Case Comment

Bob Reid

Aboriginal Title and Rights: Crown's Duty to Consult and Seek Accommodation

After the Supreme Court of Canada's decision in *Delgamuukw*, (1997) 3 S.C.R 1010, stated there was an obligation on the Crown to consult with aboriginal people, the question arose as to whether this obligation extended to situations where potential infringements are being alleged by an aboriginal people who are specifically claiming aboriginal title or rights, before their title or rights have been determined by a Court.

The British Columbia Court of Appeal recently concluded that the Crown and third parties have "a legally enforceable duty to [aboriginal peoples] to consult with them in good faith, and to endeavour to seek workable accommodations between the aboriginal interests…, on the one hand, and the short-term and long-term objectives of the Crown and Weyerhaeuser to manage [a tree farm licence] in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand"—para. 60 in *Council of the Haida Nation and Guujaaw v. The Minister of Forests et al.,* (2002) BCCA 147.

The Court did not accede to a second issue in the Haida case. Mr. Justice Lambert stated that it was "about whether the Crown title to land and timber over which a claim of aboriginal title extends must be regarded as subject to a legal or equitable encumbrance which should have prevented the Crown from dealing with the land and timber"(para 2). This question was raised in a preliminary question as a point of law in these proceedings.

It was appealed to the Court of Appeal, see (1998) 1 C.N.L.R. 98, which interpreted the question as requiring the words "if it exists" to modify an unproven aboriginal title. Aboriginal title, if it exists, will constitute an encumbrance on the Crown's title to the timber.

> *Aboriginal title, if it exists, will constitute an encumbrance on the Crown's title to the timber.*

Therefore, in light of this interpretation, Lambert J.A. did not think the Court could revisit the question and decide that a claim to aboriginal title or aboriginal rights, which have not been proven, could provide the basis for a declaration by a court that an encumbrance exists and provide a remedy for ignoring it. He did state that the question could be reconsidered when the existence of aboriginal title and aboriginal rights is determined (paras. 5 and 6).

The principal issue in the case involved the question of whether there is a legal obligation on the Crown and on Weyerhaeuser to consult with the Haida before authorizing logging operations on the Queen Charlotte Islands, or Haida Gwaii, as the area is known by the Haida people, over which they claim aboriginal title (para. 8). The Crown and Weyerhaeuser stated there is no obligation to consult prior to a judgment by a court of competent jurisdiction declaring that aboriginal title or aboriginal rights exist. Even then, the Haida must demonstrate that the logging operation would be a *prima facie* infringement of their title or rights.

The Court recognized the importance of this issue in the context of the treaty process. Lambert J.A. stated that if no recognition is given to claimed aboriginal title or rights, even on an interim basis, until such time as the title or rights are confirmed by treaty or by judgment of a competent court, "then by placing impediments on the treaty process, the Crown can force every claimant of aboriginal title or rights into court and on to judgment" to prove their title and rights do exist (para. 11).

The Haida's petition sought a declaration that the replacements of a tree farm licence (TFL 39) to Weyerhaeuser was invalid because the fiduciary and legal duty of the Crown to consult with the Haida people had been ignored.

At trial, the chambers judge dismissed the Haida's petition on the basis that the claim of aboriginal title and rights was unproven. The chambers judge relied on the reasoning in two previous BC Supreme Court decisions—*Westbank v. British Columbia (Ministry of Forests) et al.* (2000), 191 D.L.R. (4th) 180 and *Taku River Tlingit First Nation v. Ringstead,* (2000), 77 B.C.L.R. (3d) 310. It was noted, however, that the chambers judge did not have the benefit of the decision of the Court of Appeal in *Taku River Tlingit*, (2002) B.C.C.A. 59, 31 January 2002, which dealt with the key question of consultation before aboriginal title and rights are established by court order [para 19].

The chambers judge did, however, find certain conclusions from the evidence presented [para 25]. A paraphrase of several of these conclusions follows.

> Haida people have inhabited the Queen Charlotte Islands to the exclusion of other aboriginal peoples from the time of European contact in 1774, to the assertion of sovereignty in 1846, and to the present day. Their aboriginal rights have never been extinguished or surrendered by conquest, by surrender, or by treaty. The Haida have claimed aboriginal title to Haida Gwaii for over a century. From a time predating 1846, the Haida have used large old-growth red cedar trees for cultural, ceremonial, and utilitarian purposes, and continue to do so today. These old-growth red cedar trees are found in TFL 39. For a number of years, the Haida have objected to the logging of these trees and the environmental effects of this logging.
>
> The Crown has known since 1993 that there was no blanket extinguishment of aboriginal rights in BC. Since 1994, the Province has known that the Haida objected to TFL 39 being replaced without their consent and without the reconciliation of their title with Crown title. The Crown is taken to be aware that the Haida have occupied the land and areas within TFL 39 since before 1846 and of the importance of red cedar in the Haida culture. And since the Court's decision in these proceedings in 1997, the Province has been aware that if the Haida proved their claim of aboriginal title and rights, that would constitute an encumbrance on the timber in TFL 39.

