BECKMAN V LITTLE SALMON/CARMACKS FIRST NATION

Supreme Court of Canada (McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ)
19 November 2010
[2010] 3 SCR 103

Canada – constitutional law – duty to consult – modern comprehensive land claims treaty – treaty recognition of Aboriginal right to subsistence hunting and fishing over traditional territory that was surrendered to the Crown by treaty – application approved for an agricultural land grant over land subject to Aboriginal right – whether there was a duty to consult Aboriginal peoples – scope of duty – whether the Crown had discharged duty to consult – whether there was a duty to accommodate – administrative law – judicial review – procedural fairness – standard of review – whether standard of review met in this case

Facts:

After many years of negotiation, in 1997 the Little Salmon/Carmacks First Nation ('LSCFN') concluded a modern comprehensive land claims treaty with the Yukon and Federal governments of Canada. In 2001, Larry Paulsen made an application for an agricultural land grant over land that formed part of the traditional territory of the LSCFN. The land subject to the application had, under the LSCFN treaty, been surrendered to the Crown by the LSCFN, though LSCFN members retained a treaty right of access to hunt and fish for subsistence purposes.

After going through a number of approval processes, Paulsen's land grant application was scheduled by the Land Application Review Committee to be discussed at a meeting on 13 August 2004. The LSCFN was given notice of the meeting and was invited to provide pre-meeting comments and participate in discussions at the meeting. While the LSCFN provided a letter of opposition to the land grant application prior to the meeting, no LSCFN representatives attended the meeting. Having considered amongst other things the LSCFN's objections to Paulsen's application, the Land Application Review Committee recommended approval of the grant in principle.

On 18 October 2004, the Director of the Agriculture Branch of the Yukon Department of Energy, Mines and Resources ('Director') approved the grant to Mr Paulsen. The LSCFN was not informed of the decision at the time, and only found out in the summer of 2005 after making its own enquiries. The LSCFN sought judicial review of the Director's decision.

In this appeal from the Yukon Court of Appeal, the Supreme Court of Canada had to determine the scope and nature of the Crown's constitutional duty to consult in the context of a modern land claims treaty. The first issue was whether the Yukon Government had a duty to consult with the LSCFN in deciding to approve the grant and, if so, what such a duty required. This was in the context that the LSCFN had by treaty surrendered the land in question to the Crown while retaining a treaty right of subsistence hunting and fishing over the land. If the Crown did indeed have such a duty to consult, the second issue for the Court was whether the duty to consult had been discharged in the present case.

Held, dismissing the Yukon Government's appeal, that the Crown had a duty to consult, and dismissing the LSCFN's cross-appeal, that the duty had been discharged, per Binnie J, McLachlin CJ, Fish, Abella, Charron, Rothstein and Cromwell JJ agreeing (Deschamps and LeBel dissenting as to reasoning but not result):

1. The duty to consult, as a means of upholding the honour of the Crown, applies as a matter of law independently of the express or implied intention of the parties to a treaty. The Crown cannot contract out of its duty of honourable dealing with Aboriginal people: [61], [69]; *Haida Nation v British*

Columbia (Minister of Forests) [2004] 3 SCR 511 followed; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 followed.

2. Where a process of consultation has been established by a treaty, the duty to consult can be shaped by the terms of the treaty. In the context of a modern treaty agreement, the first step is to look at its provisions so as to determine each parties' obligations and whether the treaty itself provides for some form of consultation: [61], [67].

3. Though there was no express duty to consult under the LSCFN treaty so far as land grants were concerned, there nevertheless existed a duty to consult in this case. Land grants were not prevented by the treaty, but it was obvious that such grants might adversely affect the traditional economic activities of the LSCFN, which were protected by an express treaty right to subsistence hunting and fishing over surrendered land. Accordingly, the Yukon Government was required to consult with the LSCFN to determine the nature and extent of such adverse effects: [13], [57], [71].

4. In this case, the duty to consult was at the lower end of the spectrum. This was because the land in question had been surrendered by treaty and the surrender implemented by legislation, and because the parties had not decided to incorporate a more general duty to consult in the treaty itself: [57].

5. The LSCFN treaty set out a level of consultation at the lower end of the spectrum, which provided a useful indication of what the parties themselves considered fair and which was consistent with the jurisprudence on the duty to consult. Under the treaty, consultation consisted of: notice of a matter to be decided with sufficient form and detail to allow preparation of a response, a reasonable period of time in which to prepare a response and an opportunity to present such response, and full and fair consideration of the response: [73]–[75]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 followed; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 followed.

6. To comply with both the duty to consult and requirements of procedural fairness, and before making a decision as to whether accommodation of the LSCFN was necessary or appropriate, the Director was required to be informed about the nature and severity of possible impacts the land grant might have on the LSCFN in economic and cultural terms. Consultation was required to help manage the important ongoing relationship between the Government and the Aboriginal community in a way that upheld the honour of the Crown. It was not intended to be used to reopen or renegotiate the LSCFN treaty: [73].

7. The requirements of the duty to consult were met in this case. The LSCFN received appropriate notice and information about the land grant application and an opportunity to make its concerns known to the decision-maker. The LSCFN's objections were made in writing and dealt with at a meeting where the LSCFN was entitled to be present. The LSCFN's objections and the response of those who attended the meeting were before the Director when he approved the land grant application: [7], [76]–[80].

8. There was no duty to accommodate in this case. Accommodation was not required by the LSCFN treaty itself or the surrounding circumstances: [81]–[82]; *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 cited; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 cited.

9. There was no breach of procedural fairness in this case. Procedural fairness is a flexible concept capable of taking into account the Aboriginal dimensions of the decision that faced the Director. The doctrine also applies to regulate the relations between the Yukon Government and all Yukon residents, which in this case included both the LSCFN and Mr Paulsen: [79].

10. The Director, in making his decision concerning the land grant application, was required to respect legal and constitutional limits, including the honour of the Crown and the duty to consult. In respect of these limits, including the adequacy of consultation, the standard of judicial review is correctness. However, provided there was adequate consultation and the process was otherwise within legal and constitutional limits, the standard of review is reasonableness: [48]; *Dunsmuir v New Brunswick* [2008] 1 SCR 190 cited; *Canada (Citizenship and Immigration) v Khosa* [2009] 1 SCR 339 cited.

11. In this case, the Director did not err in law in concluding that the consultation with the LSCFN was adequate. Advice received by the Director after consultation was that the impact of the land grant on the LSCFN would not be significant. On the evidence, there was nothing to suggest the Director failed

to give 'full and fair consideration' to the LSCFN's concerns, or that there was any palpable error of law in the Director's conclusion. Furthermore, the Director's decision was not unreasonable. It is irrelevant whether or not a court would have reached a different conclusion on the facts: [85]–[86], [88].