IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Squamish Nation et al v. The Minister of Sustainable Resource Management et al,*** 2004 BCSC 1320

Date: 20040927
Docket: L032971
Registry: Vancouver

Between:

THE SQUAMISH NATION,
by the Chiefs and Council of the Squamish Indian Band,
on their own behalf and on behalf of the members of the Squamish Indian Band

PETITIONERS

And:

THE MINISTER OF SUSTAINABLE RESOURCE MANAGEMENT,
on behalf of Her Majesty the Queen in right of the Province of British Columbia;
LAND AND WATER BRITISH COLUMBIA INC. and
THE ENVIRONMENTAL ASSESSMENT OFFICE and
GARIBALDI AT SQUAMISH INC.

RESPONDENTS

Before: The Honourable Madam Justice Koenigsberg

Corrected and Amended Oral Reasons for Judgment

(Changes and Amendments are Highlighted - Additions are bold/underlined Deletions are bold/double-underlined in square brackets)

Counsel for Petitioners	G.J. McDade, Q.C. James P. Tate
Counsel for Respondents	P.J. Pearlman, Q.C.
Counsel for Garibaldi at Squamish Inc.	C.D. Johnston
Counsel for GAR 96	H. Shapray, Q.C.
Date and Place of Hearing:	September 27, 2004 Vancouver, B.C.

INTRODUCTION

The Petitioner, the Squamish Nation, petitions the Court for a declaration that four decisions made by the Respondent government bodies were made in breach of the government's fiduciary and constitutional duties to consult and seek accommodation with the Petitioner's claimed aboriginal rights before granting rights to third parties which may affect the exercise of those aboriginal rights.

The Parties and their Interests

[1] The Squamish Nation claims aboriginal title over the lands at Brohm Ridge which are the subject of this Petition. The Squamish Nation also claims aboriginal rights to use the area for cultural and sacred practices, and for hunting, fishing, trapping, recreational and other traditional uses. The Squamish Nation asserts that the construction and operation of the proposed project will infringe their title, and will infringe their aboriginal rights.

[2] The Minister of Sustainable Resource Management is the Minister responsible for the ***Land Act***, R.S.B.C. 1996, c. 245.

[3] Land and Water British Columbia Inc. ("LWBC") is a Crown corporation which operates as an agent of government to carry out activities such as the disposition of Crown lands, the

issuance of land tenures and the administration and licensing of Crown water resources.

[4] The Environmental Assessment Office is the office of government continued by the ***Environmental Assessment Act***, SBC 2002, c. 43 responsible for the environmental assessment of reviewable projects under that ***Act***.

[5] Garibaldi at Squamish ("GAS") **[is an interested party]** is the current proponent of a proposed four season mountain resort at Brohm Ridge, near Garibaldi Provincial Park. That project is a reviewable project under the ***Environmental Assessment Act***.

[6] Garibaldi Alpen Resorts (1996) Ltd. ("GAR 96") is an interested party.

[7] GAS plans to create a ski, golf and real estate resort on the slopes of Brohm Ridge, resulting in extensive commercial activity on Mount Garibaldi.

The Issues

[8] The Squamish Nation claims the Crown is in breach of its constitutional and fiduciary duties to the Squamish Nation because of failure to consult with the Squamish Nation about its claim to aboriginal title and rights in the Mt. Garibaldi

area prior to making significant decisions which advance the GAS project, and that the Crown is in further breach of administrative duties owed to the Squamish Nation.

FACTS

[9] The Squamish Nation is an Indian Band within the meaning of the ***Indian Act***. The Nation has four reserves in the urban areas of North and West Vancouver, and 18 reserves outside of the metropolitan area, in the Squamish Valley and Howe Sound.

[10] The asserted aboriginal title over Squamish traditional territory includes the lands within the watersheds draining into Burrard Inlet west of Indian Arm, and lands within the watersheds draining into Howe Sound, including the Squamish Valley to the height of land separating the Howe Sound drainage from the Lillooet drainage (the "Traditional Territory").

[11] Within that traditional territory Mount Garibaldi is an area of cultural and sacred significance. In Squamish Nation history, Mount Garibaldi is known as the harbour of the Squamish Nation during the Great Flood, and therefore is the point of origin of the modern Squamish Nation. The Squamish Nation claims it has exclusively occupied and owned the Mount

Garibaldi area under its laws since time immemorial. Mount Garibaldi is regarded with great reverence.

