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**Low End of Consultation Spectrum**

# Why decision in Squamish fishing case was overturned

By **Anita Boscariol**

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(October 4, 2019, 2:12 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 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.

**Analysis**

In this case, the proposed government action would not prevent the ongoing exercise of asserted, constitutionally protected, Aboriginal rights. Squamish Nation asserted, as a recognized Indigenous group, the undisputed right to fish for family, social or ceremonial (FSC) purposes. The claimed right did not include a claim to a particular quantity of sockeye salmon (para. 71 of the Federal Court decision).

The Federal Court found that the right asserted by Squamish Nation was to fish the Fraser River for sockeye salmon for FSC purposes, something Squamish Nation has been doing under the AFS since the early 1990s and continued to do. This understanding of the scope and content of the right as asserted led the Federal Court to conclude that the duty to consult was not triggered, and if it had been triggered, would have been at the low end of the consultation spectrum.

The Federal Court of Appeal took a different approach, from a different perspective. The court acknowledged that in this case Squamish Nation was not *prevented* from exercising its right to fish for FSC purposes. But the Nation asserted that it was *impeded* from exercising its right to the level of fishing required to meet Squamish Nation needs. The Court of Appeal concluded that Crown actions that negatively impact Indigenous groups' constitutionally protected rights trigger the Crown's duty to consult.

The Federal Court of Appeal further rearticulated the importance of meaningful consultation when the duty to consult is triggered in these circumstances. As set out in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511*,* the depth or richness of the required consultation increases with the strength of the prima facie Indigenous claim and the seriousness of the potential adverse effect upon the claimed right or title (*Haida Nation* para. 39).

When a claim is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, para. 43).

When a strong prima facie case for the claim is established, the right and potential infringement is of

high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty to consult lies at the high end of the spectrum.

While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, para. 44).

The Federal Court of Appeal, though not the first time a court has done so (see *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*. [2017] 1 S.C.R. 1099), stated that a detailed strength of claim analysis conducted by the Crown is not a necessary prerequisite to discharging its duty to consult.

The Federal Court of Appeal considered the spectrum approach to consultation, but states (at para. 60): "Without pigeonholing this case to be at some precise point on the spectrum, I will consider what on the record before the Court the Crown was required to do in order to make a meaningful effort to act in a manner consistent with the honour of the Crown."

The Court of Appeal confirmed the view that, regardless of where along the spectrum the duty to consult fell, the Crown ought to have ensured meaningful consultation took place. The Crown ought to have listened to the concerns expressed by Squamish Nation and responded appropriately to the concerns. In addition, the court determined that the Crown, through their representative, in this case ought to have provided written reasons for their decision, reflective of and responsive to the issues raised by Squamish Nation.

The Federal Court of Appeal moved away from adherence to tying the duty to consult to a particular location along the consultation spectrum. The emphasis according to the court for the Crown in determining consultation requirements should be on the facts of any given case, in order to act consistently with the honour of the Crown.

**Additional remarks on duty to consult**

In *obiter*, the Court of Appeal made three observations for consideration:

- The DFO, on behalf of the Crown, manages fisheries resources for, *inter alia*, groups who assert a constitutionally protected right to access the resource, a fact which ought to be front of mind when carrying out the duty to consult;
- Because the AFS and departmental policy recognize the priority of Indigenous fishers who assert constitutionally protected rights, it may well be unnecessary and unhelpful to require the DFO to conduct a strength of claim analysis;
- Squamish Nation's request for an increase in its allocation of Fraser sockeye is complicated by claims of other First Nations who also assert a historic right to fish Fraser sockeye for FSC purposes. Of necessity, the DFO is required to balance a number of conflicting rights-based claims. To do so equitably, the DFO requires accurate information concerning a group's current and requested allocations and how this compares to catch data, any conservation concerns for the stock and any potential by-catch and how this impacts on other fishers of the same species. The court confirmed that Squamish Nation ought to respond to all information requests from the DFO in order to do their part to participate actively in the consultation process.

The obiter directed at the Squamish Nation appears to emphasize the fact that the right to being consulted will not necessarily result in success in the amount of fish claimed, as the court references the many balancing factors at play.

**Conclusion**

The Federal Court of Appeal has added to the body of law dealing with the Crown's duty to consult in

two significant ways:

1. In confirming that the threshold for triggering the duty to consult is low, the Court of Appeal confirmed it is triggered by a claim that the exercise of an undisputed right has been impeded, though not prevented.

2. When determining what is required in order for the duty to consult to be considered adequately met, in cases where the Crown does not dispute the existence of the claimed Aboriginal right, the consultation must encompass a two-way, meaningful dialogue, regardless of where on the consultation spectrum the duty to consult lies. The response to the Indigenous group claiming the right must speak to the concerns expressed and the information provided.

This is part two of a series: Part one: Federal court decision in Squamish fishing case overturned

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