Blaney et al.
v.
British Columbia (The Minister of Agriculture Food and Fisheries) et al.
2005 BCSC 283

Case Comment Prepared by
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Introduction

In *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al.*, 2005 BCSC 283, British Columbia Supreme Court Justice Powers applied the recent SCC decisions in *Haida* and *Taku* to rule that the Provincial Crown as represented by the Minister of Agriculture Food and Fisheries, had not met its duty to consult with the Xwémalhkwu First Nation (Homalco Indian Band) in his reasons for judgment handed down on March 2, 2005 following a ten day judicial review hearing.

The Xwémalhkwu First Nation Chief and Council brought the judicial review application challenging the Minister's December 8, 2004 decision to approve an aquaculture license amendment application from Marine Harvest. The amendment application was to add Atlantic salmon to the species cultivated at their open net cage aquaculture facility at Church House, located at the mouth of Bute Inlet, in the heart of the Xwémalhkwu traditional territory and adjacent to two Homalco Indian Band Reserves.

In ordering the Parties to schedule and complete a process of consultation and potential accommodation specific to the amendment application, Justice Powers held that the Province should approach consultation with an open mind and be prepared to withdraw Provincial

approval of the amendment or to add conditions to such approval necessary for reasonable accommodation of the concerns of the Homalco. He also held that issues to be included in the process he ordered include the location and management of the facility as well as the amendment. [par. 127]

Justice Powers specifically directed that Marine Harvest will not add any more Atlantic salmon to the site until a scheduled process of consultation and potential accommodation has been completed, and ordered that Marine Harvest is to participate in an appropriate way in the consultation. [par. 127]. He did not grant the injunction sought, but did agree that an injunction can be included in claims for relief under the Judicial Review Procedure Act [par. 139-143]. However, practically speaking, by ordering no additional salmon placed in the site, he did not disturb the result of the interim injunction prohibiting any further addition of Atlantic salmon to the facility imposed by British Columbia Supreme Court Justice Pittfield, on December 24, 2005, pending the hearing of the judicial review, leave to appeal to the British Columbia Court of Appeal, denied, January 13, 2005.

A. Notice of the Assertion Including Scope and Content

Justice Powers held that the Province had actual knowledge of the claims by the Homalco to Aboriginal title and rights in the area of the Bute Inlet through on-going treaty negotiations, participation in regional land use planning, submissions on previous applications and published information available upon reasonable enquiry.

Justice Powers noted that the Homalco have claimed the rights to harvest wild salmon stocks, clam beds, rockfish and other stocks and are concerned about the management, protection and enhancement of these resources within their claimed territory, and argued that these resources can be impacted and that these rights are an integral part of their Aboriginal culture for their sustenance needs, social needs and trade. [pars. 23, 24]

The Homalco Petitioners led evidence that the waters, shore, near shore and marine resources located in the immediate and surrounding area of the aquaculture facility at Church House are subject to on-going treaty negotiations through the British Columbia Treaty Process, subject to Xwémalhkwu Conservation, Protection & Heritage Designations and are included in comprehensive Xwémalhkwu management and land use recommendations through the Provincially led Johnstone Bute Coastal Plan. [pars. 21, 58, 59, 66, 67, 69, 71, 73]

B. Finding of Prima Facie Case of Rights and Title

Noting that despite the fact that there may be claims by other bands that overlap a portion of the claimed territory, on the evidence, Justice Powers was satisfied that:

1. There is a reasonable probability that the Homalco will be able to establish Aboriginal title to at least some parts of the Homalco Territory including portions of Bute Inlet in the vicinity of Church House. The Homalco certainly have rights to the use and occupation of the reserve lands;
2. There is a substantial probability that the Homalco will be able to establish Aboriginal rights to harvest wild Pacific salmon and other marine resources of the Homalco territory. [par. 25]

C. Scope of the Duty in the Circumstances

Quoting extensively from the Supreme Court *Haida* decision, Justice Powers applied the principles from that case and commented on the scope of the process of consultation and potential accommodation which is necessary and that which was lacking in the facts before him:

> The parties are not obliged to reach an agreement, but they are obliged to make reasonable efforts in the process of consultation, and to keep an open mind. Failure to reach an agreement does not mean that consultation and reasonable accommodation has not occurred. Accommodation involves a balancing of competing societal interests with Aboriginal and Treaty rights. [par. 20]

D. The Crown is bound by its Honour to Balance Societal and Aboriginal Interests [*Haida* par. 45]

Throughout oral argument the Crown argued that it had met any duty it had to the Homalco with respect to the potential harm to the marine environment and resources as a result of the practice of open net cage aquaculture through a public process of consultation years earlier, and the implementation of regulations governing the aquaculture industry.

