Government of Alberta

Justice

Court of Queen's Bench
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September 24, 2012

Keltie L. Lambert,
c/o Witten LLP

Dear Sir/Madam:

RE: File: 1103 07145
COLD LAKE FIRST NATION
VS.
THE QUEEN IN RIGHT OF ALBERTA, et al

Attached is a copy of the Memorandum of Decision in relation to the above action.

Yours truly,

J. Fredericks

Joanne Fredericks
For Clerk of the Court

Encl.

Alberta

Court of Queen's Bench of Alberta

Citation: Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation), 2012 ABQB 579

Date:
Docket: 1103 07145
Registry: Edmonton

Between:

Cold Lake First Nations

Applicant

- and -

The Queen In Right of Alberta as Represented by the Minister of Tourism, Parks and Recreation

Respondent

Memorandum of Decision of the Honourable Madam Justice B.A. Browne

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[1] Treaty #6 was signed by Chief Kinoosayoo on behalf of Cold Lake First Nations and by various British Government Officials near Fort Pitt on the September 9, 1876. The preamble to Treaty #6 provides in part:

> ... And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and received from Her Majesty's bounty and benevolence...

[2] There is much jurisprudence regarding the interpretation and application of the contracts

made between Canadians and First Nations in 1876. This is one of those difficult cases where the Court is required to apply the guidelines provided in that Treaty/contract to modern day issues which could not have been contemplated by the signatories to the Treaty.

[3] Cold Lake First Nations ("First Nation") has brought an application for Judicial Review from a November 2010 decision of the North-East Regional Director of Parks, Government of Alberta ("Parks"). The decision terminated ongoing consultations between the First Nation and Parks and authorized a major expansion of the English Bay Recreation Area ("English Bay") in the traditional territory of the First Nation.

[4] English Bay is located on the west shore of Cold Lake and is described as one of the most beautiful beaches in Alberta. Two parcels of the First Nation's reserve lands are located north and south of the recreation area. Archaeological findings indicate that the area has been inhabited for 4,500 years. Non-aboriginal people have been resident in that area for only a recent and relatively insignificant portion of that time period.

[5] The First Nation calls this area Berry Point, Blueberry Point or in the Dene language, Jié Hochálá. The area has been used over the years for transportation, hunting (ducks and animals), fishing, trapping, snaring, seasonal camps, preparing (drying), caching, smoking (meat and fish), picking and preserving berries (blueberries, saskatoon berries, raspberries, cranberries, goose berries), and harvesting (birch bark and roots for medicines). Historical grave sites are located within the proposed extension to English Bay. It is conceded by all parties that the proposed expansion would involve the First Nation's Traditional Territory (not Reserve land).

[6] The First Nation and other residents of the area became concerned about people camping on, and not taking care of, the land surrounding the existing Park. The expansion of English Bay was proposed because assigning Parks or Recreation status to an area assists the Provincial authorities in monitoring the use of the land.

[7] The parties to the Treaty and to the negotiation agree that Parks has a duty to consult the First Nation in the development of the extended campground through the First Nation's Traditional Territory.

[8] This judicial review requires me to address the following issues:

1. Is the February 7, 2012 affidavit of Annette McCullough admissible for the purposes of the judicial review?

2. Did Parks properly exercise its Constitutional duty to consult and accommodate the First Nation?

1. Is the February 7, 2012 affidavit of Annette McCullough admissible for the purposes of the judicial review?

[9] The affidavit of Annette McCullough was sworn on February 7, 2012, and examinations on affidavit were subsequently conducted. The First Nation has submitted the affidavit, along with the enclosed Traditional Land Use and Occupancy Study ("TLUO Study"), to the Court for consideration as evidence on this judicial review.