[12] The Squamish people, both traditionally and presently, use the lands along Brohm Ridge for a variety of purposes including hunting, trapping, medicinal and spiritual practices.

[13] The Squamish Nation's claims to title to the Mount Garibaldi area is well documented and purports to demonstrate that Squamish people have used the Brohm Ridge area for at least 4,000 years.

[14] The Squamish Nation has repeatedly asserted aboriginal rights and title to its traditional territory, including Mount Garibaldi and the Brohm Ridge area. It is presently at Stage 3 of the 6-stage Treaty process with both the Provincial and Federal Crowns. The Treaty Commission accepted the Squamish Nation's Statement of Intent on December 16, 1993.

[15] The Squamish Nation has also produced the Xay Temixw Land Use Plan which designates the Brohm Ridge/Mount Garibaldi area as a "Sensitive Area" where special care must be taken to protect the sacred cultural values which exist there. This area is in the heart of the Squamish territory and is not subject to any significant overlap with other 1st Nations.

[16] The Squamish Nation's claim to the Brohm Ridge area was recognized by the original proponent of the project, the expansion of which is at issue in this Petition, who noted in its application for a certificate under the ***Environmental Assessment Act*** that:

> "The Squamish Nation's use and occupation of their land has continued uninterrupted since the arrival of the Europeans. Despite the negative impact that the European settlement had on their access to Squamish Nation land and resources, their current relationship to the land is extensive, varied and consistent with the reality of life in the late twentieth century."

[17] The Province of British Columbia (the "Province") conducted its own research in June, 2003 which confirmed the Squamish Nation claims to the Brohm Ridge area and concluded the consultation priority to be "High". The author recognized the soundness of Squamish Nation claims to the area, as well as the cultural and religious significance of the area in her conclusions.

[18] The process for developing a commercial ski resort in British Columbia is set out in the Commercial Alpine Ski Policy ("CASP"). CASP is a formal written policy pursuant to the ***Land Act*** that is intended to clarify the exercise of Crown decision-making for land dispositions for ski hills. The

purpose of the policy is to encourage commercial development of Crown Land for alpine ski facilities.

[19] In recognition of the wide-ranging impact of a commercial ski resort, the provisions of CASP require extensive consultation with the public, at least six provincial agencies, and local government. CASP is silent with respect to consultation with First Nations. However, the Crown states that First Nations are included in the "public".

[20] CASP governs the development process from the initial tendering of proposals right through until the execution of Master Development Agreement. CASP sets out the Ministry's commitment when entering into an Interim Agreement, which pursuant to the policy are intended to provide binding commitments from the Crown.

[21] On or about February 28, 1997, an interim agreement (the "Interim Agreement") was signed between the Province and Garibaldi Alpine Resorts (1987) Ltd. ("GAR87").

[22] The Interim Agreement proposed the development of a ski hill with some housing and a limited 5-hole golf course (the "Ski Hill Project"). The Interim Agreement covered a study area of 6,260 acres in the Brohm Ridge area. The original project was based upon a skier estimate of 12,000/day, and

therefore under the CASP policy, the development of hotels and residences was restricted to 12,000 "bed units".

[23] The Interim Agreement was constituted as a formal, legally enforceable agreement pursuant to the Commercial Alpine Ski Policy and defined "the obligations of the parties if a Project Approval Certificate is issued" (or if not issued). It set out a timeline for completion, and details of the final contract. It was conditional upon receipt of a Project Approval Certificate. The Interim Agreement mandated the Province to work towards final completion, to define the steps and studies necessary, and to meet standards of "reasonable" and "diligent" review.

[24] The Interim Agreement also provided GAR87 with a Licence of Occupation pursuant to section 36 of the ***Land Act***, R.S.B.C. 1979, c. 214 (the "Licence"), that allowed it to enter upon the land at any time to carry out its obligations under the Interim Agreement. The Licence also required consideration of the Licensee's interests prior to the authorization of potentially conflicting uses for the land.

[25] Like the Commercial Alpine Ski Policy, the Interim Agreement and Licence are silent with respect to consultation with First Nations, or the discharge of First Nation

consultation obligations representing a condition upon which any further decision would be made.

[26] The Interim Agreement had a four-year term, expiring on February 28, 2001.

