

Nlaka'pamux Nation Tribal Council (appellant/petitioner) v. Derek Griffin in his capacity as Project Assessment Director, Environmental Assessment Office, Belcorp Environmental Services Inc. and Village of Cache Creek (respondents/respondents)
(CA037570; 2011 BCCA 78)

Indexed As: Nlaka'pamux Nation Tribal Council v. Griffin et al.

British Columbia Court of Appeal
Rowles, D. Smith and Groberman, JJ.A.
February 18, 2011.

Summary:

A proposed landfill extension would occupy land over which the Nlaka'pamux First Nation claimed Aboriginal rights and title. The proposal was subject to an assessment under the Environmental Assessment Act. Section 11 required the Project Assessment Director to determine the scope and the procedures by which the assessment would occur. The original s. 11 order did not provide for any consultation with the Nlaka'pamux Nation Tribal Council (NNTC). The NNTC objected. The amended order did not specifically mention the NNTC, but provided for discretionary consultation with Aboriginal entities. The NNTC claimed that it had a right to be consulted before the scope of the assessment was established, and sought judicial review. The NNTC requested a declaration that the Crown, through the Environmental Assessment Office, failed to comply with its duty of consultation and also sought to quash orders and approvals granted in the assessment process.

The British Columbia Supreme Court, in a decision reported at [2009] B.C.T.C. Uned. 1275, dismissed the petition, finding that the Environmental Assessment Office had acted reasonably in undertaking consultations with the NNTC. The NNTC appealed.

The British Columbia Court of Appeal allowed the appeal to the extent of declaring that the Project Assessment Director's amended order failed to adequately establish the necessary processes of consultation with the NNTC, and was, in that respect, defective. The court did not accede to the other relief claimed by the NNTC. In particular, the court refrained from quashing the amended order, as the court found that it was "no longer in play".