[10] The purpose of a TLUO Study is to gather and prepare a survey or summary of information based upon the collective wisdom and information of the Study participants. It is a compilation of information gained from documents, articles, interviews and field visits. The author of the Study then attempts to confirm the information and compile it in a useful format. A summary of the findings of Annette McCullough's TLUO Study provides in part (p. 3):

> 6. To summarize the TLUO Study:
>
> *Historic and Current Traditional Uses*
>
> (a) Interviews of CLFN elders and other members indicate that Berry Point has been utilized by CLFN within living memory and since time immemorial for the following purposes:
>
> (i) Seasonal settlement and social gathering...
> (ii) Fishing and processing fish...
> (iii) Gathering food plants and berries...
> (iv) Hunting and trapping...
> (v) Gathering medicinal plants and other resources for healing and spiritual practice...
> (vi) Gathering birch bark and sap...
> (vii) Spiritual activities and connection to ancestors whose remains are buried throughout the area... and
> (viii) Travel corridors/ trails...
>
> (b) A map summarizing all of these uses as located by reports is found at Figure 5.16.

[11] The Report also records concerns raised by the participants about the effect of the expansion of the Recreation Area on the First Nation's traditional lifestyle (p. 3, para. 6).

> (d) Elders and harvesters report that the proposed construction is likely to have serious negative impacts upon their community and their ability to utilize Berry Point for traditional purposes. The Study participants predict

these impacts and effects based upon their previous experiences within their traditional territory generally and within Berry Point more particularly. A summary of the expected impacts detailed in Section 6 of the TLUO Study is as follows:

(i) A loss of culture and language resulting from near total loss of one of the last remaining CLFN ancestral "living on the land places";

(ii) Chilling effect of increasing regulations, monitoring, and access fees which conflict with the *Denesuline* culturally preferred means of using the land and harvesting resources;

(iii) Physical changes to the landscape which destroy or irreparably alter berry patches, medicine gathering locations and important animal and fish habitat;

(iv) Physical changes to the landscape which destroy or irreparably alter traditional camping and social/ spiritual gathering locations;

(v) Increased use by non-CLFN members for recreational pursuits (e.g. camping, powerboating, partying, etc.) which:

(1) is incompatible with traditional uses (e.g. spiritual/ healing retreat, berry/ medicine picking, net fishing, teaching children traditional ways etc.);

(2) creates increased concern or risk of conflict with CLFN members and increased risk of vandalism to CLFN traditional use infrastructure (e.g. nets, boats and smokehouses);

(3) results in increased pollution of the area both in the objective sense (e.g. more vehicle emissions and garbage) and in the subjective sense (e.g. "disrespectful" use of the land decreases the quality of foods and medicines harvested in the area); and

(4) interferes with solitude, peace and the "spirit of the land".

The First Nation' Argument on the Admissibility of the TLUO Study

[12] In seeking leave to admit the affidavit evidence, the First Nation relies on Rule 3.22(d) of the *Alberta Rules of Court*, arguing that the Court should exercise its discretion and admit the TLUO Study as it is logically probative of the facts in issue. The TLUO Study is important to provide a complete context for the decision in issue, fills a gap, and assists with assessing the scope and strength of Treaty Rights as well as the magnitude of the adverse impact of this proposed development. These in turn inform the content of the duty to consult. Once admitted, the Court can then determine the weight to be attributed to the evidence.

[13] Further, the First Nation argues that the record is not the product of a quasi-judicial hearing. Parks is the decision maker and the opposing party on this judicial review, and it created and controls the record. The honour of the Crown requires that the TLUO Study be filed to balance the information contained in the record produced by Parks.

[14] The First Nation also argues that the report should be admitted as expert evidence. It argues that the Crown's duty to consult is an emerging area of law, and therefore novel types of evidence should be admitted to allow proper consideration of the collective and community views which inform the Court when dealing with Aboriginal issues. The TLUO Study is relevant and not prejudicial. It provides the Court as trier of fact with information likely to be outside of its experience and knowledge. Annette McCullough is a properly qualified expert and has special or peculiar knowledge of the matters to which she testifies; and the honour of the Crown weighs in favour of admission of the evidence. The First Nation argues further that the Study is a representation of its collective experience, it is a representational sample, and it was conducted in an impartial and independent manner.

Parks' Argument on the Admissibility of the TLUO Study

[15] While acknowledging that oral history is generally admissible if it is useful and reasonably reliable, Parks submits that the flexibility required for resolution of Aboriginal claims can be achieved through the ordinary procedural rules, and post-decision evidence is not generally admissible on a judicial review save in exceptional circumstances.

