

Little Salmon and the juridical nature of the duty to consult and accommodate

By Nigel Bankes

Cases Considered:

[*Beckman v Little/Salmon Carmacks First Nation*, 2010 SCC 53](#)

This is the first decision of the Supreme Court of Canada to deal head on with the relationship between the terms of a constitutionally protected land claims agreement (LCA) and the duty to consult and accommodate. The Court holds that the terms of an LCA do not exhaust the Crown's duty to consult, or, to put it another way, an LCA is not a complete code but is embedded in the general legal system embracing both constitutional law norms and administrative law norms. This means that the Crown may have consultation obligations that are additive to those found in the text of an LCA. However, the majority articulates a narrow view of the content of the duty to consult and thus it was easy for the Court to find that the Crown -- here the Government of Yukon (YTG) -- had satisfied its obligations. In my view the content of the duty to consult articulated by the Court in this case is no greater than that which would be provided by the application of standard principles of administrative law. This impoverished view of the duty to consult is hardly likely to contribute to the constitutional goal of inter-societal reconciliation.

There are two judgements in this case. The majority judgement is authored by Justice Ian Binnie who has written many of the leading judgements of the Supreme Court of Canada in this area during his time on the bench. His other contributions include: *Quebec (Attorney General) v. Moses*, 2010 SCC 17 (which dealt tangentially with the duty to consult and land claims agreements, see my blog [Maintaining space for autonomy? Environmental assessments in the context of aboriginal land claims agreements](#)), *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 and *Marshall No. 1*, [1999] 3 SCR 456. The second judgement, authored by Deschamps (LeBel J concurring), is labeled as a concurring rather than a dissenting decision and clearly this is correct insofar as both judgements conclude that the YTG was not in breach of a duty to consult. But agreement on the result should not disguise the wide gulf between these two judgements. The majority finds that there is no breach because the YTG had discharged its duty to consult; the minority finds that there is no breach because there is no duty.

I will deal with two issues in this comment, both in the context of the majority judgement only. First, what do we learn from this case about the juridical nature of the duty to consult and accommodate? And second, what do we learn about the juridical significance of the background rules of the common law?

The facts

The facts were pretty simple. Paulsen, a non-aboriginal Yukoner, submitted an application in 2001 for a grant of Crown lands (65 hectares) for agricultural purposes in accordance with the territorial government's agricultural lands policy which had been developed in 1991. The application covered lands that fell within the traditional territory of the Little Salmon/Carmacks First Nation and a member of the First Nation, Johnny Sam, had a trapline in the area. The application was considered by a review committee, the Agriculture Land Application Review Committee (ALARC) which proposed changes to the configuration of the parcel of land. With those changes made the application was considered by the next committee, the Land Application Review Committee (LARC) on which there was a First Nation representative. That person did not attend the LARC meeting at which Paulsen's application was considered but LARC did have in front of it, and did consider, a letter of opposition from the Little Salmon First Nation. The letter noted concerns about agricultural and timber harvesting in the area and the cumulative effect of these activities on the trapline.

LARC decided to recommend approval and the application was finally approved in October 2004. Yukon Government officials took the view that they had no duty to consult the First Nation under the terms of the Little Salmon LCA which had come into effect some years earlier and that any meetings and discussion that occurred through LARC (not part of the institutional framework of the LCA) was a courtesy rather than the fulfillment of a duty. It is perhaps important to note that while the LCA had come into force, not all parts of the LCA had been implemented in a timely way; this included the obligation of the parties to develop an environmental assessment procedure. The LCA did define the term "consult" (quoted at para. 74) and did specify the many decisions to be made by government which were to trigger the duty, but the LCA did not include in that list a decision to be made on an application for a grant of agricultural land (at para. 75).

The First Nation commenced an administrative appeal and when that failed sought judicial review on the basis that the YTG was in breach of its constitutional duty to consult. The First Nation succeeded at trial but failed for the reasons summarized above in both the Court of Appeal and before the Supreme Court of Canada.

What does Little Salmon tell us about the juridical nature of the duty to consult and accommodate?

In order to apply the duty to consult and accommodate in a coherent way in this case and in the future, governments, First Nations and developers (who may be called upon to help implement the Crown's duty: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para.53) need to have answers to some fundamental questions. These include: the source and legal status of the duty; the trigger for the duty; the content of the duty; and the consequences of failing to comply with the duty. Earlier cases including *Haida Nation* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 have helped clarify the answers to some of these questions but it is important to address them in different contexts, such as the LCA context in this case.

The source and legal status of the duty

Little Salmon locates the duty to consult and accommodate within the framework of the honour of the Crown. The honour of the Crown is a constitutional principle (at para. 42) but not every

policy and procedure designed to implement the honour of the Crown is entitled to constitutional status and protection (at para. 44). The duty to consult is a “supporting doctrine” of the honour of the Crown (at para. 46) and a “valuable adjunct” (at para. 44) but it has no independent status. While the duty has constitutional pretensions, there is no need to create a special constitutional remedy and the duty can be implemented through administrative law (at para. 47).

