

The Content of the Crown's Duty to Consult and Accommodate First Nations

On March 7, 2005, the British Columbia Court of Appeal released its reasons in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*.

The British Columbia Court of Appeal held that the provincial Crown had failed in its duty to consult and accommodate the Musqueam Indian Band (Musqueam) over the sale of the University Golf Course land to the University of British Columbia (UBC). The Court suspended the operation of the Order in Council (which authorized the sale of the Golf Course land to UBC) for a period of two years. This allows the parties to participate in a meaningful process of accommodation consistent with the honour of the Crown.

The Court of Appeal left the content of appropriate accommodation measures to the parties' future negotiations but directed that any party is at liberty to bring appropriate proceedings in the Supreme Court of British Columbia to address outstanding issues. Should the accommodation process fail, the Court may require UBC to honour its undertaking to transfer the Golf Course land back to the Province.

Background

The *Musqueam* case is a dispute about the sale of the provincial Crown-held Golf Course to UBC. A subsequent Order in Council authorized the sale.

The Golf Course land is located in Musqueam's Traditional Territory and is subject to Musqueam's comprehensive land claim, which is presently subject to the B.C. Treaty process.

The Musqueam Indian Band sought judicial review of the Province's decision to sell the Golf Course land to UBC on the basis that the Province had not properly consulted with, and accommodated, Musqueam in light of Musqueam's asserted aboriginal rights and title.

After Musqueam's petition was brought, the Province tabled a proposal that would see the Golf Course land sold to UBC. Musqueam would receive \$550,000, five percent of any revenue received by the Province for future modification of the covenant that required UBC to use the land as a golf course, as well as a small amount of firewood for use in the Musqueam longhouse.

The Chambers judge held that this offer of economic compensation met the Crown's duty to Musqueam and he dismissed the petition. Musqueam appealed and succeeded on appeal.

The Court of Appeal: The Crown's Failure to Accommodate

The Court of Appeal found that the Province had breached its duty to consult and accommodate Musqueam's aboriginal title interests in the Golf Course land as part of a process of "fair dealing and reconciliation" consistent with the honour of the Crown. The Court concluded that the process of consultation and the offer of economic compensation did not meet the duty imposed on the Crown in this case.

The scope of the duty to consult and accommodate varies according to the circumstances of each case. In the *Haida* case, McLachlin CJ placed the duty on a spectrum related to the relative strength of the First Nation's title or rights claim and the nature of the proposed infringement. Where the claim is weak or the infringement minor, the Crown may only be required to give notice to the First Nation of its plans, disclose information, and discuss issues with the First Nation. On the other end of the spectrum, where a strong *prima facie* case for the claim is established, "deep consultation" aimed at finding a satisfactory interim solution or accommodation is required.

The Court of Appeal concluded that the Province owed a duty to Musqueam on the "more expansive end of the spectrum". Mr. Justice Hall noted that Musqueam's rights claim was strong and the infringement of these rights if the land was sold to UBC would mean there would likely be no opportunity for Musqueam to prove their connection to this land again.

The Court held that the Province failed to meet its obligations as the consultation process was fundamentally flawed, reasoning that the consultation and accommodation process was left until too advanced a stage in the proposed sale transaction.

Remedy

The British Columbia Court of Appeal ordered the suspension of the operation of the Order in Council authorizing the sale of the Golf Course Land to UBC for a period of two years so that the parties may consult with a view toward accommodating Musqueam's interests.

The Court directed that if the parties fail to reach some agreement after the two-year time period, Musqueam is free to bring the matter back to court. Mr. Justice Hall commented that if agreement eludes the parties, it is possible that some order could be made affecting title to the lands. This could include an order requiring UBC to transfer the Golf Course land back to the Province pursuant to its undertaking given in the *Musqueam* proceedings.

Accommodation: What is Required?

The Court accepted that Musqueam's interest is in securing a sufficient land base for its members. The evidence demonstrated Musqueam's frequently expressed concern regarding its land shortage and the prospect of a landless treaty resulting from the continued sale of what few parcels of Crown-held land remain in Musqueam's Traditional Territory.

The Court left the scope and content of possible accommodation measures open. Madam Justice Southin concluded that there was a failure on the part of the Province to accommodate Musqueam's interests in securing land, reasoning that this duty requires that lands not be sold during treaty negotiations if this would result in "little, if any" lands being left for treaty settlement. While Mr. Justice Hall suggested that some species of economic compensation may be an appropriate accommodation for some infringements of aboriginal title, he also canvassed

the possibility of an interim land protection measure where land would be set aside for treaty negotiations. He concluded that the parties should be afforded a wide field for consideration of appropriate accommodative solutions. Mr. Justice Lowry declined to comment on the extent and content of accommodation measures, stating this was better left for the parties' negotiations.

Conclusion

The Court of Appeal's decision in *Musqueam Indian Band v. British Columbia* is a welcome addition to the growing jurisprudence on the potential scope of the Crown's obligations in making decisions that affect First Nations where aboriginal rights and title are asserted but unresolved.

The Court of Appeal sets a high standard for consultation and accommodation, refusing to countenance a flawed process where the Province precluded meaningful accommodation of Musqueam's interests by formalizing its plans with a third party without regard to its obligations to Musqueam. However, the Court of Appeal left the content of appropriate accommodation subject to the parties' future negotiations. As such, this decision provides some guidance on when the consultation process and subsequent accommodation proposal is "not enough" but no prospective checklist on the content of accommodation required.

It remains to be seen what accommodation measures are consistent with the honour of the Crown. The content of consultation and accommodation will continue to develop on a case-by-case basis. The Court of Appeal in *Musqueam Indian Band v. British Columbia* gives us but one example of what is "too little, too late."

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