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Comment

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The Duty to Consult—the *Groundhog Day* Conundrum

Case Comment on *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877

By Bruce McIvor

If government had its way, the duty to consult would suffer the plight of Bill Murray in *Groundhog Day*—devoid of a past and a future, doomed to the confines of the present.

With its recent decision in *Adams Lake*, the BC Supreme Court has made a further contribution to the developing law on whether there are past and future components to the duty to consult with mixed results for government and First Nations.

What it is about

In the 1960s Tod Mountain, an hour northeast of Kamloops, BC, was a local ski hill with one ski run and a rickety lift. In the early 1990s, encouraged by the provincial government's dreams of a series of Whistler-like ski resorts across the province, the Nippon Cable Company took control of the ski hill.

In 1993 the Province approved a Master Development Agreement (MDA) for a phased development over a 4,140 hectare area including numerous ski lifts and runs, a golf course, hiking and mountain biking trails and a 'village' centre with condos, hotels, restaurants and shops—the Sun Peaks Resort was born.

At the time the MDA was approved, the provincial government's position was that Aboriginal title had long ago been extinguished through provincial legislation and that Aboriginal rights were of little consequence until proven in court. Given the Province's position, it is unsurprising that it gave no regard to the Secwepemc Nation's Aboriginal title and rights at the MDA was approved.

For nearly 15 years Secwepemc opposition to Sun Peaks, largely led by the Adams Lake Indian Band, has been in and out of the news and the courts. The BC Supreme Court's most recent decision is in regards to a challenge to the Province's decision to allow new ski runs and a ski lift to be built on Mount Morrisey.

What the Court said

The duty to consult arises when the government contemplates conduct or a decision that will potentially affect Aboriginal title and rights. The first issue the Court had to deal with was the Province's argument that there

was no duty to consult because the approval of the new ski lift and runs was not really a 'decision'. Instead, the Province was simply issuing approvals it had committed to back in 1993 through its decision to approve the MDA. According to the Province, the Supreme Court of Canada in *Carrier Sekani* held that there is no requirement to consult about past decisions (e.g. the 1993 MDA decision), and therefore there was no need to consult about further approvals to expand Sun Peaks.

The Court rejected this argument. The Court held that the 1993 MDA had not authorized Sun Peaks to actually build anything—it still needed further operational approvals. The Court reasoned that while subsequent operational decisions may have a lesser effect on Aboriginal title and rights, and so attract a lower level of consultation, this did not eliminate the requirement for consultation.

The Court also reasoned that since the MDA required Sun Peaks to comply with all laws in force at the time a specific phase of the development proceeded, it now had to comply with the common law duty to consult, even if the duty had not yet been recognized in 1993. The Province could not shield itself from its obligation to consult based on its earlier, long-held assumption that it could issue authorizations to Sun Peaks regardless of First Nation interests.

The Court also concluded that given that there was no substantial consultation with Adams Lake when the MDA was approved in 1993, it would not be consistent with the honour of the Crown to allow the Province to now avoid consultation on operational decisions.

Although the Court rejected the Province's argument that past injustices immunized it from a present-day obligation to consult, it also rejected Adams Lake's argument that consultation had to include possible future impacts of the continued development of Sun Peaks. The Court reasoned that the authorizations for the ski lift and runs were an end in themselves. Any further future impacts would require additional authorizations. Consequently, it was reasonable and correct for the Province to restrict consultation to the effects of the current decisions.

Based on the specific facts of the level of consultation required and the adequacy of the Province's consultation and accommodation efforts, ultimately the Court rejected Adams Lake's argument that the Province had failed to discharge its obligation to consult and accommodate before issuing the authorizations to develop Mount Morrisey.

Why it matters

In the last several years 'past infringements' and cumulative effects have been at the forefront of the unresolved issues surrounding the duty to consult. Governments and companies have read the Supreme Court of Canada's decision in *Carrier Sekani* as closing the door on the issue of past infringements. First Nations, supported by Chief Justice Finch's reasons in *West Moberly*, have read *Carrier Sekani* as leaving open the possibility of consultation including the effects of past decisions. Likewise, the law remains unsettled as to if and when the cumulative effects of a proposed project must be considered as part of the duty to consult.

The BC Supreme Court's decision in *Adams Lake* does not settle either of these questions. But it does make it more difficult for government to simply ignore the effect of past decisions while also increasing the challenge First Nations face when seeking consultation on the cumulative effects of a series of interrelated government decisions.

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