



BC Public Affairs Update: Supreme Court Decision on First Nations' Rights

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Governments Have a Duty to Consult First Nations

The Supreme Court of Canada ruled today that governments must in "good faith," consult and accommodate First Nation cultural and economic interests when Crown lands are being developed that are subject to land claims, even if the land claims have yet to be proven.

**...the duty to
consult will not
mean a veto.**

Chief Justice Beverly McLachlin wrote in the 7-0 decision in *Haida Nation v. BC and Weyerhaeuser* that B.C. must engage in meaningful

negotiations before simply renewing a logging licence on land that is claimed by the Haida Nation.

The court said Provinces "cannot cavalierly run roughshod over Aboriginal interests where such claims affecting those interests are being seriously pursued in the process of treaty negotiation and proof."

However, the decision does not mean the government must obtain the consent of affected Indian bands, nor does it mean there is a duty to agree. There is no veto power of First Nations over development on disputed lands.

Chief Justice McLachlin said aboriginal claimants, must not "frustrate the Crown's reasonable good faith attempts" at consultation.

"Nor should they take unreasonable positions to thwart governments from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached."

The other important issue decided in *Haida* was that only governments have the duty to consult and accommodate although private sector clients inevitably incur costs during the consultative process.

Implications:

There are significant implications for all sectors of the economy but especially resource development, including oil

and gas, forestry, mining and land development. It could mean additional costs for business as every development on Crown land will require a consultative process.

The court expanded on its earlier decision in *Delgamuukw* where they found a duty to consult but unfortunately gave no direction on what that meant. In *Haida*, the court said the amount of government consultation depends on the strength of the land claim and the degree of potential resource infringement by the Crown.

Further clarification was provided today in the related but separate *Taku River Tlingit First Nation v. Ringstad* case where the court ruled 7-0 that there had been adequate consultation with the Tlingit through the environmental approval process. That indicates that consultative processes, such as environmental assessments under provincial or federal legislation, should satisfy the requirement.

Background:

The ruling of the Supreme Court stems from a claim by the Haida First Nation in northwestern B.C., who argued that resource development should not proceed until the cultural and economic interests of First Nations have been accommodated.

Specifically, the Haida challenged the issuing of a tree farm license by the Province of B.C. to Weyerhaeuser to log and manage forest land on a section of the Queen Charlotte Islands which is under claim by the Haida.

The Haida are of the view the Province of B.C. and Weyerhaeuser had an obligation to consult and accommodate the economic and cultural interests of the Haida First Nation. The Province and other interveners argued that until Haida prove title, the Crown owns no special obligations to consult First Nations beyond general obligations it owns to all affected parties.

The Tlingit First Nation case asserted that the Province of B.C. has obligations to consult and accommodate First Nation interests on areas where aboriginal title to land has been asserted but not yet proven. B.C. had granted a Project Approval Certificate to Redfern Resources for construction of the Tulsequah Chief Mine and road.

The Province of British Columbia and other interveners were of the view that rights and title must be proved before Tlingit's concerns must be addressed.

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