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - A tribal council claimed that it had a right to be consulted, in accordance with the Supreme Court of Canada's judgment in *Haida Nation v. British Columbia (Minister of Forests)* - The British Columbia Court of Appeal stated that "[t]he nature of the required consultation depends on the strength of the claim and on the potential for the proposed use of land to have negative impacts. The consultation must be carried out in good faith, and may lead to duties to accommodate in appropriate cases ... [T]he Crown is required to afford the First Nation a right of consultation that is meaningful" - See paragraph 57.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The site of a proposed landfill extension was on territory claimed by two First Nations - The proposal was subject to an environmental assessment - Neither First Nation had any governing body that unequivocally spoke for the nation - A tribal council claimed that it had a right to be consulted regarding the proposal, in accordance with the Supreme Court of Canada's judgment in *Haida Nation v. British Columbia (Minister of Forests)* - The British Columbia Court of Appeal stated that "[t]his case illustrates some of the difficulties that can occur in actually attempting to apply the Haida framework"- Meaningful consultation was "particularly difficult when different entities that arguably speak for portions of the nations do not take compatible positions" - The absence of a consensus among First Nation groups on the issue of whether the tribal council was an organization entitled to be consulted in respect of the landfill extension complicated the task of the Crown (the Environmental Assessment Office) - See paragraphs 58 and 59.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The site of a proposed landfill extension was on territory claimed by both the Nlaka'pamux Nation and the Secwepemc First Nation - The proposal was subject to an environmental assessment - Faced with competing claims and animosity among the First Nations groups, the Project Assessment Director implemented separate consultation protocols, excluding the Nlaka'pamux Nation Tribal Council (NNTC) from the working group - The amended order provided that consultation with First Nations could be done on a government to government basis - The chambers judge concluded that the Crown was entitled to "balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner" - The British Columbia Court of Appeal disagreed - "The Crown's duty to act honourably toward First Nations makes consultation a constitutional imperative. Difficult as it might have been to fulfill, it could not be compromised in order to make the process more efficient. ... [A]t some point, the duty to consult may be exhausted. That point, however, will not occur at the outset of the process" - See paragraph 68.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The site of a proposed landfill extension was on territory claimed by both the applicant Nlaka'pamux Nation and the Secwepemc First Nation - The ethnographic evidence indicated that the site was more closely associated with the Secwepemc Nation than with the applicant - The chambers judge found that the Nlaka'pamux's claim to title over the site was relatively weak, and he used that finding to assess the adequacy of the consultation proposals put forward by the Crown - The Nlaka'pamux Nation Tribal Council asserted that the chambers judge relied on inadmissible evidence - The British Columbia Court of Appeal disagreed - "In evaluating the strength of a claim for the purposes of consultation, the Crown is not conducting a trial. It need not restrict itself to evidence that would be admissible in a court of law on a title claim. It can rely on secondary sources, and also on the history of the First Nation's assertion of title" - See paragraph 70.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The site of a proposed landfill extension was on territory claimed by both the applicant Nlaka'pamux Nation and the Secwepemc First Nation - The ethnographic evidence indicated that the site was more closely associated with the Secwepemc Nation than with the applicant - The chambers judge found that the Nlaka'pamux Nation's claim to title over the site was relatively weak, and he used that finding to assess the adequacy of the consultation proposals put forward by the Crown - The Nlaka'pamux Nation Tribal Council (NNTC) asserted that the judge's exclusive concentration on the claim to title failed to recognize that other Aboriginal rights were also claimed by the Nlaka'pamux Nation - The British Columbia Court of Appeal held that the NNTC was correct - There was much stronger support for the proposition that the Nlaka'pamux Nations had Aboriginal rights (other than title) that might be affected by the project - Accordingly, it could not be concluded that the right to consultation was at the low end of the spectrum - See paragraph 71.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The British Columbia Court of Appeal stated that, "[t]o some degree, the fact that the Crown accepts that the appropriate level of consultation in this case is 'deep consultation' relieves the Court from having to consider the particular rights that are in issue. There remains some difficulty, however, in that the adequacy of a consultation process may depend, at least in part, on the subject matter of that consultation" - In the present case, some of the demands in respect of consultation appeared to exceed the applicant's legal entitlement - A recent decision of the Supreme Court of Canada appeared to place historic effects on potential claims of Aboriginal rights outside the scope of the right to consultation - See paragraph 72.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - A proposed landfill extension would occupy land over which the Nlaka'pamux First Nation claimed Aboriginal rights and title - The proposal was subject to an assessment under the Environmental Assessment Act - Section 11 of the Act required the Project Assessment Director to determine the scope and the procedures by which the assessment would occur - An issue was whether the Director acted unconstitutionally in initially setting out the scope of the assessment and formulating the terms of reference without consulting the Nlaka'pamux Nation Tribal Council (NNTC) - The British Columbia Court of Appeal held that the Director made no error in proceeding with the assessment process by drafting a s. 11 order and receiving input from the two bands that were identified as having the most direct interest in the project - The NNTC was made aware of what was happening, and it was incumbent upon it to assert a right to participate in the process - The terms of reference did not determine the scope of the review, nor whether or not the NNTC would be consulted - See paragraphs 76 to 80.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - A proposed landfill extension would occupy land over which the Nlaka'pamux First Nation claimed Aboriginal rights and title - The proposal was subject to an assessment under the Environmental Assessment Act - Section 11 of the Act required the Project Assessment Director to determine the scope and the procedures by which the assessment would occur - The original s. 11 order did not provide for any consultation with the Nlaka'pamux Nation Tribal Council (NNTC) - The amended order did not specifically mention the NNTC, but provided for discretionary consultation with Aboriginal entities - For the purposes of the appeal, the Director accepted that the NNTC was entitled to "deep consultation" - The British Columbia Court of Appeal stated that the real issue was whether the Director's offer of consultation and his amendment of the s. 11 order were sufficient to accommodate "deep consultation" - That issue could only be answered by considering the Act as well as the duty to consult - The court agreed with the NNTC's assertion that the Act required that any First Nations consultation that was to form part of the assessment process be provided for in the s. 11 order - "Any promise to consult outside the scope of the s. 11 order is, by definition, outside the scope of the environmental assessment" - In the result, the court found that the Director should have provided for consultation with the NNTC in the amended s. 11 order - See paragraphs 84 to 100.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - Section 11 of the Environmental Assessment Act required the Project Assessment Director to determine the scope and the procedures by which an assessment would occur - The parties disputed whether First Nations consultation in the environmental assessment process must be provided for in a s. 11 order, or whether there was some extra-statutory method by which it could take place - The British Columbia Court of Appeal answered that "the s. 11 order must set out the scope of any First Nations consultation that is to take place as part of the assessment process. While this does not preclude consultation outside the assessment process, such consultation will not serve as a substitute for consultation within the process. The chambers judge erred in finding that adequate consultation could occur outside the bounds of a s. 11 order" - As to the remedy, the court declared that the s. 11 order failed to adequately establish the necessary processes of consultation and was, in that respect, defective, but would not quash the s. 11 order, as it was no longer in play - The declaration did not automatically invalidate the environmental assessment certificate that had been issued - Any challenge to the certificate would have to be made in separate proceedings - See paragraphs 101 to 107.

