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Da'naxda'xw/Awaetlala

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Cases Considered:

Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment), 2011 BCSC 620 ("*Da'naxda'xw/Awaetlala*")

In the *Da'naxda'xw/Awaetlala* case, Madam Justice Fisher was faced with a different type of duty to consult and accommodate issue.

While this is a British Columbia case it demonstrates even more the differences between British Columbia Court's treatment of the duty to consult and accommodate and Alberta Courts (see here). Further it distinguishes the recent Alberta Court of Appeal decision in *Tsuu T'ina Nation v Alberta (Minister of Environment)*, 2010 ABCA 137 on, I would suggest somewhat arguable distinctions (see here). Finally, this decision also distinguishes the Alberta Court of Appeal decision in *R v Lefthand*, 2007 ABCA 206.

In the *Da'naxda'xw/Awaetlala*, the petitioners sought judicial review of the Minister's refusal to recommend a boundary variation of a conservation area that encompassed the First Nation's traditional lands in order to accommodate a proposed hydro-electric power project (the "Project"). The twist was that the petitioners Da'naxda'xw/Awaetlala First Nation ("First Nation") and Kleana Power Corporation ("Kleana"), the nominal project proponent, were seeking the variation.

Background

The First Nation was an amalgamation of the Dai?naxdai?xw and Awaetlala tribes whose traditional lands were "adjacent to Knight Inlet from mountain top to mountain top, the watersheds that empty into Knight Inlet to their head waters, and the Klinaklini River to its source" ("traditional lands"). The First Nation asserted aboriginal title to their traditional lands and were in the process of negotiating a treaty with the provincial and federal government.

Kleana was an independent developer and operator of hydro-electric projects. Kleana proposed an instream hydro-electric project on the Upper Klinaklini River near the head of Knight Inlet. It sought to participate in the environmental review process for approval of the Project with a view to selling "clean" electricity to BC Hydro under a particular program due to expire.

The Project was to be built within a protected area temporarily designated in 2002 under the *Environment and Land Use Act*, RSBC 1996, c 115, and subsequently designated in May of 2008 as a "conservancy" under the provincial *Park Act*, RSBC 1996, c 344, as am. Under either designation, the Project could not be constructed or operated.

In February 2006, an agreement was reached on the combined Central and North Coast Land and Resource Management Plan (”LRMP”), to set aside some 100 protected areas that were generally defined but with no detailed maps. These protected areas including the Upper Klinaklini as an EBM Protection area, or “conservancy.” The First Nation supported this designation.

In March 2006, the First Nation was among the signatories to a land use planning Agreement in Principle with the province which attempted to establish a government-to-government management process. In July of 2006 the province enacted amendments to the Park Act to create the “conservancy “as a new designation of protected area and established 24 “conservancies” but the Upper Klinaklini was not included in this initial legislation.

In June 2007, the First Nation and the province entered into a Collaborative Agreement for the Management of Protected Areas in First Nation Traditional Territory (”Collaboration Agreement”). This agreement provided that each party would appoint representatives who would be responsible for making recommendations about a number of things, including the refinement of the conservancy boundaries prior to designation.

Meanwhile in 2005 the President of Kleana, had met with the Chief and Council of the First Nation. Kleana committed to involving the First Nation in the development, a share of the income and jobs in the Project. After meetings and consultations, the First Nation decided to support the Project to promote the economic and social well-being of their people. Fred Glendale, a councillor and resource manager for the First Nation, is a director of Kleana.

On July 15, 2006, Mr. Glendale wrote to the Province to request assistance to modify the boundaries of the proposed Upper Klinaklini protected area to accommodate the Project. Kleana followed this up by sending a sketch map of the proposed boundary amendment to the Ministry of Environment. In October 2006, Kleana applied to the B.C. Environmental Assessment Office for the Project to be designated a reviewable project under the harmonized federal and provincial environmental review process (the “EAO process”) and on November 6, 2006, the EAO granted the designation and issued an order requiring Kleana to obtain an environmental assessment certificate. There were two processes going forward. One was Kleana’s application under the EAO process and the other was the First Nations request to amend the conservancy boundary before it was confirmed in legislation.

