

Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans) 2007 FC 267

Decision date: May 29, 2007

This case addresses issues related to consultation and affects the following chapters of EAGLE's "Nation to Nation: The Law of Consultation and Accommodation" materials: Chapter 4 (The Crown's Obligations to Consult and Accommodate), Chapter 7 (Federal Government) and Chapter 12 (Empowering Aboriginal People Within Consultation).

This case involved the fourteen Indian Bands that comprise the Nuu-chah-nulth First Nations of the West Coast of Vancouver Island (the "Nuu-chah-nulth") who have formed the Nuu-chah-nulth Tribal Council (the "NTC"). The Nuu-chah-nulth sought a judicial review of the decision of the Minister of Fisheries and Oceans (the "Minister") under the *Fisheries Act* to implement a commercial groundfish pilot plan (the "Pilot Plan") on the Pacific Coast of British Columbia (the "Decision").

The Decision included new terms of licences and the assigning of individual transferable quotas to commercial fisherman for groundfish fisheries that had not previously had such quotas. The Department of Fisheries and Oceans ("DFO") claimed that these changes were intended "to deal with significant conservation and protection issues relating to endangered and at risk rockfish species and bycatch mortality, and to allow DFO to accurately assess stocks by improving monitoring and catch reporting for all species."¹

This decision shows how courts may consider the actions of the Aboriginal community that seeks consultation and the extent to which such a community facilitates (or not) such consultation – particularly where the duty to consult may lie near the weak end of the spectrum described in *Haida* and other decisions.

Consultation Activities

DFO consultation with industry associations resulted in the formation of the Commercial Groundfish Integrated Advisory Committee (the "CGIAC"). The CGIAC included a representative of the B.C. Aboriginal Fisheries Commission. In 2004 and 2005, this representative was from the NTC.² The Commercial Industry Caucus, a CGIAC committee with no Aboriginal representation, created the Commercial Industry Caucus Pilot Integration Proposal (the "Reform Proposal") that became the Pilot Plan.

DFO sent letters and consultation guides to all B.C. coastal First Nations seeking input. The Nuu-chah-nulth were not included in later bilateral discussions with affected First Nations because the Crown felt that the Reform Proposal would not adversely impact asserted Nuu-chah-nulth Aboriginal rights.

The Nuu-chah-nulth proposed a consultation protocol to DFO comprising of six stages:

1. Identification of policy proposals,
2. Explanation and initial discussion of the policy proposals,

¹ This decision, para. 5.

² The judge noted that the NTC representative only attended the 2005 CGIAC meetings.

3. Provision and consideration of further information,
4. Nuu-chah-nulth response,
5. DFO response, and
6. Accommodation.³

DFO essentially agreed with the first five stages but was still considering the sixth stage and would not agree to the proposed consultation timeline. As one of the affected fisheries would soon open, DFO pressured the Nuu-chah-nulth to undertake the first five stages of the consultation protocol, but the Nuu-chah-nulth would not discuss the Reform Proposal until DFO committed to the proposed consultation protocol.

Eventually, the Nuu-chah-nulth agreed to proceed with stage three of the protocol and submitted 102 questions to DFO, of which DFO provided responses to 94. The Nuu-chah-nulth sought a meeting with the Minister when he was in the region, but it did not occur, though he had met with the Nuu-chah-nulth earlier in the year.

DFO introduced the final proposal before all the proposed consultation stages had completed. The proposal contained much of the Reform Proposal with some changes, including limiting the proposal as a three-year pilot plan, making the quota reallocations temporary and a DFO commitment to provide additional First Nations quotas.