[27] On June 10, 1997, the Interim Agreement was assigned by GAR87 to Garibaldi Alpine Resorts (1996) Ltd. ("GAR 96").

[28] The Garibaldi at Squamish resort project, as originally proposed, was a "reviewable project" within the meaning of the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119. Accordingly, the then proponent, GAR 96 applied, in December, 1997 to the Environmental Assessment Office (EAO) for a Project Approval Certificate for the development of an all-season mountain resort at Brohm Ridge, adjacent to the western boundaries of Garibaldi Park. The proponent required the project approval certificate before proceeding with construction of the project.

[29] On December 23, 1997, the Environmental Assessment Office wrote to Chief Joe Mathias of the Squamish Nation notifying the Squamish Nation that the EAO had accepted for review the proponent's application for a Project Approval Certificate, and inviting the Squamish Nation to comment on the

application, and to participate in the environmental review, as a member of the Project Committee.

[30] The EAO consulted with the Squamish Nation in developing the Project Report Specifications, which set the terms of reference for the Project Report which the proponent was required to prepare for review by the Project Committee.

[31] The Project Report Specifications, issued by the EAO in July, 1998 required the proponent to "make its best efforts to identify any potentially adverse impacts of the project on Squamish Nation interests" and to perform a series of studies requested by the Squamish Nation, including:

- historical aboriginal uses of the lands;
- contemporary uses of the lands;
- the potential for restoration of any resources traditionally used by the Squamish Nation;
- the potential impacts on both existing and potential aboriginal uses of the land; and
- archaeological or spiritually significant sites at, or in the vicinity of, the project site.

[32] On November 29, 1999, the EAO issued amended Project Report Specifications identifying additional work and information required from the proponent in order to identify and assess the potential effects of the resort project.

[33] On December 11, 1998, Chief Gibby Jacob informed the EAO that the Squamish Nation intended to participate on the Project Review Committee. He requested funding for their participation. Subsequently, the EAO invited the Squamish Nation to identify their representatives to the Project Committee and advised that it was prepared to discuss how Squamish Nation interests would be identified and addressed in the review, and to discuss arrangements for funding the Squamish Nation's participation. The proponent had not yet submitted its Project Report for review by the Project Committee.

[34] Following the revisions to the Project Report Specifications in late 1999, the environmental review process came to a halt after GAR 96 ran into financial difficulties when its major investor withdrew. GAR 96 sought to arrange financing that would permit it to complete the studies necessary to prepare a Project Report containing the information requested in the original and revised Project Report Specifications. However, it was unable to complete either the environmental assessment review, or Master Plan review processes, before the term of the original Interim Agreement expired in 2001.

[35] Thereafter, GAR 96 made a number of requests to LWBC to extend or reinstate the Interim Agreement.

[36] In or around **[December of 2001] September of 2002**, GAR 96 **[transferred] assigned** its rights in the Ski Hill Project to a new proponent, Garibaldi at Squamish Inc. ("GAS")**[, a company controlled by Luigi Aqulini and Robert J. Gaglardi].** GAR 96 and GAS are engaged in a lawsuit which contests among other things, GAS' control of the project at issue.

[37] On or about September 19, 2002, the Province entered into a "Modification Agreement" with GAR 96 by which it sought to "reinstate and amend" the Interim Agreement and Licence that had expired the previous year (the "Reinstatement Decision").

[38] Through the Reinstatement Decision and Modification Agreement **and the Change of Control Decision**, the Province awarded rights to develop a Ski Area Master Plan to this new ownership group without going through the procedural requirements of CASP.

[39] On or about September 23, 2002, an Assignment Agreement was executed between GAR 96, GAS and the Province whereby the Province accepted the assignment of the rights of GAR 96 to GAS.

[40] It is acknowledged that the Squamish Nation was not consulted by the Crown with respect to either the Modification Agreement, Reinstatement Decision or Change of Control Decision.

[41] On or about December 30, 2002, GAS wrote to the Crown requesting that the study area of the development be expanded to allow for a ski hill with two separate 18-hole golf courses and a much larger real estate development (the "December 2002 Project"). The expanded study area covered by the December 2002 Project was 12,112 acres, close to double the Ski Hill Project study area. No notice was given to the Squamish Nation with respect to this request for expansion.

