

***Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests):
The Second Hupacasath Case***

1. INTRODUCTION

Like Mr. Justice Tysoe's decision in *Gwasslam v. British Columbia (Minister of Forests)*, 2004 BCSC 1734 [***Gitanyow #2***], which followed upon his earlier decision in *Gwasslam v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 [***Gitanyow #1***], **Madame Justice Lynn Smith's** decision in *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 [***Hupacasath #2***] is the followup to her earlier decision in *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2005 BCSC 1712 [***Hupacasath #1***]. Similar to Mr. Justice Tysoe's finding in *Gitanyow #2*, she found that the Crown had still not, despite her earlier ruling and orders, fulfilled its constitutional duty to consult with the Hupacasath First Nation and accommodate their rights in regard to a decision by the Minister raising serious concerns about the future of their collective rights, interests and even identity.

The dispute in both *Hupacasath* cases centred on 70,000 hectares on Vancouver Island, around Port Alberni, to which the Hupacasath First Nation claims rights and title by virtue of their prior occupation and use, which have been privately owned since 1887 and are currently owned by Island Timberlands LP, and over which the Province relinquished considerable control when the Minister of Forests decided to remove the lands from Tree Farm Licence 44 in 2004 at the request of then-owner Weyerhaeuser (**the Removal Decision**).

2. HUPACASATH #1

In *Hupacasath #1*, the First Nation sought judicial review of the Removal Decision on the basis of the Minister's failure to fulfill his constitutional duty to consult with them and accommodate their rights in regard to the private lands (**the Removed Lands**) prior

to making his decision. Having found that the Minister had failed in his duty, in December 2005 Madame Justice Smith ordered the Crown to consult with the Hupacasath in regard to the Removal Decision and its effects on their rights and interests. Although she declined to quash the Removal Decision, she imposed a set of conditions for a two year period on what Island Timberlands could do with the lands.

3. HUPACASATH #2

After the two year period had expired without the Province, advancing an accommodation offer reflective of their rights at stake, the Hupacasath returned to Court. In *Hupacasath #2*, they sought orders directing the appointment of an independent mediator, directing the mediation to focus on certain specific areas for appropriate accommodation, setting a deadline of six months for completion of the consultation and accommodation but permitting the parties to return to court if necessary to seek an extension, and re-imposing the original order's conditions on Island Timberlands.

a. Key Findings

Given the facts that over the previous two years the parties had been intensively engaged in discussions, that as many as five different Ministries and government agencies were involved, and that the Province had offered various forms of accommodation, all of which the Hupacasath rejected, Madame Justice Smith had at the outset to address the twin questions:

- i. what, if anything, went wrong? and
- ii. who, if anyone, was responsible?

Addressing these questions, she made a number of key findings.

- i. She found that the Crown's change of its lead representative after roughly 10 months of consultation together with its slow pace of response had caused some delay, although not deliberate delay.

- ii. She found the involvement of so many Ministries and agencies gave rise to a confusion of mandates and a consequent loss of focus. On the question of responsibility for the confusion and loss of focus, she found:

Since it is the Province that (by necessity) divides its mandate among Ministries and agencies, it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible (147).

She noted that in the face of this complexity and confusion that “although HFN representatives raised the possibility of involving a facilitator on at least two occasions, the Crown did not agree to do so” (148).

- iii. Despite the Hupacasath's concerns for the future of their relationship to the Removed Lands, the Crown had declined to look beyond financial compensation to accommodating the possible future exercise of their rights over the lands through, for example, legislative change or purchase of an area known as Grassy Mountain to preserve it as a sacred site.
- iv. Contrary to the Province's suggestion that the First Nation was more interested in economic compensation than in sacred sites and ongoing cultural practices on the Removed Lands – because it had put monetary value on what it stood to lose –, the Hupacasath had shown realism:

I find that the consultation record shows the HFN consistently raising the issue of access to sacred sites and resources important to the preservation of their culture. The fact that, in the face of the Crown's consistent refusal to discuss ways of dealing with those issues on the Removed Lands, they considered other options that would draw on the remaining Crown lands or on economic compensation, in my view shows realism rather than the opposite (159).

b. Standard of Review

Subsequent to the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, courts have struggled to elaborate and apply the Court's remarks on the standard of review. After her survey of recent cases, including *Gitanyow #2, Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, and others, Madame Justice Smith summed up the law as follows:

I conclude that the standard of review for whether the Crown understood the existence and extent of its duty is correctness. In my view, deference is not warranted on the question of the existence and nature of the constitutional duty, or, if any deference is warranted since the nature of the duty is to be determined in the context of the circumstances as a whole, that deference should be minimal. I also conclude that the standard of review for whether the Crown complied with its duty is reasonableness. The Crown should be afforded deference regarding its choice of consultation and accommodation process, so long as it falls within a range of possible, acceptable choices (187).