[16] Parks argues that although the information in the format presented in the affidavit was not available to the decision maker, it was contained within the archaeological studies.

[17] Further, Parks asserts that Ms. McCullough was retained in September 2011, she did not conduct the interviews, attend the site, or attend the community meetings. She oversaw the compiling of the report. Aside from the documentation, the report is a compilation of hearsay which has not been tested on cross-examination. The qualifications of those who recorded the substance of the report are not before the Court. Concerns are raised about the selection of community members who participated in the Study and their "expertise" as elders, reporters or politicians.

[18] Parks further argues that Ms. McCullough is put forward as an expert with a considerable amount of experience in terms of TLUO studies relating to proposed development projects. In other words, her expertise is in gathering information and presenting it rather than forming an opinion based on supporting facts. The report is written from the First Nation's perspective. It is not in any way presented as an independent study but is rather a presentation on behalf of the First Nation. In fact, the interview guide for the TLUO Study indicates the following:

> ...The information is needed to support CLFN's court [case] against Alberta about redevelopment plans for the English Bay Provincial Recreation Area...

[19] The consent form signed by interviewees similarly indicates that the purpose of the project is to document the First Nation's land use to support its court case "against English Bay".

[20] Parks argues that this is not a proper expert report. It is issued by a corporation. It is based on double hearsay being reported by Ms. McCullough who received information through a staff member who did interview various members of the First Nation. The report does not contain scientific facts but rather is a gathering of stories, vignettes and opinions. It is a non-independent, partisan report prepared for one of the parties to the litigation. The reporters were paid an honorarium and their evidence is not under oath.

[21] Finally, Parks argues that the TLUO Study is not relevant to the determination on this judicial review. The case relates to proven treaty rights which are already recognized by Alberta and which formed the basis for the discussions and negotiations.

Decision on the Admissibility of the TLUO Study

[22] Rule 3.22(d) of the *Alberta Rules of Court* provides:

> **3.22** When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

[23] Slatter J. (as he then was) in ***Alberta Liquor Store Assn v Alberta (Gaming and Liquor***

Commission), 2006 ABQB 904, 406 AR 104 discussed at paras 40 to 43 the law concerning what evidence is relevant and admissible on a judicial review. Noting that judicial review is usually conducted based on the return, he listed circumstances where supplementary evidence is allowed: 1) to show bias, or a reasonable apprehension of bias; 2) where the facts in support of the allegation do not appear on the record; 3) where breach of the rules of natural justice will not be apparent from the record; 4) exceptionally on other issues such as standing; and 5) where a tribunal makes no, or an inadequate record of its proceedings, in order to show what evidence was actually placed before the tribunal.

[24] Slatter J. cited with approval S Blake, *Administrative Law in Canada*, 4th ed (Markham, Ont: LexisNexis Butterworths, 2006) at 198:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review. It is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible. The tribunal's findings of fact may not be challenged with evidence that was not put before the tribunal. Fresh evidence, discovered since the tribunal made its decision, is not admissible on judicial review.

[25] Judicial review is the review of a decision, not a hearing or decision *de novo*. When reviewing the reasonableness or the correctness of a decision, the reviewing court must undertake that review based on the information available to the original decision maker. The issue in this proceeding is not whether the First Nation's views on the proposed development are preferable to those of Parks. Rather, the main issue before this Court at this time is whether Parks failed to properly exercise its Constitutional duty to consult and accommodate the First Nation when discussion and negotiation were concluded.

[26] The First Nation cites ***Tsuu T'ina Nation v Alberta (Environment)***, 2008 ABQB 547, 453 AR 114:

> 28 The decision in ***Haida*** must be seen as a tacit approval of evidence, which would go beyond that contained in a return, being considered by the Court in a judicial review when the Crown's duty to consult is an issue.
>
> 29 Perhaps more fundamentally, the duty to consult is grounded in the honour of the Crown. It would not be in keeping with the honour of the Crown to strike evidence which is available and might assist the Court in making a preliminary assessment of the merits of the right claimed and the other issues before the Court.

