

Neskonlith Indian Band v. Salmon Arm (City), 2012 BCCA 379

Background

The significance of this case is that it lays out the barriers to placing the duty to consult on municipalities. Note that while this case declared that municipalities in BC have no duty to consult with First Nations, much of the reasoning that brings the court to this conclusion has been overturned by higher court rulings at the Supreme Court of Canada. For this reason, it is likely that this decision will be overturned and a duty to consult will be placed on municipalities in the future.

This case came about due to the city of Salmon Arm in BC approving a shopping centre development on a floodplain in the traditional territory of the Secwepemc First Nation. The development had the potential to cause flooding on land that the Secwepemc traditionally used for ecological and cultural activities such as hunting and berry gathering. The Secwepemc argued that the City had a duty to consult with them before approving the plan.

Legal Issues

The two main legal issues this case addresses are:

1. Do municipalities have a duty to consult?
2. If they do, what is adequate consultation?

The Law

In answering these questions, the court said the duty to consult rests with the Provincial and Federal Governments, and that municipalities do not have a duty to consult for the following reasons: municipalities do not have the legal ability to provide the remedies needed to "achieve meaningful consultation and accommodation." Additionally, on a practical note, municipalities (especially smaller communities) lack the resources to consult adequately.

Even though it found that municipalities do not have a duty to consult, the court still analysed whether Salmon Arm had adequately consulted, if it was bound by the duty.

In answering this, the court found that, if Salmon Arm had a duty to consult, it was met in this case because the city had taken the following steps:

- Fully informed the affected First Nation of the plan for development.

- The First Nation was given several opportunities to express their concerns.
- These concerns were considered by the city and led to modification of the development plan to mitigate the risk of flooding.

Therefore, even if the municipality had a duty to consult, it was met in this case by the city's actions.

[Note: there appears to be a degree of inconsistency in these reasons. The court says that municipalities do not have the practical resources to conduct consultation, but then says that Salmon Arm adequately conducted consultation within the framework of the duty to consult. Inconsistencies, such as this, have indicated to some lawyers and legal scholars that this case was wrongly decided and will be overturned in the future.]

Conclusion

This case demonstrates the court's concerns with placing a duty to consult on municipalities. As it stands, a municipality has no duty to consult because it does not have the legal or practical ability to conduct effective consultation. The final duty to consult rests only with the Provincial and Federal Governments.

The law, however, is in the process of changing. See *Clyde River/Chippewas of the Thames* for an example where the courts have said the Provincial and Federal Governments may delegate the duty to consult to another government body, this reasoning will likely soon apply to municipalities as well.

Prepared for Shared Path Consultation Initiative by Dr. Alexandra Flynn