[42] On or about December 30, 2002, a new act, the ***Environmental Assessment Act***, S.B.C. 2002, c. 43 (the "new ***EA Act***") came into force. On the same date the EAO issued a transition order (the "Transition Order") pursuant to section 51 of the new Act to provide for the continuance of the environmental assessment of the Ski Hill Project under the new ***EA Act***.

[43] The Transition Order provides, in part, that:

> "(1) The application and supporting information provided to date by the Proponent be accepted as an

> application under section 16 of the Act, subject to condition 3.
>
> (2) The time limit specified by the ***Prescribed Time Limits Regulation*** (B.C.REG. 372(02) for the review of this application will commence from the date that the additional information described in the Project report specifications is accepted by the Executive Director for review, subject to condition 3; and
>
> (3) The additional information described in the Project report specifications must be provided to the Executive Director by December 31, 2003 or the current assessment of the Project is terminated and the Proponent may not proceed with the Project without a new assessment.
>
> Pursuant to section 51(6) of the ***Act***, the reason for this order is that the continuance of the assessment of the Project in accordance with this order will ensure a fair, orderly and timely effects of the Project under the ***Act***." [emphasis added]

[44] The Transition Order deadline was subsequently extended to June 30, 2004.

[45] The Squamish Nation first learned of the possibility of the revival of and changes to the Interim Agreement, between January and March of 2003.

[46] On March 26, 2003, and April 24, 2003, the Squamish Nation, through counsel, requested relevant documents and notified LWBC that no alterations to the Interim Agreement, in terms of both approval of the share transfer and an expansion of the boundaries, should be approved by LWBC prior to consultation with the Squamish Nation.

[47] LWBC, through counsel, advised that while consultation would be necessary at some point, it did not believe that consultation was necessary prior to the preparation of a Ski Area Master Plan. LWBC also advised that the processes for review and consultation were set out in the Interim Agreement.

[48] The Squamish Nation met with representatives of the EAO on April 25, 2003 to discuss the Garibaldi process, and were advised that the GAS request for an expansion had been denied. The Nation reiterated its concerns about the process and the project and requested that no further changes to the timelines be made.

[49] On May 16, 2003, representatives of the Squamish Nation attended a meeting with representatives of LWBC. LWBC directly advised that the GAS request for expansion had been rejected by the LWBC Board. LWBC further advised that GAS had appealed that rejection to Minister Stan Hagen and that the original deadline for filing the Master Plan of April 25, 2003 had been extended. LWBC indicated that the appeal was not statutory but political. Squamish Nation representatives expressed their opposition to both the extension of the deadline and to any decision being made by the Minister prior to consultation. The Squamish Nation representatives expressed clear opposition to any expansion of project

boundaries and further indicated that to date LWBC had not kept the Squamish Nation informed about the project.

[50] On June 5, 2003, at a further meeting with LWBC, the Squamish Nation were advised that the expansion had been rejected, and provided a letter from LWBC to GAS (dated May 26, 2003) confirming that it was GAS's intention to proceed with the project as described in the Interim Agreement without the expansion. They were advised that a new Master Plan would be submitted, reflecting the original boundaries.

[51] Also on July 30, 2003, LWBC wrote to Chief Campbell confirming that LWBC had advised GAS that the Master Plan needed to be adjusted to reflect the original boundaries in the Interim Agreement. Attached to that letter was a copy of a letter dated July 14, 2003 from LWBC to GAS confirming that GAS had agreed to revise the design of the project so that it would conform to the original boundaries. That letter to GAS was signed by both LWBC and the EAO.

[52] As a result of the July 30, 2003 letter from LWBC to the Squamish Nation, the Squamish learned for the first time that the authorized capacity of the project had been increased from 12,000 bed units to 15,000, but within the existing boundaries.

[53] On September 18, 2003, the Squamish Nation received a letter from LWBC that indicated that LWBC was currently reviewing a request by GAS to significantly expand the boundaries of the project. The letter was dated September 17, 2003.

[54] The Squamish Nation subsequently learned that a letter requesting expanded boundary areas had been sent to LWBC on July 17, 2003 and that a proposal to expand the boundary of the project had been under consideration since that date.

[55] LWBC then wrote to the Squamish Nation on September 22, 2003 advising that "further to our letter of September 17, 2003, we write to inform you that [LWBC] has approved an amendment to the Interim Agreement between the Province and GAS whereby the study area will be altered and expanded over the land upon which GAS is proposing to develop its mountain/ski project."

