

Consultation and Accommodation Updates

***R. v. Douglas* 2007 BCCA 265**

Decision date: May 3, 2007

This case affects the following chapters of EAGLE’s “Nation to Nation: The Law of Consultation and Accommodation” materials: Chapter 3 (Section 35), Chapter 4 (The Crown’s Obligations to Consult and Accommodate) and Chapter 7 (Federal Government). The case addresses issues related to priority of Aboriginal rights, justification, consultation and consent.

This case involved Cheam Nation Aboriginal fishers who were convicted of fishing during a time when fishing was closed to Aboriginal fishers but open to the non-Aboriginal sport fishery. Although the Department of Fisheries and Oceans (DFO) consulted broadly with other First Nations,¹ it did not directly or specifically consult with the Cheam with respect to the sport fishery opening. At trial, the Crown admitted that the Aboriginal fishers had an Aboriginal right to fish for food, social and ceremonial purposes and that the *Fisheries Act* and the relevant regulations under that act infringed that right. However, it argued that its infringement of that right was justified.

Lower Court Decision

In the original appeal decision (B.C. Supreme Court, February 17, 2006 – summarized earlier on this website)² the judge set aside the convictions based on an application of *R. v. Sparrow* (*Sparrow*).³ *Sparrow* established that s. 35 of the *Constitution Act, 1982* protects Aboriginal rights from Crown infringement unless the Crown justifies the infringement according to the following test:

1. The Crown must show that it acted pursuant to a valid legislative objective; and
2. If there is a valid legislative objective, the Crown must show that its actions are consistent with the honour of the Crown. The Crown can uphold its honour by giving Aboriginal rights priority,⁴ ensuring that Aboriginal rights are minimally infringed, undertaking consultation, and offering compensation.

The judge found that the government had acted pursuant to a valid legislative object and that the non-Aboriginal fishery openings involved the implementation of such a valid

¹ Importantly, as seen in the Court of Appeal decision, the Cheam avoided (at times refusing) participating in the broader consultation efforts.

² *R. v. Douglas* 2006 BCSC 284.

³ [1990] 1 S.C.R. 1075 (“*Sparrow*”).

⁴ According to Canadian case law, Aboriginal food fishers have priority over all other fisheries. The judge held that Aboriginal Rights to fish for food, social or ceremonial purposes have a clear priority over non-Aboriginal recreational fisheries. The judge held that DFO denied Aboriginal fishers priority by allowing non-Aboriginal fishers to fish at times when Aboriginals were not permitted to fish for such purposes.

legislative object (the second part of the justification test), not its validity. He also found that the non-Aboriginal fishery opening, despite the closure of the Aboriginal fishery, amounted to a minimal impairment of Aboriginal rights to achieve DFO's escapement goals. He held that compensation is not required each time an Aboriginal right is infringed and that, in this case, the Aboriginal right was not sacrificed to non-Aboriginal interests; no quantifiable Aboriginal right was transferred, taken or appropriated.⁵

However, the court did find that the Crown failed to give constitutional priority to the Cheam's Aboriginal right and failed to consult them, thereby breaching the honour of the Crown. The Crown was not justified in infringing the Aboriginal right, so the judge acquitted the Aboriginal fishers.

Court of Appeal Decision

The Court of Appeal disagreed with the B.C. Supreme Court decision and reinstated the convictions. It held that the Supreme Court judge applied a justification standard that was "too rigid and did not take into account the relevant context," noting that:

[t]he Supreme Court of Canada has repeatedly emphasized the need to consider the specific factual context of a given case in applying the justification test, including the requirements for consultation and priority.... The standard to be applied is reasonableness....⁶

The Court of Appeal pointed to the nature of the overall fishery, the number of First Nations involved and their lack of unanimity on important issues to find that joint consultation was "reasonable and appropriate." DFO had adjusted the escapement target and exploitation rate of the fishery in response to First Nations' concerns and attempted to separately consult with the Cheam, who had refused to participate in the joint consultations. This court agreed with both the trial decision and lower court appeal decision that DFO consultation efforts were "reasonable and in good faith."