[27] In my view, in judicial reviews in Aboriginal matters where the termination of consultation is in issue, courts should be careful to ensure that useful contextual information is not excluded out of hand. Such evidence may be important, for example, to the determination as to whether the termination of consultation was premature given the information before the decision maker.

[28] It is clear from a review of the record that the Historical Resources Impact Mitigation Report ("HRIM Report") addresses many of the issues raised by the TLUO Study. The methodology of the HRIM Report is similar to the TLUO Study in that it involved consultation with the First Nation Elders and members, and also employed a number of the First Nation members on the excavation. The HRIM Report connects stories with artifacts and historical events and locations.

[29] It is imperative as this area of the law develops that reasonable processes are available to gather collective information and to present stories, vignettes of elders and others in the community as the oral history passes down from generation to generation. That requires sensitivity, understanding and respect for that process on both sides. The very nature of oral history is that hearsay is involved in the gathering of that information. Through oral histories we are constantly looking for the common thread that connects and confirms the stories and history related.

[30] Ms. McCullough has skills and ability in gathering information from First Nation communities, and there are many potential uses for this TLUO Study. For example, it would have been useful in the ongoing negotiations which took place at various meetings where the First Nation was attempting to establish to Parks' satisfaction various traditional uses of the proposed expansion of the campground. The cross-examination on Ms. McCullough's transcript is not useful in terms of advancing the First Nation's position. It would have been much preferable to have evidence or affidavits sworn by Band members so that the stories, vignettes and opinions could be properly vetted through cross-examination on their affidavits.

[31] The HRIM Report contains references to interviews with elders and complements those interviews with objective findings through the archaeological work done. Interestingly, Ms. McCullough does not review the HRIM Report nor use it to confirm or to refute any of the conclusions or historical activities referred to in the TLUO Study.

[32] In my view, the fact that some of the interviewees were paid an honorarium would not necessarily affect the reliability of the report, unless the compensation is effected in such a way as to encourage expression of a certain viewpoint or is otherwise shown to have undermined reliability.

[33] As indicated, the TLUO Study may be useful in some circumstances. However, I find that it is not admissible on this application as post-decision material. The TLUO Study is a compilation of information already available through the HRIM Report, through the minutes and

through the discussions of the parties. It adds little in the way of context. Its admission into evidence would turn the judicial review into a hearing *de novo*. Its admission would not assist the Court in determining whether Parks failed to properly exercise its Constitutional duty to consult and accommodate the First Nation by ceasing discussions and negotiations.

[34] For the above reasons, the First Nation's application to admit the TLUO Study into evidence on this judicial review is dismissed.

[35] Parks requested a ruling that there is no implied undertaking not to disclose supporting documents to the TLUO Study. Since that Study is not admissible in these proceedings, it is not necessary to discuss whether there is an implied undertaking regarding the use of the material gathered.

2. Did Parks properly exercise its Constitutional duty to consult and accommodate the First Nation?

Standard of Review

[36] The proposed development of English Bay or Jié Hochálá is within the traditional territory of the First Nation. The parties have agreed through their submissions and through their actions that the proposed expansion of English Bay triggered a duty on the part of Parks to consult with the First Nation.

[37] The First Nation argues that Parks misunderstood the seriousness of the Treaty claim the impact of the Treaty infringement, and erred in determining the scope or strength of the Treaty rights asserted.

[38] The First Nation also submits that the Crown has failed in its duty to identify the Treaty rights asserted and the adverse effects of the proposed extension of English Bay. Further, the First Nation argues that the duty to consult lies at the high end of the spectrum based on the Treaty rights asserted, and the adverse impacts that may arise from the proposed activity. It submits that the applicable standard of review is correctness.

[39] Parks argues that the standard of review on this application is reasonableness. The parties undertook consultation (which they were required to do - correctness). Having undertaken consultation the decision of Parks can only be reviewed on whether it was reasonable - one of the available options.