The content of the duty

The duty has a variable content (*Haida Nation, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 36) depending upon the nature of the interests at stake. In this case the content of the duty fell at the low end of the spectrum. I think that a key issue in this case and others is the question of whether the duty to consult at the low end of the spectrum has any greater content than the duty of procedural fairness in administrative law. A related question is whether there is any substantive content to the duty to consult (as opposed to the duty to accommodate) at the low end of the spectrum.

If one thinks about this case in conventional administrative law terms one might come up with something like this. The First Nation and the individual trapper have property or property-like interests that may be adversely affected by a statutory decision-maker. For the First Nation that interest was an interest in the continued access to these lands for harvesting activities (see para. 56 and s.16.4.2. of the LCA) by its citizens; for Johnny Sam, that interest would be his additional rights in relation to his trapline. The consequences for the First Nation are serious; the First Nation loses its right of access to lands that are granted to the third party. Such a grant works a defeasance (at para. 56) of the indigenous interest; we might also say that it extinguishes the aboriginal harvesting right. It is true that, for the time being, there remain other lands on which these activities can occur, but we don't normally say to other property owners who own large blocks of land, “don't worry, we're just taking a bit of your land or part of your hunting right”. Statutory powers that re-distribute property rights from A to B are actually very rare beyond public utility-type takings. So, in administrative law, one would expect the content of the procedural duty of fairness to be quite thick. It would certainly include the right to know that the decision was being considered and the right to make submissions. But the procedural duty of fairness does not ordinarily entitle the affected party to reasons and it does not entitle the affected party to anything other than a consideration of its interests in the decision making. Procedural fairness never entitles the affected party to a particular outcome. If the affected party doesn't like the outcome, the affected party must come up with some substantive grounds for review, such as: (1) the standard of review for that particular decision was correctness and the decision maker made an error of law, or (2) the standard of review is unreasonableness and the decision was unreasonable, i.e. it was not within the range of reasonable decisions or expected outcomes. Finally, it is important to note that the usual remedy in administrative law is that the decision is void and the matter is referred back to the original decision-maker.

So what happens when we turn to the duty to consult in this case and ask questions about both procedure and substantive outcomes? The majority seems to suggest that the duty to consult has some incremental content over and above that which might be available under general administrative law but I really wonder if this is so. Here are the relevant passages beginning with a passage at para. 73:

The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to

the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy. (Emphasis added)

But what was the added content demanded by the honour of the Crown? Is this a mere rhetorical flourish or does it actually mean something? It is surprisingly hard to find the answer to this question in the case but I think we can find hints of an answer at several places. First, under the heading of “standard of review” (at para. 48) the majority has this to say:

[I]f there was adequate consultation [a question that would be subject to review on correctness grounds], did the Director’s decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

Second, under the heading of accommodation, the majority says (at para.81):

Adequate consultation having occurred, the task of the Court is to review the exercise of the Director’s discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes.

In that same paragraph the Court also tells us what the honour of the Crown did not require in this case. “The test is not ... a duty to accommodate to the point of undue hardship for the non-Aboriginal population.” I note that while the Court is discussing accommodation under the heading of “accommodation” which elsewhere is associated with the duty to consult at the other end of the spectrum I think that it is at least arguable that the Court is here asking whether there is any substantive (read accommodation) content to the duty *in relation to a decision like this which is at the lower end of the spectrum*.

Along the same lines as the “standard of review” extract quoted above, the majority judgement ends with this paragraph (para. 88):

Whether or not a court would have reached a different conclusion on the facts is not relevant. The decision to approve or not to approve the grant was given by the Legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was not unreasonable. (Emphasis added)

The legal effect of breaching the duty to consult

As indicated above the normal remedy in administrative law for breach of the duty of procedural fairness is that the resulting decision is void and can be set aside by way of *certiorari* or its equivalent. But what about the effect of breaching the duty to consult? The majority does not

deal with this issue at all but the matter was the subject of comment in *Carrier Sekani* (see my [blog](#) on this case) where the Court said (at para. 37):

The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

It is apparent that with the exception of damages (which would only be available in case of misfeasance in public office) the remedies here are very similar to the remedies available in administrative law. *Certiorari* and prohibition together serve injunctive functions and an order to carry out consultation before proceedings is the functional equivalent of quashing a decision and sending it back to the original decision maker. However, it is hard to read a decision like *Carrier Sekani* or a decision like *Haida Nation* and not think that the Court is reserving more discretion to itself at the remedies stage than is typically the case in administrative law proceedings.