The chambers judge did conclude that a moral duty (as opposed to a legal duty) existed on the Crown to consult (para. 23). Lambert J.A. supposed that this moral duty to consult was based on the moral duty to negotiate referred to by Chief Justice Lamer, at para. 186, in his reasons in *Delgamuukw*, when he said:

> "Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct negotiations in good faith."

The Crown has known since 1993 that there was no blanket extinguishment of aboriginal rights in BC.

In relation to this moral duty, the chambers judge found there was a "reasonable probability" that the Haida would succeed in their claim to aboriginal title to the area included in TFL 39, and a "substantial probability" they would establish the aboriginal right to harvest red cedar trees from various old-growth areas of Haida Gwaii, including TFL 39 (para. 47). The chambers judge was also of the opinion that a reasonable probability existed that the Haida could show a *prima facie* case of infringement of that aboriginal right by the past and continuing logging of those trees (para. 48). All these factors support the finding that "the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

On the basis of these probabilities, the chambers judge stated (para. 51) that:

> "In my judgment, the provincial Crown should have been able to make a similar assessment of the apparent strength of the Haida claims, long before September 1, 1999, when the Minister offered to replace TFL 39. I think this factor favours the creation of a moral duty to consult in relation to the decision to replace TFL 39."

Additional evidence found by the chambers judge to be relevant to the moral duty to consult was considered (para. 59). The evidence indicated that TFL 39 constitutes about one-quarter of the landmass of Haida Gwaii and that it is unclear how much has already been logged, although an aerial overview showed large areas as having been logged. Since these old-growth forests take 500 years or more to grow, the desire of the Haida to reduce the rate of logging was found to be understandable by the chambers judge; the Haida are, however, unable to influence the quantity of the annual allowable cut in TFL 39.

On the basis of all this evidence and findings, the chambers judge concluded "that the decision to replace TFL 39 has high potential to affect Haida title" and that "consultation at the replacement stage would enable the Haida to seek the inclusion of terms and conditions in TFL 30 that would address their major concerns, on a long-term basis"(para. 60). He therefore concluded that the Crown does have a moral duty to consult with the Haida concerning their Aboriginal claims, in connection with the decision to replace TFL 39… ." (para. 61).

But is there any constitutional or fiduciary duty of consultation?

Mr. Justice Lambert, after citing the conclusions of the chambers judge, referred to the reasons handed down by the Court of Appeal in the *Taku River Tlingit* case a week before the *Haida* case was set down for hearing. He concluded that the general principles stated by Madam Justice

Rowles (concurred in by Madam Justice Huddart) in the *Taku River Tlingit* case as binding on the Court in *Haida* and determinative of the outcome (para. 29).

Lambert J.A. found that "Madam Justice Rowles decided that there was an obligation on the Crown to consult aboriginal people who had claimed aboriginal title and aboriginal rights, in the circumstances of that case, and it could not be said, as the Crown said in that case and this case, that the obligation to consult never arose until a court of competent jurisdiction decided on the existence and scope of aboriginal title and aboriginal rights" (para. 28).

According to Lambert J.A., "the roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal peoples of Canada" which is reflected in the *Royal Proclamation of 1763* (para. 33). The Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R 1075, at pp. 1108–09, determined that "the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation."

Finding that the "trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other," Lambert J.A. determined that one manifestation of this fiduciary duty is that it grounds a general guiding principle for Section 35(1) of the *Constitution Act, 1982* (para. 36). In fact, he stated that it would be contrary to that guiding principle to interpret Section 35(1) as to require that:

> "before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the subject of a declaratory or other order of the court… . Yet that interpretation is what was effectively given to it by the chambers judge in this case and…in *Westbank v. British Columbia*" (para 37).

Mr. Justice Lambert then reviewed the question of the content of the duty to consult as addressed by Chief Justice Lamer in *Delgamuukw.* He concluded that the Chief Justice regarded the accommodation process involved in the duty to consult as preceding the infringement "which itself will occur before the aboriginal title is declared by a court of competent jurisdiction in proceedings alleging both the title and infringement" (para. 40). A fiduciary duty to consult arises immediately after aboriginal title is asserted, not after it is proved.

The chambers judges decided that if the precise nature of the aboriginal title or rights has not been determined, then no conclusive determination of whether they have been *prima facie* infringed, and whether this infringement was justified, can be made. But, asked Lambert J.A.,

how can the consultation aspect of the justification test be met if it does not occur until after the infringement? By then it may be too late for consultation and the only remedies may be a permanent injunction and compensatory damages (paras. 41 and 42).