[40] The standard of review regarding the existence and extent of the duty to consult and accommodate has been held to be correctness, as this is a pure question of law, whereas the standard for assessing the result once the Crown has discharged its duty to consult is

reasonableness. The Supreme Court of Canada stated in ***Haida Nation v British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 SCR 511:

> 63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[41] The Supreme Court of Canada addressed the standard of review again in ***Beckman v Little Salmon/Carmacks The First Nation***, 2010 SCC 53, [2010] 3 SCR 103:

> 48 In exercising his discretion under the *Yukon Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190, and ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

[42] Therefore, I will review the adequacy of the consultation on the correctness standard. If the consultation is determined to be adequate then we will proceed to a review of the decision on the standard of reasonableness.

Consultation Chronology

[43] The proposed expansion of the English Bay campground required specific consultation. First Nation ancestors have lived and survived on this land for thousands of years. Parks proposes in its expansion project to construct 185 campsites, facility upgrades, a boat launch, parking spaces, registration booths, day-use areas, playgrounds, new toilets and walking trails. The 4,000 page Record prepared and filed by Parks discusses internal and external office communications regarding the proposed redevelopment. What follows is a brief summary of significant events that took place between the parties.

[44] There is a significant history of negotiations between the First Nation and the Government of Alberta. In 2001 a significant settlement was reached regarding the Cold Lake Air Weapons Range and access of members of the First Nation to the land taken up by

Government as a result of that project.

[45] The traditional territory in and around the Cold Lake Reserve also became an issue between the parties in approximately 2003. At that time, the Government was receiving complaints about the degradation of the land in question as a result of random unsupervised camping. Parks proposed to transfer the land from the Department of Sustainable Resources and Development to Parks.

[46] The First Nation objected to the transfer of land. Some consultation took place but the transfer ultimately proceeded. Arising from the transfer, Parks' promise letter of July 5, 2005 to the First Nation contained a commitment to ensure access to the First Nation members for traditional pursuits such as gathering medicines, berry picking and sweat lodges as well as to the fish landing area. Parks continues to stand behind this commitment although this was not made clear to the First Nation until this application.

[47] Thereafter, in March 2006 the English Bay Campground was closed and in June of 2006 clearing of the land was commenced to implement the expansion. At that point, there had been no consultation with the First Nation with regard to the expansion of English Bay. Additionally, no permission allowing the park to proceed had been sought or granted as required from other Government departments. The construction was therefore abruptly stopped in July 2006 by the Historical Resources Division of the Government of Alberta (memo July 25, 2006 from the ADM Historical Resources Decision to ADM Parks and Protected Areas) to allow for the Cultural Facilities and Historical Resources to carry out extensive archaeological work on the site before approval.

[48] During the time the Historical Resources Impact Assessment & Mitigation Reports (HRIA) were being prepared a number of meetings were held between representative of Parks and representatives of the First Nation on September 14, 2006, October 23, 2006, November 28, 2006, July 16, 2007, July 23, 2008, September 12, 2008, October 13, 2009 and December 17, 2009. Additionally, there was significant correspondence between the two parties. Both parties had lawyers representing their interests throughout most of the meeting process. A community meeting was set up for October, 2008 to be held on the reserve. That meeting was cancelled by the First Nation. There was a community meeting held September, 2009.

[49] At the December 17, 2009 meeting there was a promise made that a community meeting would be held in the new year on the reserve to discuss the outstanding issues and obtain community input. This community meeting never occurred.

[50] Between December 2009 and February 27, 2010, the final HRIM Report was completed and forwarded to the appropriate authorities giving permission from that Government Department for the expansion of English Bay to proceed. This report does not discuss Treaty rights but provides an impressive and compelling history of fishing, hunting and lifestyle of historical aboriginal people in this area over thousands of years.

[51] The First Nation was invited to public consultations in Cold Lake by letter dated February 2, 2010. The Chief was advised of a 60-day public comment period regarding the redevelopment of English Bay. The First Nation was invited to make submissions through that public consultation.

[52] On February 23, 2010, the First Nation was again invited to the public open house to be held in Cold Lake on March 11, 2010. Further suggestion was made for a meeting with the First Nation on specific dates in March. Some members of the First Nation attended the public open house and objected to the expansion. The proposed dates for the meeting between Parks and the First Nation passed.