Whether the Crown met its duty to consult and accommodate the Hupacasath depended therefore, first, on whether it correctly understood what was required and, second, on whether the steps it took to consult and accommodate were reasonable.

c. The Crown's Misconception of its Duty

Madame Justice Smith concluded that the Crown had misunderstood its duty both in respect of consultation's purpose, and in respect of the context in which its duty arose and was shaped. As for the purpose of consultation, drawing upon *Haida Nation*, at paragraph 203 she wrote:

In considering whether the Crown properly understood its duty in this case, it is important to keep sight of the reason for the existence of the duty to consult. **The Crown is honour-bound to consult and attempt reconciliation with aboriginal peoples when it makes decisions potentially affecting their unproven rights with respect to the occupation and use of land, because otherwise those rights may be devoid of content by the time they are recognized by courts or through treaty** (emphasis added).

Again drawing from *Haida Nation*, she emphasized the centrality of *balancing* the Crown's fulfillment of its duty to accommodate and reconcile:

... The goal in all cases is reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (para. 45), and the effect of good faith consultation may be to reveal a duty to accommodate (para. 47). Accommodation requires good faith efforts to understand each other's concerns and move to address them, "*seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation*" (para. 49). The Court stated at para. 50:

50 Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, ***the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.***

The Aboriginal peoples do not have a veto, and there is no ultimate duty to reach agreement: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 666 at para. 61. Rather, the Supreme Court stated in *Taku* at para. 2, "***[A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns***" (emphasis added). (para. 214-215)

As for the context of the Crown's duty, Madame Justice Smith noted that her decision in *Hupacasath #1* provided crucial context shaping the Crown's duty in the circumstances. In particular, her decision had made clear that the Hupacasath had advanced "a credible factual claim" to aboriginal rights on the Removed Lands, despite the yet unresolved legal uncertainty about the relationship between aboriginal rights and fee simple title (222-229), and that "the only possible purpose of after-the-fact consultation was to provide a process in which the Crown and the Hupacasath First Nation would attempt to agree on accommodation for the possible impacts of the Removal Decision" (232).

She further noted that despite her decision, the Crown had proceeded as though the Hupacasath's rights on the Removed Lands were non-existent and thus had even

questioned whether it had any duty to accommodate in regards to impacts on the Removed Lands. For this, she criticized the Crown as follows:

It is relevant to note that the Crown did not appeal the 2005 Decision. It was required, in its approach to the consultation and accommodation discussions, to accept the conclusions reached in that decision. Those conclusions included findings that the HFN could suffer adverse impacts on their aboriginal rights, both with respect to the Removed Lands and the Crown lands within their asserted traditional territory, as a result of the Removal Decision. **The Crown's position in the consultation, however, seemed at times inconsistent with acceptance of those conclusions** (238 – emphasis added).

Because the Crown had avoided even trying to balance and thus reconcile the Hupacasath's rights with the rights and interests of the Province and Island Timberlands in the Removed Lands in the interim opportunity afforded by her decision in *Hupacasath #1*, and because it ignored the context giving shape to its obligations, she found that

... the position taken by the Crown is inconsistent with a balancing process aimed at eventual reconciliation, and is inconsistent with the context of this dispute (in particular, with the conclusions reached in the 2005 Decision) (239).

Accordingly, she found that the Crown had not correctly understood its duty.

d. The Crown's Failure to Proceed Reasonably

Madame Justice Smith found that the Crown not only misunderstood the scope of its duty to consult, but did not take reasonable steps to consult with and accommodate the Hupacasath.

She found that the Crown had “a duty to focus on the relevant issues in the discussions (250)”; and those issues included “the possible impacts of the Removal Decision, particularly with respect to the Removed Lands (246)”.

Specifically, she found that “the Crown’s misconception about what was required in the circumstances led it to conduct the process in a way that was not reasonable (242).”

In short, she found that the Crown lost its focus because of its misconception of its duty to consult.

Madame Justice Smith summed it up:

In short, the Crown's duty required a process focused on the possible impacts of the Removal Decision. Because the consultation process was delayed for various reasons, and because it became enmeshed in other complex processes, that focus was lost.