[56] The Squamish Nation subsequently learned that LWBC had in fact agreed to the expansion on September 17, 2003 (the "Expansion Decision"), ***prior to the receipt by the Squamish Nation on September 18, 2003 of the letter indicating that LWBC had received a request for expansion and that request was under consideration.*** The September 22, 2003 letter fails to

indicate that the Expansion Decision had been taken on September 17, 2003.

[57] The Squamish Nation took the position that the letters of September 18, 2003 and September 22, 2003 were either designed to give the appearance of consultation when none actually existed, or were an indication that LWBC had not been acting in good faith. The Squamish Nation both directly and through legal counsel requested that if an expansion decision had been taken that it be reversed or that no steps be taken to formalize any amendments to the Interim Agreement pending substantial consultation and accommodation with the Squamish.

[58] The Expansion Decision reflected approval of an expanded proposal by the proponent, including a full 18-hole golf course outside the original boundaries, an equestrian centre, an increase in the number of housing and hotel units from 12,000 to 15,000 units, an increase in the area of housing development outside the original boundaries, and an increase in the carrying capacity of the ski lifts (now the "Real Estate Project").

[59] The change in the project was described by the proponent as a change from a "sleepy 3 or 4 month resort" to "a vibrant four-season resort".

[60] LWBC said the Expansion Decision "will likely lead to the development of an all-season resort with anticipated investment of $200 million in the first stage." and noted the limitations of the original proposal.

[61] On October 23, 2003 the Squamish Nation filed the within Petition.

[62] On March 26, 2004, the Province, through LWBC, set out a proposal (the "Proposal"), conditional upon the resort project proceeding, which has two elements:

(a) Provision of 150 acres of Crown land in fee simple for commercial development which would be compatible with the GAS resort project; and

(b) A Licence of Occupation over an area of approximately 6,000 acres adjacent to the proposed development for non-commercial purposes.

[63] In the March 26, 2004 letter LWBC also set out the benefits which it understood GAS to be proposing for the Real Estate Project which was the subject of the Expansion Decision.

[64] The Proposal was not reached through a consultation process with the Squamish Nation.

[65] Squamish Nation responded to the Province's March 26, 2004 proposal by letter dated April 13, 2004. Chief Jacob noted, *inter alia*, the following with respect to the process that had been followed:

> (a) That LWBC has refused to consult about the Expansion Decision, the Reinstatement Decision and the Change of Control Decision or about Squamish Nation rights, title and cultural interests;
>
> (b) That because of the refusal to consult, the Proposal was unilateral and could not substitute for proper consultation and accommodation; and
>
> (c) That a fair consultation process would not start with the decision pre-determined and irreversible.

[66] Chief Jacob also noted the following points in relation to the Proposal:

> (a) That it failed to address or mitigate in any way the severe cultural infringement represented by the Ski Hill Project, Expansion Decision and the Real Estate Project Expansion Decision;

(b) That the Licence of Occupation granted no new rights, and in fact was itself an infringement of existing Squamish Nation rights and title;

(c) That a Licence relating to a different area could not mitigate the loss of such a culturally significant site;

(d) The provision of 150 acres in substitution for the loss of over 7,300 acres was wholly inadequate;

(e) The restriction that the 150 acres could only be used for commercial development compatible with the GAS project was inappropriate; and

(f) That the requirement for an agreement with the Province and GAS that the 150 acres not be developed until "substantially all of the GAS development has been completed" was unacceptable, and granted a priority inconsistent with the Crown's constitutional obligations.

[67] Finally, Chief Jacob noted that the Province's reliance upon any offer by GAS was misguided. Chief Jacob understood that any offer which was currently on the table from GAS was subject to the Squamish Nation agreeing to a further project

expansion, beyond that which was the subject of the Expansion Decision. The GAS proposal is not available on the Ski Hill Project or the Real Estate Project and was also not the result of any consultation process.

[68] On April 21, 2004 LWBC responded to the Squamish letter. LWBC repeated its understanding that the "benefits" that GAS had proposed were not tied to any further expansion, and were available on the Real Estate Project, which was the subject of the Expansion Decision.

[69] The Court was advised at these hearings by the proponent GAS that while it seeks acceptance of the project expansion decision to 7,300 acres from the original 6,260 of the Interim Agreement, it will seek during any EA review, as provided for under the new legislation, an amendment or modification and will seek to expand the project to the larger area of 12,112 acres as it does not consider the smaller area **to be** as economically viable **as the 12,112 acre proposal**.

