringements or adverse effects on the rights of NTC resulting from the Pilot Plan would be limite especially given the compelling and substantial objective of conservation of the fishery resource. The Court concluded that consult and accommodate the interests of NTC would be located on the lower end of the spectrum. From there the Court cc what sufficient consultation at the lower end of the spectrum might entail. Several significant points were made:

Timely Consultation

While acknowledging that consultation must be timely to be meaningful, the Court suggested that it may not always be nec involve a First Nation directly in the earliest stages of decision making. Rather, indirect notification of the contemplated dec be sufficient to meet the obligation to provide early consultation. The Court held that NTC could not argue that there was n consultation at the beginning of the process when they were well aware of the development of the Pilot Plan through the de NTC representative to the advisory committee. The Court noted that, had the NTC representative actually been in attendan first four advisory committee meetings, NTC would have been aware of the Pilot Plan and engaged in the consultation proc year earlier. The opportunity to attend the multilateral discussions of the advisory committee, while admittedly indirect, wa opportunity for NTC to be engaged in the process at the earliest stages. The Court did not see the failure of the NTC repres attend advisory committee meetings as a flaw attributable to DFO's consultation efforts.

The Court's recognition of the potential acceptability of multilateral consultation processes may open the door to more effic consultation. While direct Crown consultation with individual First Nations may still be needed in cases involving more serio on rights, Ahousaht recognises that this may be unworkable or impractical where there are lesser impacts and multiple Firs involved.

Bilateral vs. Multilateral Consultation

Building on the above point and using Taku River(3) as support, the Court found that bilateral consultation is not necessari acceptable form of consultation. The Court did not see NTC's insistence on bilateral consultation as reasonable given that th consult was on the lower end of the spectrum. Mr. Justice Blais stated:

"(w)hile the failure to complete the bilateral consultations may appear, at first glance, to be a violation of the Minister's dut consult, I believe that there are sufficient extenuating circumstances in this case, including the multilateral consultations th held, the nature of the plan in question, the accommodations made by the respondent, and the behaviour of the applicants militate against a declaration that the Minister breached his constitutional obligations towards (NTC)."

The duty to consult was on the lower end of the spectrum and given that NTC was represented in the multilateral process t advisory committee and was well aware of the Pilot Plan as it developed, there was no need for the Minister to take further engage NTC.

Along the same line of reasoning the May 3rd, 2007 decision of the British Columbia Court of Appeal in R. v. Douglas et al( notable. Without going into detail on the facts of the case, this decision focussed on a similar fishery issue where DFO was regulations to conserve a salmon fishery. A potentially affected First Nation claimed, in part, that joint or multilateral consu were insufficient to discharge the duty to consult and that separate consultation with the First Nation was required. The Co disagreed, and found that adequate consultation had taken place given the nature of the fishery, the number of First Natio and lack of unanimity between them. Joint consultation was seen as reasonable and appropriate, as DFO had provided the with the necessary information, technical assistance and opportunities to express their concerns.

The takeaway from these cases is that where the duty to consult would appear to be on the lower end of the spectrum, for where a First Nation has claimed an area as its traditional territory but cannot demonstrate current, active use of the area members, multilateral consultation is potentially appropriate to the situation.

Reciprocal Duty of the First Nation

In Ahousaht, the Court found that the First Nation's demands to negotiate a consultation protocol frustrated and delayed ef consultation on the substantive issues, making meaningful consultation impossible in the time available. The Court said NT "squandered" opportunities to provide their input by insisting that DFO abide by a particular consultation protocol instead o in meaningful discussions on the substance of the issues.

These comments are consistent with other recent court decisions. In the Douglas case, one of the key points made in the d

if the First Nation failed to meet, consult or even respond to the major issues, it would be illogical to find that the Crown ha consult. The facts showed that the First Nation clearly did not fulfil its reciprocal duty to carry out its end of the consultatio extent that its members deliberately frustrated all attempts to consult. By failing to meet its own obligations, the First Nati precluded from receiving any remedy respecting an infringement on Aboriginal rights.

These decisions reinforce the principal of reciprocity in consultation and the need for the good faith participation of both sid consultation process. First Nations do not have the right to insist that their preferred consultation protocol be followed. So l First Nation has been presented with reasonable and appropriate opportunities for meaningful consultation, the First Natior obligation to participate in the consultation. If the First Nation does not, it will not be able to complain about inadequate co

Summary

The Courts are becoming increasingly critical of complaints from First Nations that obstruct consultation efforts by attempti impose unilateral procedural requirements. First Nations have a duty to participate in consultation in good faith, to stick to issues that pertain directly to their aboriginal and treaty rights and to consult specifically on those issues.

The Ahousaht and Douglas decisions help to clarify reasonable expectations in the consultation process. This will help gove project proponents and First Nations, and should assist in the development of increasingly appropriate and effective consul protocols. Judicial consideration of the consultation efforts in both these cases suggests that it is entirely appropriate to de consultation protocols that are dynamic and tailored to meet the specific circumstances instead of relying on rigid and pred formulas. By adopting a flexible approach to consultation, project proponents may implement project-appropriate consultat capable of being adapted and adjusted in response to information as it is gathered from First Nations.

The information provided in this summary is for general information purposes only and should not be relied on as legal adv opinion. If you require legal advice on the information contained in this summary, we encourage you to contact Ruth Johns rjohnson@lawsonlundell.com or 403.781.9457.



Footnotes:
(1) 2007 FC 567.

(2) Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511.

(3) Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550.