The Crown's position essentially was that the Removal Decision did not significantly change the Hupacasath's position, and that the Crown was not required to consider steps which would accommodate for what the HFN stood possibly to lose as a result of the Removal Decision. As examples of what could have been considered: could the Crown find a way to assist the HFN in retaining access to at least the most important of their sacred sites? was it possible for the Crown to provide improved access to resources on the Crown lands in replacement of the former access to such resources on the Removed Lands? could wildlife corridors be protected so that the animals hunted by the HFN would still be available on the Crown lands? Those are not the questions upon which the parties focused, although the evidence shows that the Hupacasath did try to raise them.

There is no duty to reach agreement, but there is a duty to focus on the relevant issues in the discussions.

Consultation and accommodation with the goal of reconciliation is a two-way street; the HFN were required to conduct themselves reasonably in the process. If a First Nation is intransigent and unresponsive to government attempts to consult, those government efforts may be found reasonable even if they do not bear fruit.... As stated earlier in these Reasons, I find that the HFN did, overall, conduct themselves reasonably in this process. They participated willingly, and showed readiness to compromise in that they were open to forms of accommodation that did not involve the Removed Lands, while continuing to insist that they had lost something significant when the Removal Decision was made. The fact that they continued to press their claims does not mean that they were being unreasonable. They were by and large consistent in their position, though the delivery of the judgment in Tsilhqot'in Nation led to a hardening of their views, with a new insistence on co-management.

Reasonableness, not perfection, is required, of the Crown in its efforts to consult with and accommodate aboriginal peoples when it makes decisions potentially affecting their claimed aboriginal rights. Here, I find that the Crown's efforts did not fall within a range of reasonably defensible approaches in the context of the 2005 Decision and the history and relationship between the parties (248-252 – citations omitted).

She then found that “the Crown has not yet fulfilled its duty with respect to the Removal Decision (253).”

e. Remedies

Madame Justice Smith set out certain specific remedies which had been requested by Hupacasath. These remedies included:

- i. Appointment of an independent mediator paid for by the Crown with the power to set timelines, direct the exchange of information and report to the court if there are difficulties.
- ii. The direction of the mediation to focus on addressing appropriate accommodation for the effects of the Removal Decision on Hupacasath rights, both with respect to Crown land and the Removed Lands in a number of specific areas, including addressing “possible measures to assist the HFN in obtaining the co-operation of the landowner to enable the HFN to exercise ongoing access to their sacred sites and areas where they have traditionally gathered medicinal plants on the Removed Lands.
- iii. A direction that the parties could return to court to address the definition of the issues they are required to address in the mediation, or for further clarification as to the Crown’s duty of consultation.
- iv. The parties were also granted the right to return to court to seek an extension of time if six months proved insufficient.

Because of assurances she had been given by both Island Timberlands and the Crown, Justice Smith declined to grant an order re-imposing the original order's conditions on Island Timberlands. She did nonetheless order that

... during the period of the further consultation between the Crown and HFN (whether it is six months or longer), if there is any change in Island Timberlands's position (from the position described by counsel to the Court or by Mr. Waugh in his affidavit) as to the ongoing effectiveness of the conditions in the Minister's letter, as to HFN access to the Removed Lands or as to other matters, Island Timberlands will so advise the petitioners and the Crown, and the parties will be at liberty to return to court (265).

Finally, given "the more than ordinary difficulty" of the matter before her and the substantial success of the petitioners, she ordered that the Hupacasath would have their costs against the Crown at Scale C, the highest scale (268).

4. FINAL REMARKS

Madame Justice Smith's earlier decision in *Hupacasath #1* was groundbreaking in a number of ways, most obviously in her finding that the Crown had a duty to consult with and accommodate the Hupacasath on the impacts of the Crown's decision on rights asserted over private lands. Her decision in *Hupacasath #2* significantly clarifies and confirms her finding. Despite the present uncertainty over the relationship of aboriginal title and fee simple *in law*, a First Nation may, her decision shows, present a factually credible claim to such rights on such lands – and thus a claim that may found a duty to consult and accommodate.

Her decision in *Hupacasath #2* further strengthens the legal principle arising out of *Gitanyow #2* and more recently *Wii'litswx* that the previous decisions of the courts can form an important part of the context shaping the Crown's duty to consult and accommodate. In other words, the Crown cannot begin each consultation process *de novo*, with a "blank slate" mentality, particularly when courts have previously made

relevant findings on the strength of the claims and the seriousness of the potential impacts.

Madame Justice Smith's willingness to grant an order appointing an independent mediator – apparently a first in a consultation case - is also evidence of the increasing seriousness with which the courts view the reconciliation process and their role in reconciliation of aboriginal and non-aboriginal peoples.

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