LAW

[70] A useful discussion of the development of the caselaw in the area of the duty of consultation, is found in ***Gitxsan and Other First Nations v. British Columbia (Minister of Forests)*** (2002), 10 B.C.L.R. (4th) 126, 2002, BCSC 1701. The duty of

consultation has been considered in a number of Court of Appeal and Supreme Court of Canada decisions. In summary that duty arises from the fiduciary duty of the Crown to recognize, affirm and protect aboriginal rights however they arise. Crown title is burdened by aboriginal title and rights — and thus there my be two conflicting rights whenever the Crown seeks to grant rights to parties over land claimed as subject to aboriginal rights. The duty to consult and accommodate then arises from those potentially conflicting rights and becomes the means of reconciling those rights. Whether aboriginal title and rights are potentially infringed must be assessed in light of the potential of a Crown granted right in question being inconsistent with the exercise of aboriginal rights including title if such rights should be proven to exist in the area in question.

[71] In ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, (1997), at 1112 at para. 168, Chief Justice Lamer made clear the duty to consult and its general scope:

> Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within

> it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leaded may breach its fiduciary duty at common law: ***Guerin.*** [emphasis added]
>
> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[72] In ***Haida Nation v. British Columbia (Minister of Forests),*** (2002), 99 B.C.L.R. (3d) 209, (Haida No. 1) at para. 55 Lambert J.A., after quoting from ***Delgamuukw*** and considering the duty to consult concluded that the obligation to consult and accommodate is a free standing enforceable legal and equitable duty.

[73] The duty to consult is triggered whenever there is the potential for impact of third party interests on claimed

aboriginal lands. In this case — there can be no issue about how or why that duty arises at the earliest stages. The Crown knew of the aboriginal claims and knew before it reinstated the Interim Agreement and approved the Change of Control that the Squamish Nation had defined and confirmed interests in the area and a concern about the negative impact on their interests (which were then and still are the subject of treaty negotiations) of any commercial development specifically including a ski hill development. ***Mikisew Cree Nation v. Canada (Minister of Canadian Heritage)***, [2002] 1 C.N.L.R. 169 at 211-213 – a recent decision of the Federal Court Trial Division discusses the importance of consultation at early stages of planning.

[74] The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions, Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of <u>early</u> consultations being an essential part of meaningful consultation. At this point, and for some time, GAS has asserted legally enforceable rights to pursue the expansion agreement even though it is aware that there has been no consultation. There is thus, the clear appearance of

bias in favour of GAS's expansion plans, as GAS has issued a warning of legal proceedings against the Crown should rights they believe they now have not be realized.

[75] The case law establishes that the proper questions to be asked in order to assess whether the duty to consult and its scope will arise in respect of statutory decisions in respect of an activity which causes a potential infringement to aboriginal rights and title are these:

a) Does the decision purport to grant rights, in enforceable terms, either actual or conditional ones, in relation to lands which would be inconsistent with aboriginal title or rights?;

b) Does the decision constitute the imposition of obligations or the fettering or restriction of Crown discretion over lands upon which there were duties of consultation?;

c) Does the decision amount to an important decision with respect to the use of aboriginal title lands (including the identity of the future operator)?; and

d) Is the decision a statutory decision which is in furtherance of a legislative or administrative scheme that has the potential to infringe aboriginal rights or title?

(e) Is there <u>strong</u> potential to affect the claimant's rights

[76] In Gitsxan, Tysoe, J. found:

> I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any

> of the conditions attached to them, the change in control was not neutral from a practical point of view [emphasis added]

[77] Here the practical implications of the change of control decision are dramatic. The original proponent made a comparatively modest proposal for the development of a ski resort. The Squamish Nation although not formally "consulted" was invited to make submissions on the possible accommodation with such a proposal at the time of the environmental assessment stage. It used that opportunity and made submissions. Subsequent to that process, the new controlling shareholders wasted no time in securing an expansion of the project. Further, at this point, GAS forthrightly states it really is mainly interested in the greatly expanded project.

[78] The defendant government has always agreed there was and is a duty to consult the Petitioners about a decision to allow the development of a ski and golf resort to be built on land which is the subject of the aboriginal rights including title claimed by the Squamish Nation.