The reasons delivered by the Supreme Court of Canada in *Delgamuukw, Sparrow, and R. v. Gladstone,* [1996] 2 S.C.R. 723, were relied on by Lambert J.A. to support the finding that "the major aspects of justification, including consultation, must be in place before the infringement occurs and, normally, before the aboriginal right is proven in court" (paras. 43 and 44).

The Crown in argument had relied on the decision of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore [Township],* (2000), 186 D.L.R. (4th) 403, as supporting the position of the chambers judges. Lambert J.A. agreed with the finding of Mr. Justice Borins who delivered the decision, that in determining whether an alleged infringement has occurred, the "first step" is to consider whether aboriginal title or rights have been established. He did not, however, agree that the Ontario Court of Appeal said that "the duty to consult does not arise until the court considers whether it has been discharged" (para. 46). Lambert J.A. did not consider there to be any divergence of views between the two Courts on the question of consultation.

Mr. Justice Lambert relied on the findings of the chambers judge that the Haida people had a good *prima facie* case to a claim for aboriginal title and aboriginal rights and also a "reasonable probability" of showing a *prima facie* case of infringement (paras. 48 to 50). He stated that the strength of the Haida case gave "content to the obligation to consult and the obligation to seek an accommodation" (para. 51). He stressed that he was not saying that if a *prima facie* case does not exist, there is no duty to consult.

He found that the obligations to consult and to seek an accommodation with the Haida were enforceable, legal, and equitable duties of the Crown at the time when TFL 39 was replaced (para. 52). The Crown did not consult; therefore, Lambert J.A. asked what would be an appropriate remedy. He said that "the aim of the remedy should be to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights. Once that final decision is made…a final determination can be made of the quality and extent of any *prima facie* infringement…that may have occurred before that determination… ." (para.54).

He stressed that he was not saying that if a prima facie *case does not exist, there is no*

Lambert J.A. stressed that the consultation must occur prior to the infringement. In his opinion, "the obligation to consult is a free-standing enforceable legal and equitable duty. It is not enough to say that the contemplated infringement is justified by economic forces and will be certain to be justified even if there is no consultation. The duty to consult and seek an accommodation…stands on the broader fiduciary footing of the Crown's relationship with Indian peoples who are under its protection" (para. 55).

The question of whether TFL 39 was invalid or void was not, in Lambert J.A.'s opinion, fully argued on the appeal, and therefore no order was made in this regard. He said that the proper time to determine this question would be at the same time as the determination of aboriginal title, aboriginal rights, *prima facie* infringement, and justification, by a Court of competent jurisdiction (paras. 58 and 59).

A declaration was granted to the Haida that the Crown and Weyerhaeuser have now, and had earlier, "a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable

accommodations between the aboriginal interests of the Haida people, on the one hand, and the short-term and long-term objectives of the Crown and Weyerhaeuser to manage TFL 39…in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand" (para. 60).

And the Crown and Weyerhaeuser were cautioned that how they discharge this duty in the immediate and long-term future will have a very significant impact on the final determinations by a court when it makes its final determinations about aboriginal title and rights, and about the alleged infringement of that title or rights (para. 61).

Council of the Haida Nation and *Guujaaw V. the Minister of Forests et al.*

2002 B.C.C.A. 147. Lambert J.A. (Finch C.J. and Low J.A. concurring)

Editorial comment from the author: This decision has raised serious questions concerning the resource development in the province, most notably, drilling for oil or gas either offshore or in northeast BC. The Haida claim of aboriginal title and aboriginal rights extends to the waters and subsurface of all of Dixon Entrance and one-half of the ocean to Vancouver Island.

At first it would appear that a claim of aboriginal title to the subsurface, or ocean floor, would have no likelihood of success as it would require proving exclusive occupation before 1846 and afterwards. The latest underwater archeological research in the waters off Haida Gwaii, however, has indicated the possibility that this area was occupied by the ancestors of the present Haida peoples at a time when it was dry land. Certainly the Haida would have little difficulty in establishing aboriginal rights to fishing in these waters.

The Court of Appeal found that the duty to consult arises when the claim of aboriginal title and aboriginal rights is made. If the Crown and the resource company do not consult and seek accommodation, then a lawsuit would be likely. What will be the outcome of these decisions on the resource development of the province? It is this possibility of litigation that could result in the reluctance of industry to commit to resource development. If so, the result could be a greater commitment by both the federal and provincial governments in the treaty-making process to resolve the uncertainties. The present process, which has been ongoing for a decade at a cost of millions, appears to be stalled or is moving very slowly. ▲

Robert S. Reid is the Assistant Dean of Admissions and Career Placement, and an associate professor in the Faculty of Law at UBC. He also teaches the first-year course in Property Law. A member of the Notary Board of Examiners, Bob teaches our graduating Notaries.