Justice Powers rejected this argument. Homalco argued that none of the previous broad based consultation processes and consequent regulations were carried out in consultation specifically with Homalco, and further, that Homalco had specific concerns and perspectives with respect to the continued ability of their members to exercise aboriginal title and rights which needed to be addressed with the Province independently.

> I agree with the Respondents that the precautionary principle does not require governments to halt all activity which may pose some risk to the environment until that can be proven otherwise. **The decisions on what activity to allow and how to control it often require a balancing of interests and concerns and a weighing of risks. This is exactly the kind of situation which requires consultation, discussion, exchange of information and perhaps accommodation**. [par. 45]
>
> Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. This type of consultation should have occurred before the amendment to the existing license was approved. [par. 108]

E. Being Prepared to Amend Policy Proposals in Light of Information Received [*Haida* par. 46]

Justice Powers held that even though previous Homalco Chief and Council had supported the introduction of the fish farm and consultation had occurred initially, the Crown could not continue to rely on previous consultation in the face of new information received by the Homalco upon learning of potential harm the fish farm may have on the rights and title asserted. As such, previous support of an activity does not change the Crown's duty to consult when new information or a new policy decision was reached by present leadership of the Nation.

> ... I do not think that I could say the adaptive management approach is not a proper means of **accommodation**, although there may be some **other things that should be considered**. **Some of these may be the levels of enforcement of the regulations and monitoring those regulations**, et cetera. [par. 46]
>
> I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. **However, that does not mean that these matters do not continue to be the subject of review and further consultation in light of additional knowledge or information**. **The fact that there may be some controversy about the new** evidence or information provided does not mean that it is not a proper matter of consultation. [par. 49]
>
> The issue of siting of a particular aquaculture fish farm is not something that is concluded once and for all. **Additional information may require a review of the siting and further consultation with the Homalco** [par. 50]
>
> I have considered the regulatory requirements, but again, **that is not the end of the matter. Those are the proper subject matters of discussion during consultation. There may well be additional measures which should be taken to address the concerns of the Homalco** [par. 128]
>
> Clearly, **the Ministry must deal with each application on its own merits**, and consult and address the individual concerns of the Homalco with regard to this specific site. If, after consultation, reasonable accommodation of the concerns raised by the Homalco required a refusal to allow the amendment, then that would be the decision that the Ministry must make. **The Ministry must deal with the concerns of potential infringements on a site by site basis, not based on any general policy**. [par. 135]

F. The Right and Potential Infringement is of High Significance <u>to the Aboriginal</u>

Peoples
[*Haida* par. 44]

Justice Powers heard from the Homalco that from their perspective their aboriginal title and aboriginal rights at stake were of utmost importance and the potential infringement of those rights therefore required a serious consideration as to how to mitigate and avoid any such potential infringement. The Homalco asserted that the Crown had repeatedly ignored their concerns with respect to previous amendments, despite providing notice of those concerns through anthropological studies, biological studies, comprehensive submissions and repeated requests to meet to begin to address and articulate the nature and scope of the rights and potential infringements.

Ultimately Justice Powers agreed with Homalco in finding that consultation on a site by site basis is necessary for the Crown to meet its duty to consult as different aboriginal groups take different positions on activities occurring in their traditional territory.

> They [the Ministry] argue that any consultation necessary did occur by an exchange of correspondence and the **accommodations that were necessary have occurred as a result of the implementation of the detailed Aquaculture Regulations**, following the Salmon Aquaculture Review. [par. 48]
>
> The fact that the Salmon Aquaculture Review occurred and that some Aboriginal people may have been involved in that study **does not eliminate or reduce the need for consultation on a site by site basis. Different aboriginal groups may take different positions on aquaculture**. **The Homalco are a group of people whose claims to Aboriginal title and Aboriginal rights may well be affected by the actions of the government. It is the obligation of the Crown to consult with them and it is their entitlement to be consulted**. [par. 51]
>
> **I find that the Ministry has erred in failing to consult to the extent necessary in these particular circumstances**. The Ministry believed that the change of species from Chinook to Atlantic was not a significant amendment, and did not have any different impact on the claims or rights of the Homalco than the original license. [par. 108]
>
> Clearly, the Ministry must deal with each application on its own merits, and **consult and address the individual concerns of the Homalco with regard to this specific site**..... **The Ministry must deal with the concerns of potential infringements on a site by site basis, not based on any general policy**. [par. 135]

March 9, 2005

G. Mere Hard Bargaining Does Not Offend An Aboriginal People's Right to Be Consulted [*Haida* par. 42]

The Crown argued that the Petitioners were attempting a veto due to Homalco's strong policy position on aquaculture as presently practiced at the site and in British Columbia. Justice Powers recognized however that the Homalco were clear and persistent in articulating their strong concerns and recommendations as to conditions necessary for Homalco to be able to support open net cage aquaculture in their traditional territory, including scientific studies, monitoring and regulatory changes.