So what happens when we put all of this together and do this comparison between the content for the duty to consult at the lower end of the spectrum and the content that we might obtain from administrative law taking into account both procedural duties of fairness and substantive grounds of review? I do not believe that the duty to consult has any greater content. In my view this conclusion is not consistent with the honour of the Crown or the goal of inter-societal reconciliation.

But perhaps I should be a bit more constructive in addition to being critical. What should the minimum content look like in relation to this type of decision? And I think that that is an important way to put the point; the minimum content of the duty will vary depending upon the type of decision. I have two suggestions: the first is general, the second more contextualized. The general suggestion is that we return to the idea of “demonstrable integration” articulated by Justice Huddart in *Halfway River First Nation v British Columbia (Minister of Forests)*, 1999 BCCA 470 at para. 160. To me demonstrable integration involves the idea that the Crown consults; it acquires information about potential impacts and the alternatives that may be available in terms of project configuration and decisions to be made; and then, in light of that, the onus is on the Crown to show how it integrated what it learned in the final decision. Implicit in this is the idea of minimizing impacts, if not avoiding impacts altogether. Implicit also is the need for written reasons justifying the decision. These could both be made explicit. Demonstrable integration then has significant substantive content which goes beyond the normal content of the procedural duty of fairness.

The more contextual point is that the greatest risk in relation to decisions such as the one in question here is the risk of cumulative impacts and fragmentation of habitat. Consequently, the Crown should have to demonstrate as part of making these decisions that there is a framework in place for considering cumulative impacts. Such a framework should include thresholds and relevant ecological indicators, and, at a certain point, if there is no such framework, one has to question whether the Crown is able to continue to make disposition decisions, or, to put it another way, such decisions start to fall outside of the range of what is reasonable, precisely because they lack a rational basis (or the Crown is unable to demonstrate that they have a rational basis).

The relevance and juridical significance of the background rules of the common law

One of the leitmotifs of the majority decision is the numerous references to the relevance of the general law of the land. Here are some examples:

... as Lamer C.J. observed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, aboriginal rights exist within the general legal system of Canada. (para. 45)

The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new constitutional remedy. Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. (para. 47)

The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. (para. 62)

It [the duty to consult] is simply part of the essential legal framework within which the treaty is to be interpreted and performed. (para. 69) (Emphasis in all of above quotations added)

A similar approach is evident in the way in which the Court characterizes the LCA. While the majority does emphasise that an LCA is a treaty, there is no suggestion that this is “an agreement whose nature is sacred” (*R. v. Badger*, [1996] 1 SCR 771 at para. 41). Similarly, while this is no ordinary commercial agreement (at para. 10) there was a fair balance between the parties because the First Nation did have access to funds for the negotiations and access to appropriate advice: see paras. 75, 67, 58 (an LCA is a “lawyerly document”), 52, 54, and 9.

In all of this the Court does not refer to the fact that it is the Crown (and government policy) and the background rules of the common law that effectively unilaterally establishes the parameters of modern land claim negotiations. Instead the Court notes that *somebody* has to decide when “enough is enough”, and it is no coincidence that in this case that “somebody” is the responsible official in the Yukon Government (at para. 84). But that conclusion was hardly inevitable unless one is of the view that the only background rules that count are the rules of the settler society (which is not what the Court has said in other cases such as *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010).

What then is the significance of this theme? What work is the Court making it do? What is the Court not doing? Here are three points – not all of which head in the same direction. First, to the extent that the general law includes constitutional norms it is evident that the Court is using this theme in a progressive way (almost as a form of *jus cogens* or non derogable norms: see *Vienna Convention on the Law of Treaties*, Articles 31(3)(c), 53 and 64) to discipline the negotiations and the resulting agreement and to suggest (not always consistently, see para. 71) that the parties cannot readily contract out of constitutional obligations (and see 2.2.4 of the LCA). Second, and less progressively, the Court is declining the opportunity to build a body of (unique) inter-societal law informed by both indigenous law and traditions and the common law. It is turning its back on the idea of *sui generis*. Any gap in an LCA is effectively filled by settler law, not by inter-societal law. Third, by rendering the duty to consult in terms that reflect “normal”

constitutional law, it is allowing settler laws and norms to return to a dominant position. While the Court boasts (at para 33) that the entrenchment of aboriginal and treaty rights in 1982 represented a “a commitment by Canada’s political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal” there is little in this judgement to suggest that the Supreme Court is interested in articulating in an imaginative way what that space might look like. Instead, just as the Court in *R v Marshall and R. v Bernard*, [2005] 2 SCR 220 sought to corral aboriginal rights and title by “translating” these concepts into the boxes of settler real property law, so too does the Supreme Court in this case try and box the duty to consult into the familiar terms of the duty of procedural fairness. The result is an impoverished view of the content of the duty to consult.

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