Pollution Control - Topic 1815

Environmental assessments or impact studies - General - Pre-assessment requirements (incl. terms of reference) - [See ninth **Indians, Inuit and Métis - Topic 3**].

Cases Noticed:

Haida Nation v. British Columbia (Minister of Forests) et al., [2004] 3 S.C.R. 511; 327 N.R. 53; 206 B.C.A.C. 52; 338 W.A.C. 52; 2004 SCC 73, appld. [paras. 2, 57].
Taku River Tlingit First Nation et al. v. Tulsequah Chief Mine Project (Project

Assessment Director) et al., [2004] 3 S.C.R. 550; 327 N.R. 133; 206 B.C.A.C. 132; 338 W.A.C. 132; 2004 SCC 74, reld to. [para. 12].
Carrier Sekani Tribal Council v. British Columbia Utilities Commission et al. (2010), 406 N.R. 333; 293 B.C.A.C. 175; 496 W.A.C. 175; 9 B.C.L.R.(5th) 205; 2010 SCC 43, reld to. [para. 72].
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council - see Carrier Sekani Tribal Council v. British Columbia Utilities Commission et al.
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) et al., [2005] 3 S.C.R. 388; 342 N.R. 82; 2005 SCC 69, reld to. [para. 69].
R. v. Adams (J.R.), [1996] 3 S.C.R. 101; 202 N.R. 89, reld to. [para. 88].
Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management) et al. (2005), 209 B.C.A.C. 219; 345 W.A.C. 219; 37 B.C.L.R.(4th) 309; 2005 BCCA 128, reld to. [para. 97].
Kwikwetlem First Nation v. British Columbia Transmission Corp. et al., [2009] 9 W.W.R. 92; 266 B.C.A.C. 250; 449 W.A.C. 250; 89 B.C.L.R.(4th) 273; 2009 BCCA 68, reld to. [para. 97].
Mining Watch Canada v. Canada (Minister of Fisheries and Oceans) et al., [2010] 1 S.C.R. 6; 397 N.R. 232; 2010 SCC 2, reld to. [para. 106].

Statutes Noticed:

Environmental Assessment Act, S.B.C. 2002, c. 43, sect. 10(1)(c) [para. 22]; sect. 11 [para. 30].

Counsel:

Reidar Mogerman and Mark G. Underhill, for the appellant;
Patrick G. Foy, Q.C., and Erin K. Christie, for the respondent Griffin;
Stephen M. Fitterman, for the respondent Belcorp.

This appeal was heard on March 31, 2010, at Vancouver, British Columbia, before Rowles, D. Smith and Groberman, J.J.A., of the British Columbia Court of Appeal. In written reasons by Groberman, J.A., the Court of Appeal delivered the following judgment, dated February 18, 2011.

Appeal allowed in part.

Editor: E. Joanne Oley

Pollution Control - Topic 1815

Environmental assessments or impact studies - General - Pre-assessment requirements (incl. terms of reference) - Section 11 of the Environmental Assessment Act required the Project Assessment Director to determine the scope and the procedures by which an assessment would occur - The parties disputed whether First Nations consultation in the environmental assessment process must be provided for in a s. 11 order, or whether there was some extra-statutory method by which it could take place - The British Columbia Court of Appeal answered that "the s. 11 order must set out the scope of any First Nations

consultation that is to take place as part of the assessment process. While this does not preclude consultation outside the assessment process, such consultation will not serve as a substitute for consultation within the process. The chambers judge erred in finding that adequate consultation could occur outside the bounds of a s. 11 order" - As to the remedy, the court declared that the s. 11 order failed to adequately establish the necessary processes of consultation and was, in that respect, defective, but would not quash the s. 11 order, as it was no longer in play - The declaration did not automatically invalidate the environmental assessment certificate that had been issued - Any challenge to the certificate would have to be made in separate proceedings - See paragraphs 101 to 107.