THE LAWYER'S DAILY

The Lawyer's Daily | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.thelawyersdaily.ca
Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Low End of Consultation Spectrum

Federal Court decision in Squamish fishing case overturned

By **Anita Boscariol**

Anita Boscariol

(September 26, 2019, 2:42 PM EDT) -- In *Squamish Nation v. Canada (Fisheries and Oceans)* 2019 FCA 216, the Federal Court of Appeal considered the Federal Court's judicial review of the decision of the Regional Director General (RDG) on behalf of the minister of Fisheries and Oceans Canada (DFO). The Federal Court determined that the RDG's decision denying the Squamish Nation's request for an increase in its allocation of Fraser sockeye for food, social and ceremonial (FSC) purposes did not trigger the duty to consult. Furthermore, had the duty to consult been triggered, such a duty would have been at the low end of the spectrum and thus was met through the engagement of the Squamish prior to the decision being rendered.

The Federal Court of Appeal set aside the Federal Court's decision and determined that the Federal Court's decision, that the duty to consult was not triggered, was neither correct nor reasonable.

Background

Section 4 of the *Department of Fisheries and Oceans Act* RSC 1985, c F-15, sets out the power of the minister of Fisheries and Oceans to manage the fishery. It is under this broad power that the minister sets catch allocations for First Nations for FSC purposes. Under this broad authority, the DFO has also adopted regulations, policies and frameworks (the Aboriginal Fisheries (AFS) Strategy and the 2006 First Nations Access to Fish for Food, Social and Ceremonial Purposes), which guide the process for arriving at allocations of fish for FSC purposes. Through its AFS strategy, DFO provides fishing opportunities through comprehensive fishing agreements with, and communal licences to, Indigenous groups to carry out their FSC fisheries.

Following the Supreme Court of Canada decision in *R. v. Sparrow* [1990] 1 S.C.R. 1075, it is well settled law that the asserted right of Indigenous groups to fish for FSC purposes is understood to be an Aboriginal right that takes priority over other uses of the resource, after conservation. This assertion was not disputed by DFO.

In 2012, Squamish Nation, a recognized Indigenous group, requested an increase in their allocation of Fraser River sockeye from 20,000 to 70,000 pieces. Following some meetings and in a letter dated May 8, 2014, the RDG confirmed an increase to their allocation of sockeye by 10,000 pieces, and (although the Squamish Nation did not request it) their chum, pink, chinook and coho salmon allocations were also increased. The Squamish Nation sought judicial review of this decision by the Federal Court.

The Federal Court dismissed the application, stating that there was insufficient evidence of an adverse impact on Squamish Nation's rights, and thus the duty to consult was not triggered. The Federal Court then stated that even if this duty was triggered, it was met because it was at the "low end of the spectrum" and Canada was required only to give notice, disclose relevant information and discuss any issues raised in response, which the Federal Court felt took place within the facts of this case.

Squamish Nation appealed the decision of the Federal Court.

Findings of Federal Court of Appeal

The Federal Court of Appeal first considered the applicable standard of review in this case. The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 confirmed that the existence or extent of the duty to consult is a legal question reviewed on the standard of correctness. However, the assessment of the facts required in order to determine whether the duty to consult arises is to be reviewed on the standard of reasonableness.

The Federal Court of Appeal determined that the Federal Court's decision, that the duty to consult was not triggered in this case, was neither reasonable nor correct.

The Federal Court erred at law, because the threshold in determining whether the duty to consult is triggered is low (as per the SCC decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage* [2005] 3 S.C.R. 388. The Federal Court of Appeal found that in order to meet the threshold, the Squamish Nation was required to demonstrate an appreciable, apprehended, evidence-based, potential or possible impact on their right, which the court found they did.

The Squamish Nation had stated in their letter of Jan. 27, 2012, to DFO that their allocation of sockeye had not increased since the 1990s, while their population had increased substantially.

Because of this, their members receive about five FSC fish per person annually, which is insufficient to their needs. The Federal Court of Appeal found that this information was enough to put the DFO on notice of an adverse impact on Squamish Nation's right to fish for FSC purposes. Therefore, the information was enough to trigger the duty to consult.

The Federal Court additionally erred in finding that if triggered, the duty to consult was at the low end of the consultation spectrum and was therefore met in this case. The Federal Court of Appeal found that, regardless of where a factual situation falls along the consultation spectrum, the Crown must make a meaningful effort to act in a manner consistent with the honour of the Crown.

The Court of Appeal noted at para. 63: "… the duty of consultation required, at the least, an interactive process which included a meaningful two-way dialogue in which the DFO did more than passively request and receive information from Squamish.

Meaningful two-way dialogue required the Department to provide responses that were responsive, considered and meaningful in response to the concerns Squamish expressed and the information it provided."

The Federal Court of Appeal found that the DFO failed to meaningfully discuss the merits or frailties of the Squamish Nation's request, or alternative means of meeting the needs of the Squamish people. There was also no evidence of any discussion about how an unsolicited increase in allocations of other salmon species would accommodate the Squamish Nation and no rationale was provided for the unsolicited increase. The RDG gave generic reasons only and failed to demonstrate that the Squamish Nation's stated concerns were considered when coming to a decision on their request for an increase in their allocation.

The Federal Court of Appeal concluded that the RDG's failure to meaningfully consult and arriving at a decision without doing so, rendered the decision made by the RDG unreasonable. The Federal Court erred in concluding otherwise.

The Federal Court of Appeal allowed the appeal and set aside the judgment of the Federal Court.

This is the first part of a two-part series. Part two: Why decision in Squamish fishing case was overturned

Anita Boscariol is associate counsel at Watson Goepel LLP *in Vancouver. With over 10 years' experience as director general, treaties and Aboriginal government negotiations west, for the former federal Department of Indigenous & Northern Affairs, she continues to focus her practice on Indigenous law.*

Photo credit / Tasiania ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily*, contact Analysis Editor Peter Carter at* peter.carter@lexisnexis.ca *or call 647-776-6740.*