This court found that the number of fish involved in the non-Aboriginal fishery opening was insignificant and, therefore the opening was in keeping with the strategy DFO developed after the broad consultations. Furthermore, even if it had not been consistent, the small opening required no further specific consultation because "it had no appreciable

⁵ The court also discussed the issue of consent, holding that the honour of the Crown may require it to obtain Aboriginal Peoples' consent before infringing an Aboriginal Right, whether or not the right is in relation to land. The judge rejected the argument that the number of people or First Nations that must be consulted is not relevant to whether the consent of a First Nation is required before a right may justifiably be infringed. Instead, "consent, like compensation, fairly arises where a right is either expropriated or completely denied" (at para. 136). The Court of Appeal did not address either of these issues (compensation or consent) and this lower court decision does not settle the issues of when consent and/or compensation are required. The Supreme Court of Canada has yet to set out principles or tests for determining these issues.

⁶ At para. 37.

adverse effect on the First Nations' ability to exercise their aboriginal right to fish for food, social and ceremonial purposes.”⁷

Finally, the court took particular issue with the Cheam's failure to reciprocate Crown efforts to consult and refusal to clearly articulate its fishery needs:

To hold that members of a First Nation who deliberately frustrated all of the government's attempts to consult, and thereby failed in its own obligations should receive a remedy for an infringement of its aboriginal right because the government did not approach it on a minor issue goes far beyond what is required to justify DFO's conduct. The DFO's duty as described by the Supreme Court of Canada in *Sparrow* was to uphold the honour of the Crown and conform to the unique contemporary relationship between the Crown and aboriginal peoples. As the trial judge held, “the refusal by the Cheam to meet, to communicate, and to refuse to attend group discussions has direct implications on the assertion the consultation efforts of government are flawed.”⁸

As for the question of priority, the Court of Appeal (like the trial judge) looked at the entire fishing season and DFO strategy of fishery allotments. It found that the First Nations, including the Cheam, in fact *had* received priority over all other fisheries.⁹ The court noted that the Aboriginal fisheries of the Cheam and the other Lower Fraser First Nations “both preceded and occurred simultaneously with the marine sport fishery” and that, other than that sport fishery and test fisheries, the Fraser River First Nations, as a whole, received the entire fishery that remained after meeting conservation needs.¹⁰ The Court of Appeal confirmed that this allotment was in accordance with Supreme Court of Canada requirement that, under the *Sparrow* test, the Crown show that it “has truly taken into account the existence of aboriginal rights,”¹¹ further noting that the priority requirement aims to “guarantee that fisheries conservation and management plans ‘treat aboriginal peoples in a way ensuring that their rights are taken seriously.’”¹²

⁷ At para. 44. The court referred to Supreme Court of Canada decisions holding that “the trigger for a duty to consult is twofold: not only does it require knowledge of the existence of an aboriginal right, but also contemplated conduct that might adversely affect it” (at para. 44 – referring to *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 64 and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 33.)

⁸ At para. 45.

⁹ In this case, the commercial fishery received none of the fishery.

¹⁰ Conservation concerns have priority over the food, social and ceremonial fishery needs. The court also noted that DFO had to include restrictions to ensure that each entitled Fraser River First Nation could meet its food, social and ceremonial fishery needs.

¹¹ *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 63.

¹² At para. 54, quoting *Sparrow* at p. 1119. The court added that the priority requirement does not mean that such food, social and ceremonial fisheries must always precede or occur contemporaneously with non-Aboriginal fisheries. It reiterated the importance of context, e.g., the movement of the fish themselves, such that protecting the fisheries of upriver Aboriginal rights holders does not mean preventing a non-Aboriginal fishery downstream. Rather than insist that the Aboriginal fisheries *occur* first, the important DFO task is to allot adequate numbers of fish to Aboriginal fisheries before allotting fish to other fisheries.

Conclusions

The Court of Appeal found that DFO had not breached the honour of the Crown in opening a small sport fishery when the Aboriginal fishery was closed. It set out the following important principles:

1. If the Crown conducts appropriate, strategic-level consultation (e.g., as here with multiple affected First Nations), then it does not have to consult each First Nation on related “minor” matters that are consistent with the overall strategy;
2. If there is no appreciable adverse effect on the First Nation’s ability to exercise the right, then no duty of consultation arises; and
3. If, as here, the First Nation fails to reciprocate Crown consultation efforts and communicate their needs in concrete terms, the First Nation cannot later rely on the infringement being unjustified.