[79] Initially the government's position was that the duty to consult was not triggered by any of the decisions made in the approval process required of the proponents of the ski development until the plans had been sufficiently refined that an Environmental Assessment process was underway. In the

approval process leading to that assessment review there are several preliminary steps or hurdles for a proponent and decisions to be made by the government agencies as to whether any particular proposal is appropriate to go on to the next stage. After this hearing was underway in May of this year, the government modified its position and acknowledged that its duty to consult may have arisen earlier. It sought an adjournment of the hearing to seek settlement of the issues including trying to arrive at a consent order. Over objections to such an adjournment from the proponent GAS and the Petitioner, I granted the adjournment to an early resumption date, if settlement was not achieved with leave of the parties to return to court for further directions toward settlement.

[80] Settlement was not achieved. Earlier court dates were not available and the hearing resumed on September 10.

[81] In the interim, the government sought consultation with the Squamish Nation in relation to some or all of the impugned decisions – the Squamish Nation resisted such consultation until the ground rules were established to their satisfaction. The issues surrounding the appropriate ground rules for meaningful consultation among these parties now require the Court to set out the principles to be followed.

[82] Broadly speaking, the specific circumstances in this case which are of most relevance in determining the timeliness and scope of the duty to consult are the following:

1. The aboriginal rights at issue include claimed aboriginal title and other significant aboriginal rights relating to the use of the land in question. The strength of all of those rights and their precise nature is not conceded by the Crown, however, that there is a strong case for aboriginal rights in the area, is conceded. Those rights have been formally asserted and have reached Stage 3 in the Treaty process.

2. The Squamish Nation objected since first it became aware of any proposal for commercial development on land it claims. It was notified in December of 1997 of the original proponents proposal on impacts of a relatively modest proposal for a ski hill development by the early proponent, GAR 96. That proposal lapsed. The Squamish Nation agreed to participate in early discussions but never took the position that any commercial development was agreeable.

3. The decisions made thus far, including Reinstating the lapsed agreement, have not granted any rights to land, but have granted rights to be engaged in the long approval process toward the granting of such rights.

4. *Prima facie* a ski and golf resort of any size will have an impact on the exercise of the claimed aboriginal rights.

5. If the Squamish can prove aboriginal title, that is, exclusive rights to use the land - to any significant part of the land covered by the proposed resort - or any land directly adjacent to it - then accommodation of those rights may entitle them to a near veto, if not a veto, having regard to the specific circumstances of this case. The strength of the claim to title and its breadth is the most contested aspect of the claim - but it is agreed that it is possible they may have title to some land somewhere in the proposed impacted area.

6. The area at issue is still primarily wilderness, that is, although modest encroachments are present, if the aboriginal rights claimed were declared and

> affirmed today - full exercise would be possible and compensation for their loss would not be necessary. This is an important consideration in informing the scope and duty of consultation as well as the reasonableness of any accommodation.

[83] Thus, in my view, the duty to consult in this case arises at the earliest decision making by the government in an approval process leading to the possible infringement of claimed aboriginal rights. Further, the accommodation which may be required in order to justify any infringement may include requiring the consent of the Squamish Nation to some part of the proposed infringement. Therefore, the consultation process must be full, timely and well documented.

[84] Among other considerations, in relation to meaningful consultation in this case - because the claimed rights have as yet not been substantially infringed and the ***prima facie*** strength of the aboriginal rights is high and includes title, the importance of the legislative objective of economic development must be evaluated in relation to the proposed development of a ski and golf resort. Then that evaluation must be considered in relation to the potential impact on the uses inherent in the exercise of the asserted rights.

[85] Thus, in this case, specifically, - the need and viability of a ski hill and golf resort of any size in this location is a relevant consideration in determining how and whether the accommodation of aboriginal competing interests is to be achieved.

[86] The need for meaningful consultation as discussed above, at every step of the way in this case, is highlighted by the reasoning in the ***Halfway River First Nation v. British Columbia (Ministry of Forests)*** (2000), 178 D.L.R. (4th) 666 (B.C.C.A.) including the dissent of Southin J.A. That case was dealing with Treaty rights on the part of the First Nation - and already granted rights to Canfor. In order for Canfor's rights to be implemented, they were and are, subject to administrative decisions by a District Manager.

