

If a Municipality Can't Consult it Can't Decide

Reduced to its essentials, the duty to consult is a local matter.

Despite low turnouts in municipal elections, many Canadians appreciate that from zoning to jaywalking, local government decisions affect their daily lives to a greater extent than many provincial and federal government decisions. Consequently, it would seem axiomatic that local governments are obligated to consult and possibly accommodate Aboriginal people. The British Columbia Supreme Court has decided otherwise.

The Court recently considered the Neskonlith Indian Band's complaint that a municipality had failed to consult regarding decisions to allow a large shopping centre to be built on a floodplain adjacent to its reserve. The Court rejected the Band's argument that, having been delegated the power to decide by the Province, the municipality had the legal obligation to consult the Neskonlith on the effect of the decisions on their constitutional rights.

The Court left unanswered the question of whether it was lawful for the municipality to allow the shopping centre to be built while the duty to consult remained unfulfilled.

The principles established by the courts are clear. The duty to consult is a constitutional imperative—its fulfillment isn't optional. The duty to consult arises and is fulfilled upstream of the exercise of government's decision-making powers. The duty to consult cannot be deferred, postponed or sidestepped, it must be met—period. If the duty to consult is left unfulfilled, a government decision is unconstitutional.

The Neskonlith case is expected to go forward. On appeal, the Court will have the opportunity to confirm that if a pending municipal decision triggers the duty to consult, the duty has not been met and the municipality can't fulfill it, the municipality cannot decide.



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