[53] In June 2010, letters were exchanged between the First Nation and Parks regarding deadlines and extensions of deadlines for the community meeting. No meeting was ultimately scheduled. The First Nation did not submit any comments in writing to Parks by the deadline of June 30, 2010. On July 21, 2010, Parks sent to the First Nation a closure of consultation letter. In reply to that letter one of the councillors replied that the First Nation was in the midst of an election taking place on July 30, 2010 and it was impossible to address any of the issues until after the election proposing a date in August, 2010.

[54] Representatives from the First Nation wrote on June 28, 2010 requesting dates for a meeting between parties and a community meeting. On July 15, 2010, a decision was made by Parks to end the consultation. (The decision which is the subject of this review.) This was confirmed in a letter to the Chief dated July 21, 2010.

[55] In August 2010, the Consultation Adequacy Assessment template form was completed by the Director to close off further negotiations and proceed with construction.

[56] As it turns out, the Director of Parks Mr. Nowicki did not have the authority to conclude negotiations and order the construction to proceed and he did not receive that authority until November of 2010.

[57] A final closure letter was delivered to the Chief on November 15, 2010.

[58] A final meeting between the parties was held on December 6, 2010, but it was not productive in resolving issues raised by either of the parties.

[59] A number of the issues identified throughout the meeting minutes have been, to a large extent, resolved between the parties over the course of the relevant time period:

- Grave Sites will be protected either through a buffer zone, through marked graves or through a fencing process. The First Nation must decide how those graves will be protected. Loop 2 of the campsite may have to be

deleted (July 16, 2007 letter and July 5, 2005). Elders were involved and paid for their assistance in the identification of grave sites.

- The birch bark trees, particularly those with syllabic markings, will be saved.

- The Park name will be changed to reflect Dene Tha' culture (Berry Point Jié Hochálá). (July 16, 2007 agreement)

- Parks will work, with the support of the First Nation, towards a Dene Tha' theme in its signage and interpretive programming for the new campground, including developing, in conjunction with the First Nation elders, interpretation texts and messages. (July 16, 2007 letter and August 27, 2007 letter)

- The Doyle farmstead will be avoided in the development of site. (August 2008)

- The First Nation should identify berry picking and other medicinal plant areas that should be protected. (July 2005)

- Spiritual or Ceremonial areas should be identified. (letter July 2005)

- The present fishing camp is designated and protected. (promise letter July 5, 2005 and letter of July 16, 2007)

- Camp fees are waived for the First Nation members engaged in treaty fishing rights on site.

- Despite the closure of the area, Parks allowed a First Nation Cultural Retreat to take place on sacred ground in June 2009.

- Parks allowed access to the closed property for fishing purposes through a combination lock system made known to the First Nation by August of 2009. This exception to the closure of English Bay was concluded through negotiations.

The First Nation's Position

[60] The First Nation argues that the Indian way of life is protected by the Treaty by implication (***Sundown*** case). The duty to consult lies at the high end of the spectrum as the Treaty claims to the area are strong, and the potential adverse impacts to Treaty rights are significant. Finally, the First Nation submits that the consultation process was flawed throughout,

and especially in the abrupt termination of consultation.

[61] In particular, the following decisions or positions are not supported by the First Nation:

- Fire bans apply equally to the First Nation and non-First Nation users.
- Parks will not have the ability to sole source contracts relating to the Park.
- The First Nation claims ownership of artifacts that have been found have been catalogued and are stored through the Alberta Museum system.
- The First Nation has proposed throughout discussions to co-manage.
- Other government departments responsible for interpretive signage and artifacts are a source of frustration.
- Proposed memorial to the Chief who signed Treaty 6.
- Lack of consultation on previous park projects.
- Failure to recognize Primrose Trail.
- The First Nation will be informed of employment opportunities and encouraged to apply. (July 2007)

[62] The First Nation submits that the consultation process was flawed from the outset because Parks started from the position that the construction would proceed, no matter what occurred. One year after promising to protect the area for the First Nation's use, Parks started construction without any notification or consultation. And, immediately upon receiving regulatory clearances under the *Historical Resources Act*, Parks unfairly implemented steps to terminate consultation.