Despite these positions being contrary to that of previous Chief and Council, and contrary to the current Provincial policy, Justice Powers did not find that Homalco's position on aquaculture and concerns were unreasonable. He applied the *Haida* principle to the facts and found that hard bargaining did not obviate the need of the Provincial government to consult on the issues raised. :

> I understand why the Ministry might conclude that the Homalco's statement of concerns were really a statement of position, on which they had little interest in moving. **Despite the strong position that the Homalco appeared to take, however, the communications from them made it clear that they wished to discuss their position with the Ministry. They did not assert, at any time, that they were not prepared to change their position as a result of further consultation**. [par. 106]

Further reference to the strong policy decision Homalco articulated to the Province throughout the initial stages of consultation are mentioned throughout the judgment:

> The Homalco take the position that there should be no amendment to allow the aquaculture of Atlantic salmon until the Ministry and Marine Harvest can prove that there is no risk to wild salmon stocks [par. 43]
>
> The new Chief and Council appeared to oppose fish farming in general and the fish farm at Church House in particular. [par. 47]
>
> The Ministry argue and believe that the Homalco were not interested in consultation, but had simply decided that they no longer supported aquaculture of any kind. The Ministry believed that the Homalco were not really prepared to engage in meaningful consultation. [par. 54]
>
> ... the initial response of the Chief and council was that they did not support the amendment application because of too many outstanding risks to the marine environment related to open net cage fin fish culture as it is presently practiced at the site. They stated the introduction of the Atlantic salmon would only exacerbate those conditions. [par. 57]
>
> The fact that there may be some controversy about the new evidence or information provided does not mean that it is not a proper matter of consultation. [par. 49]
>
> The letter points out that the Homalco have declared this area as a Xwémalhkwu salmon enhancement and protected area, as a Xwémalhkwu rock fish conservation area, and as a Xwémalhkwu krill conservation area and a Xwémalhkwu heritage and protected zone. The letter takes the position that the amendment by adding Atlantic salmon and even the fish farm aquaculture as it is presently practiced is in conflict with those designations. [par. 67]
>
> The August 8, 2004 Band Council Resolution that was attached resolves that the Band and council do not approve of open net cage fin fish aquaculture as presently practiced in British Columbia and in their traditional territory. The letter does not approve the facility at Church House or the amendment to add Atlantic salmon or any species to the operation. [p.71]

H. The Effect of Good Faith Consultation May be to Reveal a Duty to Accommodate

Throughout the judgment, Justice Powers provided direction as to what was not acceptable with respect to the limited consultation that did occur in the circumstances of this case, and provided direction as to what should be included in the scheduled process he ordered and potential accommodation which might result. Subjects for consultation included indirect and potential future interference of aboriginal rights. Subjects for potential accommodation of such interference included refusal to allow the activity and mitigation measures above and beyond existing regulations:

> The Ministry does not agree with the scientific opinions presented by the Homalco, and **the response required was significantly more than that contained in the letter of November 22, 2004. The letter of January 18, 2005 is a good foundation for the face to face meetings that consultation requires**. Consultation, in some cases, may include the parties educating each other as to their concerns and responses to those concerns. The concerns raised may not necessarily be accepted, but they may still lead to some reasonable accommodation of those concerns. **This type of consultation should have occurred before the amendment to the existing license was approved**. [par 108]
>
> ... it is not simply direct or immediate interference [with claimed rights] which is of concern. **It is also indirect and potential future interference. This is the very subject matter of the consultation**. [par. 128]
>
> I have considered the **regulatory requirements**, but again, that is not the end of the matter. **Those are the proper subject matters of discussion during consultation**. There **may well be additional measures which should be taken to address the concerns of the Homalco** [par. 128]
>
> **The consultation, including the early portion of the consultation, could be specific steps that may be taken to further minimize the risk above and beyond the existing regulations**, or steps that could be taken to ensure that the existing regulations are enforced. [par. 129]
>
> Clearly, **the Ministry must deal with each application on its own merits**, and consult and address the individual concerns of the Homalco with regard to this specific site. **If, after consultation, reasonable accommodation of the concerns raised by the Homalco required a refusal to allow the amendment, then that would be the decision that the Ministry must make**. The Ministry must deal with the concerns of potential infringements on a site by site basis, not based on any general policy. [par. 135] [Emphasis added throughout]

I. Relevant Information to be Provided as Part of the Process of Consultation

Direction from the court was also provided with respect to relevant information to be provided, and in the circumstances of this case, a process by which proprietary information in the possession of the third party Respondent, Marine Harvest may be accessible to Homalco during the process of consultation.