The Minister’s Decision

Unfortunately, on April 29, 2008, the government introduced Bill 38, *Protected Areas of British Columbia (Conservancies and Parks) Amendment Act*, 4th Sess., 38th Parl, BC, 2008 (assented to 29 May 2008) SBC 2008, c 26, which included the “Dzawadi/Upper Klinaklini River Conservancy” without the requested boundary amendment. Further, after lengthy discussions, meetings and correspondence (see below), the Minister of Environment, on April 27, 2010, wrote to Mr. Glendale and to Mr. Eunall advising them that he did not intend to recommend an amendment to the conservancy boundary:

> I must at this time advise that I do not intend to recommend to Cabinet or to government that legislative changes occur to amend the boundary of the Upper Klinaklini Conservancy in order to facilitate this Project. Similarly, I am not prepared to direct ministry staff to devote additional time and resources in pursuing a more detailed review of this proposal (para 122).

The petitioners sued.

Summary of Facts

Fully one hundred paragraphs (paras 9-123 of the case) recite the First Nation, Kleana's and the provincial government's interaction prior to the establishment of the conservancy, while Bill 38 was before the legislature and efforts to modify the boundary after the conservancy was established and until the Minister's April 27, 2010 decision letter. A full reading of the facts in this case is instructive. (see paras 54 to 57) The summary of facts in paragraph 124, list the facts found by the Court as particularly relevant, but for the purposes of this blog posting, I have further reduced the summary:

- In 2006, after the regional process leading to the Central and North Coast LRMP and subsequent government-to-government negotiations, the Dai?naxdai?xw agreed in principle to the area of the Upper Klinaklini River being protected as a conservancy.
- The Dai?naxdai?xw made the initial request to modify the boundaries of the proposed Upper Klinaklini Conservancy in July 2006 for the purpose of allowing the Project to be assessed in the EAO process. They proposed that any lands not required for the Project after final surveys were complete would be returned to the conservancy.
- In October 2006, Kleana submitted its application under the EAO review process.
- In January 2007, Ministry of Environment staff set out to assist the Dai?naxdai?xw to move the boundary amendment request forward.

  …….
- Under the June 2007 Collaborative Agreement, there was room to adjust conservancy boundaries, but the amendment proposed by the Dai?naxdai?xw was a material change to the 2006 land use planning Agreement in Principle.
- From October to December 2007, Ministry of Environment staff assisted the Dai?naxdai?xw to define and map the boundary amendment request. Using the 2004 Park Policy as a guide, the Ministry then treated the request as going forward from Kleana as the proponent, with the support of the Dai?naxdai?xw, rather than by the Dai?naxdai?xw themselves. Ministry staff supported the amendment as defined in the Kissinger Proposal, which contemplated removing an area from the conservancy while the EAO process was going forward and returning the land to the conservancy in the event the Project did not satisfy environmental requirements.
- In January 2008, the Ministry sought to consult with the Dai?naxdai?xw and the Ulkatcho First Nations as those who may be affected by the proposed boundary amendment. The Ministry consulted on the basis that it was not considering the merits of the proposed Project, as the potential environmental impacts would be determined through the EAO process, where further consultations would take place.

  ……
- Without any notice to the Dai?naxdai?xw or to Kleana, on April 29, 2008, the government introduced Bill 38, (Protected Areas of British Columbia (Conservancies and Parks) Amendment Act), which included the Upper Klinaklini Conservancy without the requested boundary amendment.
- The Minister gave little, if any, consideration to the Kissinger Proposal or even to the 2004 Park Policy and was not prepared to recommend any boundary changes that were not consistent with the conservancy areas that had been agreed to in 2006 though the LRMP process.

  ……

- The government was committed to a government-to-government consultation process with the Dai?naxdai?xw for managing conservancies and other protected areas, which included a process for considering boundary amendments. However, no definitive agreement was reached on a government-to-government process with respect to the Upper Klinaklini boundary amendment request and the Ministry insisted that the process follow the 2004 Park Policy.
- In January 2010 the Dai?naxdai?xw submitted a formal amendment request to Cabinet on the basis that the potential environmental impacts would be reviewed under the EAO process.
- The Dai?naxdai?xw were not informed about the 2010 Protected Area Policy and were given no opportunity to comment on its application to the boundary amendment request.
- The Minister's decision of April 27, 2010 refusing to recommend the boundary amendment appears to have been based only on the considerations set out in the 2010 Protected Area Policy and more particularly on potential negative environmental impacts of the project.

Legal Issues

The legal issues were broken out into essentially two categories:

A. The duty to consult and accommodate that had three elements:

1. whether the Crown owed a duty to consult with the First Nation and accommodate their interests,
2. the scope of that duty; and
3. whether the Crown had met that duty.

B. Administrative fairness including reasonable expectations, estoppel by representations of the Minister and abuse of discretion.

The second set of issues advanced by the petitioners was found unsustainable on the facts of the case but the first set of issues were decided in favour of the petitioners.