[87] The majority upheld the decision of a chambers judge quashing a decision which granted cutting rights to Canfor. Essentially, the majority found that the failure to consult the Halfway River First Nation resulted in an inability on the part of the Crown to justify any possible infringement. Here, infringement of Squamish Nation rights on the ground has not yet occurred and accommodation has not been explored.

[88] Justification requires consideration of the following questions (said in ***Sparrow*** not be an exhaustive or exclusive list):

> 1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
>
> 2. Whether legislative or administrative conduct infringes the treaty right as little as possible;
>
> 3. Whether effects of infringement outweigh the benefits derived from the government action; and
>
> 4. Whether adequate meaningful consultation has taken place.

[89] As Huddart J.A. stated in ***Halfway*** at para. 191:

> In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

[90] This paragraph is quoted by Southin J.A. in dissent to expose a difficulty of no inconsiderable moment. From a principled and practical point of view, how does the economic and social life of the Province carry on on behalf of all British Columbians including aboriginal people while large

parts of the Province are subject to undeclared aboriginal rights. It is salutary to remember that ***Halfway*** demonstrates complexities and costs in the process where rights have been declared. In that case treaty rights and competing granted rights to Canfor. Southin J.A. pointed out the sense of practical frustration and injustice on both sides of the situation demonstrated by a failure to consult ***Halfway***. At para. 234 she said:

> If the Crown has so conducted itself that it has committed a breach of its obligations under the Treaty to the respondents and, perhaps, other First Nations who are also Beaver Indians, then it is right that the Crown should answer for that wrong and pay up. The paying up will be done by all the taxpayers of British Columbia. But it is not right that Canfor and all others, who in accordance with the ***Statutes of British Columbia*** have obtained from the Crown rights to lands in the Peace River and conducted their affairs in the not unreasonable belief that they were exercising legal rights, should find themselves under attack in a proceeding such as this.
>
> Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

[91] In this case there are undeclared aboriginal rights on the one side and interim and conditional rights to process on the other.

[92] Thus, the need for consultation to take place at the earliest opportunity arises, before parties seeking land

rights from the government have invested such time and money that practical frustration ripens into legally enforceable rights against the Province and ultimately to the detriment of all British Columbians.

[93] The duty to meaningfully consult in this case arises in relation to the earliest decisions because LWBC knew, from discussions with the Squamish Nation in relation to the GAR 96 earliest proposal that significant rights were being asserted by the Squamish Nation which could result in the need for such significant accommodation that proposals by GAR 96 or others might never be able to go forward. At no time could it be said before or after the GAR 96 proposal that the government was unaware of the legitimate need to meaningfully consult with the Squamish Nation.

[94] Thus, I find that there has been a breach of the government's fiduciary duty to the Squamish Nation in failing to consult the Squamish Nation. The result, at least in part, appears to be a loss of trust in the good faith of the decision makers in relation to decisions already made with regard to the Ski Hill proposals and those still to be made. This loss of trust has made any consultation more difficult to make meaningful. The appropriate remedy, in addition to the declaration that such is the case, is that, in relation to all

of the decisions having been made without consultation, consultation must include consideration of the issues as if those decisions had not already been made.

[95] I would add, meaningful consultation consists of two fully engaged parties.

[96] The Squamish Nation is entitled to timely notice of any proposal in relation to which a decision is sought which could affect their aboriginal interests in the land.

[97] All information relevant to their ability to make meaningful submissions must be provided. On the part of the Squamish Nation they must advise of any specific requirements they have in the way of information in the government's control and once it is provided they must be prepared to make timely submissions based on consideration of the provided information and evidence of their claims and impacts of the proposed government action on the exercise of their claimed rights.

[98] Thus, in summary I set out the applicable principles which must guide consultation in this case.

[99] There was and is a fiduciary and constitutional duty to consult before any decision can be final with regard to the following decisions already made:

- Reinstatement Decision
- Change of Control Decision
- Expansion Agreement Decision

[100] The Expansion Decision is sent back for full reconsideration after consultation has taken place with regard to the earlier abovementioned decisions.

[101] **These Reasons for Judgment do not purport to address whether GAR 96 should be heard in relation to its rights or interests, if any, at the consultation hearing to be held with respect to the Reinstatement and Change of Control decisions**.

"M.M. Koenigsberg, J."
The Honourable Madam Justice M.M. Koenigsberg