The Court Decision

The Nuu-chah-nulth applied for judicial review of the decision to implement the Pilot Plan (the “Decision”) based on a failure to uphold the honour of the Crown and to fulfill the duty to consult. The judge identified the following as the issues:

1. What was the scope of the Minister’s duty to consult regarding the Decision?
2. Were the steps taken by the Minister sufficient to meet the duty to consult?
3. What, if anything, is the appropriate remedy to be ordered by this Court?⁴

The judge agreed with the Crown’s arguments regarding the scope of the duty to consult. The Crown contended that the Nuu-chah-nulth could not identify any adverse impacts⁵ and questioned whether the Decision might adversely affect the Nuu-chah-nulth’s asserted Aboriginal rights. It further argued that, because any potential adverse effect or infringement was “minor,” the scope of the duty to consult lay at the lower end of the consultation spectrum identified in the *Haida* decision⁶ and other cases.

The asserted Aboriginal rights included commercial fishery rights. Past court decisions indicated that a broad range of government objectives (including, as here, conservation objectives) could justify infringement of such rights.⁷ Thus, when assessing the adequacy

³ Para. 13.

⁴ Para. 27.

⁵ The Nuu-chah-nulth did not challenge that contention.

⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (see our analysis in the EAGLE publication, “Nation to Nation: The Law of Consultation and Accommodation,” and access the decision at <http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html>).

⁷ At para. 44, the judge noted that the Nuu-chah-nulth “did not deny the existence of a valid conservation objective... in implementing the Pilot Plan.” At para. 36, the Crown argued that the conservation objectives actually protect the asserted rights.

of consultations where the infringement is justified, the duty to consult will be small and “the giving of notice and a subsequent discussion of issues would suffice.”⁸ The judge apparently applied this argument to limit the consultation duty regarding asserted rights.⁹

The judge found that the Nuu-chah-nulth had been aware of the development of the Pilot Plan in sufficient time.¹⁰ He noted that the Nuu-chah-nulth “essentially took the position, throughout the process, that the only acceptable form of consultation was a bilateral consultation” and suggested that adequate consultation need not always be bilateral.¹¹

The judge decided that the consultation opportunities that had occurred and the resulting Nuu-chah-nulth awareness of the Pilot Plan were sufficient. He apparently approved of the limited bilateral Crown consultations and appreciated the Crown’s efforts. He noted: the applicants share a lot of the blame for delaying the process to the point where there was no time for them to present their official submissions before the Minister adopted the Pilot Plan. They cancelled meetings... and they did not submit their consultation protocol until November 23, 2005, even though they proposed bilateral consultations as early as January 2005. More importantly, they insisted that DFO agree to their protocol, before they proceeded to discuss the substance of the issues.¹²

Further, the judge found that, by insisting on bilateral consultation but refusing full engagement in such consultation except according to their own protocol, the Nuu-chah-nulth put the Minister in “a very difficult position.” DFO’s time pressures led him to decide that the timetable the Nuu-chah-nulth proposed was “problematic,” summarizing: Essentially, by refusing to participate in the consultation process until DFO agreed to a consultation protocol, which they must have known would be problematic, the applicants destroyed any possibility that meaningful consultations of the type they sought could be accomplished before the beginning of the 2006 fishing season.¹³

The judge found that changes in the final Pilot Plan were “meant to address concerns of stakeholders” and that the additional First Nations quotas made it “clear that a measure was introduced in the Pilot Plan to accommodate the potential adverse effects of the reform Proposal identified by the applicants.”¹⁴ In all, the judge found that the Minister was justified in proceeding without waiting for the bilateral consultations to conclude.

⁸ Para. 38.

⁹ Paras. 39-46.

¹⁰ He added that the Nuu-chah-nulth would have been aware of it even earlier and engaged in the development process had the NTC representative attended the 2004 meetings.

¹¹ Paras. 50 and 51.

¹² Para. 60. He discussed *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (<http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html>) - see our analysis in the EAGLE publication, “Nation to Nation: The Law of Consultation and Accommodation”).

¹³ Para. 62. He noted, for example, that the target completion date for consultation was “[a]s required to complete the consultation process.”

¹⁴ Para. 65.