Duty to Consult and Accommodate

The Court held that the standard of review to be applied on whether there was a duty to consult was a matter of the "correctness" of the decision. The Court summarized the law in this area to require three elements: "(1) the Crown has knowledge, real or constructive, of the potential existence of an aboriginal claim or right; (2) the Crown contemplates a decision or conduct that engages the aboriginal claim or right; and (3) the contemplated Crown decision or conduct may adversely affect the aboriginal claim or right: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 40-50″ (para 125).

The petitioners had argued that "…the duty to consult arose when the Minister contemplated a decision on their request to amend the conservancy boundary, as this decision implicated their ability to use the land, water and resources in their asserted traditional territory to promote the economic and social well being of their people" (para 126).

The government had argued that the duty was not triggered because the decision to maintain the *status quo* did not affect the First Nation's claim of aboriginal title, the *purpose* of the duty to consult and accommodate was to avoid irreparable harm to First Nation rights and that the First Nation was "seeking to benefit from aboriginal title before proving it" (para 127).

The Court noted that this was not the usual case of the Crown or a business initiating a proposal or conduct but rather the First Nation had requested a specific change. The Court held that this case involved an ongoing consultation and that this duty did not end with the Minister's refusal.

The Court said:

> There is no dispute that the government has knowledge of the Daínaxdaíxw's claims or that the Minister's decision engages their claim to aboriginal title. The primary issue is whether the Crown's contemplated conduct might *adversely* affect the Daínaxdaíxw's claim to aboriginal title (para 133 - emphasis added).

As to the adverse impact, the government argued that the First Nation's aboriginal title claim would be unaffected and any impact of the decision was indeterminate because Cabinet may never have approved a variation and the Project might never receive environmental approval. The Court dismissed these uncertainty arguments saying:

> While the economic benefits the Daínaxdaíxw hoped to receive from the Project may or may not have been realized, I do not see the adverse impact as speculative. The effect of the Minister's decision is a certainty that the Project will not be realized. The Daínaxdaíxw have lost a unique opportunity, which is significant to them, especially considering the remote location of their traditional territories (para 136).

The government then said that the *purpose* of the doctrine was to preserve the *status quo* quoting from paragraph 33 of the *Haida* decision and by reference to the Alberta Court of Appeal decision in *Tsuu T'ina Nation v Alberta (Minister of Environment),* 2010 ABCA 137 ("*Tsuu T'ina Nation*") and as such the Minister's decision did protect the *status quo*. The Court disagreed with the government's argument saying:

> I accept that in some circumstances, decisions preserving lands or the status quo may not have an adverse impact on aboriginal claims. *Tsuu T'ina* is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development.
> …..
> Proposed conservation measures could have an adverse affect on claimed aboriginal rights and title, as they may limit future uses of land. …. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation (para 139).

With respect to the argument that the First Nation was, under the guise of consultation, attempting to gain the benefit of aboriginal title the Court disagreed with the government's characterization saying:

> They are not seeking to decide how the land in the Upper Klinaklini will be used. That decision remains with the Crown. The Daínaxdaíxw are simply seeking an

> accommodation that will allow the Crown to consider whether the Project is feasible, taking into account all of the environmental, social, economic and public interests (para 141).

For these reasons, the Court found that the Minister had a duty to consult and accommodate the First Nation with respect to the decision embodied in the April 27, 2010 letter.

Scope of the Duty to Consult

The standard of review regarding the scope and adequacy of Crown consultation was derived from the Court's interpretation of *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 and the *Haida* case. Justice Fisher split the question as to the relevant standard of review in the following fashion:

> In my view, this is a situation where the Crown misconceived the impact of the Minister's decision and, as I outline below, also misconceived the seriousness of the Daínaxdaíxw's claim. No deference should be given to the government's decision to determine the issue under the 2010 Protected Area Policy. In these circumstances, the scope and adequacy of the consultation should be reviewed on a standard of correctness. However, the Minister's decision to refuse to recommend the amendment, being based on public policy considerations, should be reviewed on a standard of reasonableness (para 147).

Haida Analysis

The Court engaged in a *Haida* spectrum analysis wherein the scope of consultation "…is proportionate to a preliminary assessment of the strength of the claim and to the seriousness of the potentially adverse effect on the right or title claimed" (para 148). The government argued that the scope of the duty to consult fell at the lower end of the spectrum as the First Nation's claim to aboriginal title was weak, the adverse effect was speculative and compensable in any event. The First Nation disagreed with the government's characterization of its claim.