Parks' Position

[63] Parks argues that the duty to consult fell at the low end of the spectrum and it was effectively and thoroughly undertaken from 2004 until 2010, as evidenced by a number of meetings, negotiations and commitments. Parks relies on the voluminous Record containing over 4,000 pages of material documenting the consultation process since 2004.

[64] Parks expresses frustration in the consultation process - meetings were sometimes unfocused and sometimes were a forum for venting old grievances, old issues and other issues, and commitments to employ First Nations members were sometimes difficult to follow through in arranging for the workers to participate. There were ongoing difficulties in setting up meetings

and delays in responses to ongoing discussions.

[65] Parks takes the position that the consultation was terminated because ongoing delays in communication from the First Nation became unacceptable. Those delays had the potential effect of delaying the construction of the proposed expansion. And finally, the First Nation does not have a veto over proposed development.

Discussion

[66] "The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions": ***Mikisew Cree The First Nation v Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 SCR 388 at para 1.

[67] The Supreme Court noted in ***Beckman***:

> 46 The link between constitutional doctrine and administrative law remedies was already noted in ***Haida Nation***, at the outset of our Court's duty to consult jurisprudence:
>
> > In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.
>
> The relevant "procedural safeguards" mandated by administrative law include not only natural justice but the broader notion of procedural fairness...

[68] Consultation was required in the present case in proposed development between the government and the First Nation in a way that would uphold the honour of the Crown.

[69] Both parties have protocols on consultation. However, the history of the discussions between the First Nation and Parks reveals significant political turmoil in their shared history and in many of the discussions. It is unlikely that those political challenges will be resolved in this generation, but the parties to the ongoing conflict must find a way to engage in a respectful and thorough process in order to resolve the issues that arise between them from time to time.

[70] It is well accepted that the land in question (Dene Ni Nenné) is fundamental to the First Nation's culture and lifestyle. The land provides for its people and the people are stewards of the land. They come from the land and return to the land. This is the context in which many of the contentious issues must be understood.

[71] As I read the material in preparation for this application, I was struck by the exciting possibilities which could flow from this collaboration. It is in both parties' interests to recognize and preserve this beautiful area of Alberta which includes a fundamentally important archeological site where members of the First Nation have lived for thousands of years. The interpretive centres at Batoche and Wanuskewin in Saskatchewan, and Head-Smashed-In Buffalo Jump come to mind as examples of projects which have, and will continue to, inspire thoughtful appreciation of Canada's rich First Nation heritage.

[72] The troubled history between Parks and the First Nation with regard to this land and the proposed development began when the land was originally transferred from SRD to Parks in 2005 against the First Nation's wishes. In response to their objection, the First Nation received the July 11, 2005 letter.

[73] Parks then began construction on this expanded camp site in 2006 without notice to, or consultation with, the First Nation or other government departments. Fortunately, the Department of Heritage stopped construction until it had completed its consultative work.

[74] There was a significant delay in this construction project from the time that the Heritage Department began its mitigation work until it completed its Report. The delay for the archaeological work done by the Government of Alberta began in July 2006 and the HRIM Report was filed in February 2010. There were a number of meetings between the parties hereto during the time that the HRIM Report was being prepared. It is notable that the September 14, 2006 meeting accomplished nothing because Parks had not provided the first stage report of the HRIM to the First Nation. None of the delay from July 2006 and February 2010 can be attributed to the First Nation. That delay must be attributed to the Government.

[75] Once the HRIM Report was completed, Parks pushed for further meetings. However, the First Nation election was called in April 2010.

[76] A Councillor of the First Nation indicated in an e-mail on June 22, 2010 that the Band was in the midst of an election and could not comment until August 2010.

[77] Correspondence from Alberta government dated June 30, 2010 indicates in part:

> Alberta wishes to consider its decision on the park redevelopment so that, if a decision is made to proceed, there will still be time this season to do work on the English Bay Provincial Recreation Area. Further delaying the process, until late July, may very well foreclose the option to proceed with work this year.

[78] The decision of the Director authorizing Parks to proceed with the proposed construction was communicated to the First Nation in a conclusion of consultation letter dated July 21, 2010 in the midst of that election.