> Certainly the obligation to consult includes the provision of relevant information that the Ministry may have in its possession. [par. 111]
>
> I would not order the production of the fish health management plan without specific terms that protect the interests of Marine Harvest, if actual production of the plan is necessary. Marine Harvest's suggestion that they meet and discuss the contents of the plan with the Homalco under certain conditions may be sufficient to meet the needs of the parties. [par. 116]

J. Direction on Indivisible Crown

The practice of aquaculture requires permits, licenses, approvals and enforcement by all levels of government. In the course of the hearing, Justice Powers heard from the Ministry, Homalco and Marine Harvest as to the level of compliance and the nature of the complex regulatory regime in place. Due to its complexity, and the apparent lack of communication between departments, Ministries and levels of government, Homalco argued that it appeared that Homalco was the only government concerned specifically with ensuring that the company was complying with regulations. In fact, there is presently a federal action being brought by the Homalco with respect to federal permitting in relation to the site. Justice Powers made some interesting comments with respect to the Crown's actions:

> Page 20 of the report deals with the requirement by DFO for an authorization to Harmfully Alter, Disrupt and Destroy Habitat (HADD). The response essentially is that that is a matter between DFO and Marine Harvest, and it was not a condition of the amendment. The Homalco are simply referred to the DFO. The response is not particularly helpful to the Homalco. **I would have expected that the Ministry would be concerned about whether Marine Harvest was compliant with all of the federal**

> **regulations as well as the provincial regulations.** [par. 104]
>
> I am satisfied that this is a matter that is more properly handled, at this stage, through the Department of Fisheries and Oceans. **Certainly, I anticipate the Department of Fisheries and Oceans would consult with the Homalco on the issue of whether a permit for a HADD should be granted, or whether an agreement to prevent a HADD is appropriate**. Those matters, however, may be the subject of the proceedings in the federal court, and I do not wish to make any further comment on them. [par. 149]

Conclusion

In *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al.*, 2005 BCSC 283, British Columbia Supreme Court Justice Powers applied the recent SCC decisions in *Haida* and *Taku* to rule that the Provincial Crown as represented by the Minister of Agriculture Food and Fisheries, had not met its duty to consult with the Xwémalhkwu First Nation.

Of significance is the direction the Court is giving with respect to the practical implementation of the principles further articulated in the *Haida* and *Taku* decisions as itemized above. The Court is sending a clear message to the Crown, First Nations and third parties that meaningful consultation and potential accommodation is particular to the nature and scope of the aboriginal rights articulated by the specific First Nation. The Crown cannot merely rely upon broad based public consultation or overarching regulations on activities which may potentially negatively impact upon asserted rights. The Crown must take the specific circumstances of each First Nation's concerns as regards their aboriginal rights and title seriously and make all reasonable efforts to address and mitigate those concerns.

The aboriginal perspective as to the significance of the potential infringement must be seriously addressed in the consultation and accommodation process. This important direction from the Court must not be overlooked. In fact the Crown should be reminded of this direction that existing regulatory processes are only the starting point in meeting its duty of consultation when First Nations respond to referrals and consultation requests with respect to their specific aboriginal rights, resources, perspectives, and management practices on traditional lands and waters.

The challenge for First Nations is to clearly articulate and assert their aboriginal rights including the significance of those rights from their particular First Nation perspective. This can be a serious difficulty and very discouraging especially when faced with Crown representatives who do not appear to listen or misconceive information provided through written communications, or even, potentially in face to face consultations. The challenge is to persistently give notice, provide information and attempt to provide explicit direction as to methods Crown or third parties can mitigate, avoid or reduce potential impacts to rights and the lands and resources upon which the exercise of those rights rely. Capacity issues with respect to meeting this challenge remain outstanding and must be addressed as consultation referrals are numerous and on-going.

Further direction the Court has given which is of particular importance is the on-going nature of the duty to consult and accommodate. The Crown has been given explicit direction that new information, whether controversial or otherwise, must be meaningfully addressed notwithstanding any previous support a First Nation may have given to an activity occurring on the traditional territory, or affecting the exercise of aboriginal rights and title.