The Court properly noted that a *Haida* type judicial review application did not involve a final determination but rather a "preliminary assessment of the strength of the claim". The First Nation's claim to aboriginal title rested primarily on archeological evidence, at least as to the lower areas of the Klinaklini River adjacent to the conservancy where the Project's power station was to be located. There was ethnographic evidence as to traditional use of the Upper Klinaklini region and evidence of present use from Mr. Glendale's affidavit.

The Court noted the test for aboriginal title from *Delgamuukw v British Columbia*, (1997) 3 SCR 1010 as interpreted in *R v Marshall*; *R v Bernard*, 2005 SCC 43 involved proving exclusive pre-sovereignty occupation of the land by their ancestors. The difficulties in this exercise were acknowledged by the Court especially for nomadic or semi-nomadic tribes.

The government argued that "a preliminary assessment of this evidence shows that the Daínaxdaíxw do not have a strong *prima facie* claim of aboriginal title to the lands in the Upper Klinaklini Conservancy, as there is no evidence of pre-sovereignty exclusive occupation and the ethnographic records indicate that the Daínaxdaíxw rarely ventured upstream into that area. It says that if the Daínaxdaíxw have a claim, it is a claim for aboriginal rights, which will only benefit from the protection of the land within the conservancy." (para 161) The First Nation

argued that for the purposes of this application they had "a credible *prima facie* claim for title based on their clear presence in the area immediately south of the conservancy and the ethnographic and oral history evidence that shows some use of the area within it" (para 162).

The Court ruled that:

> The Daínaxdaíxw may have difficulty proving aboriginal title to the Upper Klinaklini River in accordance with the tests established in *Delgamuukw* and *Marshall* and *Bernard* but I cannot conclude on a preliminary assessment that their claim is at all bound to fail. I do not consider it a strong claim but I am satisfied that it is a reasonably credible one, as they claim that this area was of central significance to their culture (para 177).

As to the adverse effect of the decision, the government advanced the earlier uncertainty and the suggestion that the harm to the First Nation's aboriginal title is not irreversible or irreparable, given its economic nature i.e. if the First Nation proved aboriginal title any losses could be compensable in damages. With respect to irreparable harm the Court noted that this concept underlies injunctive relief and "…form a backdrop to the overall purpose of the duty to consult, as noted in *Rio Tinto* (at para 41). While they may be relevant, it is not necessary, in my view, to find irreversible or irreparable harm to conclude that a potentially adverse impact is serious" (para 180).

The Court dispensed with the government arguments as to uncertainty noting "the effect of the decision definitively puts an end to the Project and this future use of the land is now foreclosed" (para 181). The Court went on to say "(t)he decision has also established a process of consultation about boundary amendments within the confines of the Ministry's own policy, and this may foreclose future consideration in the government-to-government process that has been the subject of on-going negotiations. In this context, I consider the potentially adverse impact to the Daínaxdaíxw to be quite serious" (para 181).

The Court held that "… the scope of consultation required a meaningful exchange of information with a view to considering a reasonable accommodation, within the mid-range of the spectrum (para 182).

Did the Crown fulfill its duty?

The Court noted that both the government and the First Nation relied on the extensive interaction between them but for different purposes. The First Nation argued that the earlier interaction cannot be considered as consultation as the duty consult is an ongoing obligation and agreements negotiated subsequently both recognized this and contemplated further negotiations and consultations for their specific interests. The government argued that the extensive course of negotiations did satisfy the duty and argued, relying on paragraph 40 from *R v Lefthand*, 2007 ABCA 206, that First Nation had an "…artificially compartmentalized approach to the facts" and that the decision was the result of an administrative decision implementing the earlier consultations and agreements (para 185). The Court rejected that argument, noting:

That is quite a different context than this case. I do not characterize the Minister's decision of April 27, 2010 as an administrative decision made to implement a strategy earlier established after consultation. It was a decision that was consistent with the earlier consultations, but it was made after the Daínaxdaíxw brought concerns about the boundary to the government's attention not long after the implementation phase of the LRMP process began in 2006 (para 186).

The Court said the "…LRMP process involved consultations on a regional scale" and while the First Nation agreed to those designation they did so firstly on a without prejudice basis to their treaty negotiations and on assurances that their particular concerns and issues would be addressed later. The First Nation and the Province had entered into a number of agreements, the Land Use Agreement in Principal (March 2006) and the Collaboration Agreement (June 2007) with the province. Further,

> When the Daínaxdaíxw decided that the Project was compatible with their interests within the conservancy, they reasonably concluded that their request to amend the boundary would be dealt with in the collaborative manner as contemplated by these agreements, and before the conservancy was established in legislation (para 187).