[79] The Consultation Adequacy Assessment Template prepared by the Director dated August 4, 2010 recounts (p. 3):

> Due to the inability to arrange another meeting, TPR decided to send a letter to the CLFN stating that any further concerns could be forwarded, in writing, to TPR until June 30, 2010. TPR wished to conclude consultation, and proceed to consider its decision on the park redevelopment, in order to allow work to occur in the 2010 construction season.

[80] Parks unilaterally cancelled further consultation in order to allow construction to begin in 2010. However, because Luc Nowicki did not have the authority to authorize that construction, the initial deadline proved to be artificial causing further delay. For various reasons, the Director could not authorize the construction until November 2010. Because of the delays in obtaining the authority for Mr. Nowicki to proceed with his decision, a further meeting was held on December 6, 2010 between Parks and the First Nation. No solutions were identified during that meeting; it merely polarized the parties.

[81] The timing of the First Nation election was beyond the control of the First Nation and of Parks. There were certainly delays in organizing the community meeting anticipated in February 2010, but that delay was unavoidable due to scheduling difficulties and the Band election. Consultation could have continued during the delay resulting from the Director's lack of authority.

[82] The record shows that the negotiations which had occurred to that point had resolved many problems and were largely effective in bringing the two sides together in order to identify important Treaty and Aboriginal issues. A number of modifications and commitments were made to the proposed development to accommodate Treaty rights, thereby protecting Aboriginal interests and portraying Aboriginal history in a respectful manner and in a way which would be instructive for all people of Alberta. There is more work to be done.

Conclusion

[83] Having reviewed the record and considered all of the circumstances, I conclude that Parks erred in unilaterally terminating the ongoing consultation and negotiation, and in concluding that the level of consultation that had taken place was adequate. The decision in July 2010 to conclude consultation was driven by arbitrary and unrealistic construction deadlines. Parks had acknowledged the importance of further consultation by attempting to arrange meetings and inviting written comment. However, Parks failed to consider the impact of the election on the First Nation's ability to meet and respond to Parks. Government departments are well aware of the effect a looming election may have on many important government activities and the ability to respond to outside agencies. I find that Parks' termination of consultation in July 2010 was premature. Parks erred in concluding that the consultation was adequate.

[84] As recorded in the notes of the final meeting between the parties in December 2010, there is little "goodwill" (to use the words of the Treaty) between the parties in this case. The honour of the Crown requires good faith which will include taking the initiative to offer to reestablish a positive negotiating relationship. In my view, a simple change of the name in negotiations from English Bay to Jié Hochálá could make a significant difference to the process.

[85] I would add that my review of the history of the negotiations and observations of the parties lead me to believe that the relationship between the parties has deteriorated to such an extent that a mediator or arbitrator may well be essential to encourage effective communication and decision making. Both parties have an obligation to cooperate in the process and to engage in and facilitate effective communication and good faith negotiations. Despite their success on this judicial review, I would remind the First Nation that while it is entitled to adequate consultation, it does not have veto power and therefore it must engage in the negotiation process.

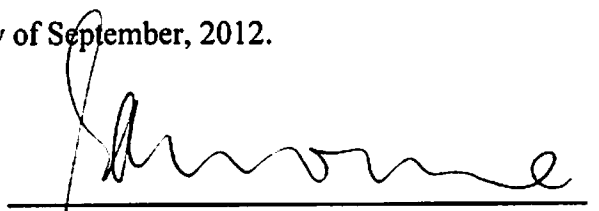
[86] Accordingly, I set aside the decision of the Director of Parks for the North East Region to unilaterally terminate further discussions and to proceed with construction of the expansion of English Bay. The process of consultation must continue to a proper conclusion with both parties acting in good faith towards a mutually beneficial solution.

[87] To enable this to occur, the decision of the Director is stayed until April 30, 2013 in anticipation that the parties will return to the discussion table as soon as possible.

Costs

[88] The parties may speak to costs, if need be, within 30 days of the date of this decision.

Heard on June 5th to 8th, 2012.
Dated at the City of Edmonton, Alberta this 21st day of September, 2012.



B.A. Browne
J.C.Q.B.A.

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