The result was different. The Ministry staff while helpful in advancing the First Nation interest was powerless to effect any change as the Minister did not consider their work. Instead the Minister "was not prepared to recommend any boundary changes that were not consistent with the protected areas that had been agreed to in 2006 though the LRMP process" (para 188). The Court noted that " …prior to Bill 38, the specific concerns of the Daínaxdaíxw regarding the boundary were not considered at all. Consultation that excludes the possibility of any form of accommodation is meaningless: see *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54″(para 188).

After the passage of Bill 38, the Court went on to find that the Minister's insistence that this boundary adjustment be dealt with under the 2004 Park Policy was inconsistent with the intent and purpose of the Collaboration Agreement. The Court noted "… (w)hile the agreement was not intended to be legally binding, it was intended to "establish a working relationship and to improve communications between the Parties" (para 191). The government's insistence on relying on the existing government policy regarding boundary variations breached these commitments. Further, after the First Nation made a formal request on January 18, 2010 to vary the boundary to accommodate the Project, the Ministry changed the relevant policy on boundary adjustments without notice to or input from the First Nation. While the Minister was entitled to consider the "public interest" under government policy the duty to consult with the First Nation "… required something more than the opportunity for the Daínaxdaíxw to make an application within the scope of that policy. It required an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Daínaxdaíxw's interests in allowing the Project to be assessed in the EAO process" (para 197).

The Crown did not discharge its duty.

Remedy

As noted above, the petitioners had failed to demonstrate their entitlement to conventional administrative remedies. The First Nation had demonstrated a breach of the "duty to consult and accommodate" by the Crown which the Court noted was owed only to an affected First Nation "…as it is not proper for a corporate entity with First Nation directors (or shareholders) to be the recipient of this constitutional duty" (para 228).`

The First Nation sought an Order in the nature of *mandamus* to compel the Minister to recommend to the Cabinet that the boundary variation be approved or alternately to have the Minister engage in the government-to-government negotiation while the Crown proposed an

Order directing the Minister "to reconsider his decision after carrying out the appropriate level of consultation" (para 230-231). The Court held that:

> The court may quash a decision where it has been made without adequate consultation or accommodation: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 at para 78. It is rare, however, for the court to become involved in directing a particular form of accommodation. In Musqueam Indian Band it was held that the Crown and First Nation should be left to engage in "the broadest consideration of appropriate arrangements". See also *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1620 at para 23. (233) The consequence of the Minister's breach of the duty to consult is that no accommodation of the Daínaxdaíxw's interests was considered. The circumstances here are quite different from those in *West Moberly First Nations*, where the court found that accommodation which was put in place was not reasonable (para 232).

The Court was referring to the Trial decision in the *West Moberly* case which had directed a particular accommodation and that aspect of the decision was overturned by the Court of Appeal, in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247. See the commentary on that case here.

In the result, the Court was prepared grant an Order quashing the Minister's decision, and declaring that the Minister had a legal obligation to consult and accommodate. The Court also outlined the nature of the duty to consult in the following terms:

> As I have determined, the scope of consultation in this case requires the Minister to consider the Daínaxdaíxw's request in the context of the terms of the June 2007 Collaborative Agreement and the on-going negotiations about a government-to-government process for managing the conservancy and considering boundary amendments, and to provide them with an opportunity to respond to his concerns about the potential negative environmental impacts of the Project. While the Minister is entitled to consider the public interest as described in the government's policy, this requires something more than the opportunity to make an application within the scope of that policy. It requires an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Daínaxdaíxw's interests in allowing the Project to be assessed in the EAO process (para 235).

In doing so, the Court appears not only to have directed further consultation but also for the Minister to comply with the spirit and intention of the various agreements.

Some additional thoughts

As described above, this case highlights the growing difference between the courts in Alberta and British Columbia regarding the duties of the Crown to consult and accommodate First Nations. If, for nothing else, the detailed scrutiny deployed by the B.C. Courts to the particulars of the consultation between the Crown and First Nations. Secondly, I would suggest the distinction drawn between *Tsuu T'ina Nation* (which was not binding on the B.C. Court) and this case is weak given that both cases deal with, to paraphrase Justice Fisher's words:

> Proposed conservation measures (that) could have an adverse affect on claimed aboriginal rights and title, as they may limit future uses of land (para 139).

More generally, this case demonstrates that a strong case for occupation of traditional lands with geographically adjacent to lands with *some* evidence of occupation will qualify all of the lands, at least for the preliminary assessment of *Haida* claims. Further, while courts may continue to be reluctant to Order a particular form of accommodation, they are willing to give "guidance" as to the requirements for adequate consultation.