Federal Court of Appeal  Cour d'appel fédérale

Date: 20190808

Docket: A-39-18

Citation: 2019 FCA 216

CORAM: **DAWSON J.A.**
WOODS J.A.
RIVOALEN J.A.

BETWEEN:

THE SQUAMISH INDIAN BAND, AND SYETÁXTN, CHRISTOPHER LEWIS ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SQUAMISH INDIAN BAND

Appellants

and

MINISTER OF FISHERIES AND OCEANS

Respondent

Heard at Vancouver, British Columbia, on April 8, 2019.

Judgment delivered at Ottawa, Ontario, on August 8, 2019.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WOODS J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Prior to European contact, Indigenous groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. Indigenous peoples' lives "centered in large part around the river and its abundant fishery." (*R. v. Kapp*, 2008 SCC 41,

[2008] 2 S.C.R. 483, paragraph 4). Today, First Nations are prohibited by the *Fisheries Act*, R.S.C. 1985, c. F-14 and its associated regulations from fishing for any purpose, except as authorized by licences issued by the Department of Fisheries and Oceans or the Minister of Fisheries and Oceans.

[2] "Fraser sockeye" are a migratory species of sockeye salmon that originate in the Fraser River Watershed. Fraser sockeye may travel as far as 1,500 kilometers upstream to return to their natal spawning lake or river. Fraser sockeye typically have a highly productive return every four years. This results in an anticipated abundance of stock once every four years. However, fisheries managers and biologists employed by the Department of Fisheries and Oceans have identified a decline in Fraser sockeye abundance and productivity since the early 1990s.

[3] Today, approximately 140 First Nations, including the Squamish Indian Band, are licenced to fish along various points of the migratory routes for Fraser sockeye for food, social and ceremonial purposes. In recent years, the amount of returning Fraser sockeye has been insufficient to meet the existing fishery allocations to First Nations for food, social and ceremonial purposes in two or three years out of the four year Fraser sockeye cycle.

[4] For these and other reasons there are significant challenges in managing the Fraser sockeye fishery. This appeal arises in this challenging factual situation.

I. Factual background

[5] The Squamish Indian Band is a band as defined by the *Indian Act*, R.S.C. 1985, c. I-5. The Squamish are a distinct group of the Coast Salish peoples, with their own language, economy and culture.

[6] The applicable administrative and legislative schemes are explained briefly below. At this point it is sufficient to state that the parties agree that around 1992 Squamish was granted an allocation allowing it to catch 20,000 pieces of Fraser sockeye per year; Squamish entered into a comprehensive fishing agreement on this basis and Squamish also received a communal fishing licence on this basis.

[7] The parties also agree that once an allocation is set, the allocation continues to apply to subsequent years, unless a request is made for an increased allocation.

[8] On July 5, 2011, Squamish requested "a substantial increase" in the amount of fish they are allocated to harvest for food, social and ceremonial purposes. On January 27, 2012, Squamish specifically requested that their allocation for Fraser sockeye be increased from 20,000 pieces to 70,000 pieces.

[9] This request was only partially granted; in a letter dated May 8, 2014 the Regional Director General, Pacific Region, of Fisheries and Oceans Canada (Regional Director) increased Squamish's allocation to allow an additional 10,000 pieces of sockeye, 4,500 pieces of chum and

9,000 pieces of pink salmon to be harvested for food, social and ceremonial purposes (Squamish had not requested any increase in its allocation of pink or chum salmon as confirmed in Squamish's letter of December 18, 2013 to the Department). Squamish's allocations for coho and chinook salmon were unchanged, as was Squamish's access to crab and prawn. Thus, Squamish's allocation is currently 30,000 pieces of Fraser sockeye, 8,500 pieces of chum, 10,000 pieces of pink, 1,500 pieces of chinook and 500 pieces of coho salmon annually for food, social and ceremonial purposes. Dissatisfied with this result, the Squamish sought judicial review of the decision.

[10] For reasons indexed as 2017 FC 1182, the Federal Court dismissed the application for judicial review.

[11] Key to the dismissal of Squamish's challenge to the Regional Director's decision were the findings of the Federal Court that:

- Squamish failed to establish that the Regional Director's decision adversely affected Squamish's asserted right to fish for Fraser sockeye. This was because Squamish "exercises this asserted right to fish for sockeye salmon by virtue of the [food, social and ceremonial] allocation for this species." (reasons, paragraph 70).
- Squamish was required to demonstrate "how not being able to fish for 70,000 sockeye salmon pieces versus the 30,000 sockeye salmon pieces … has an adverse impact on its asserted claim to fish for sockeye salmon" for food, social and ceremonial purposes (reasons, paragraph 72).

- Further, Squamish failed to establish how “the existing” allocation is insufficient for food, social and ceremonial purposes (reasons, paragraph 74).
- “Given the lack of evidence of an adverse impact on the Squamish Nation’s asserted right” to fish for food, social and ceremonial purposes the duty to consult was not triggered (reasons, paragraph 76).
- In the alternative, if the duty to consult was triggered, the “duty was at the low end of the spectrum” (reasons, paragraph 78).
- Any duty to consult that was owed was met because Canada was required “only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice.” (reasons, paragraph 79).
- In particular, “the Squamish Nation was consulted and had various opportunities to provide evidence to substantiate its claim.” The Department of Fisheries and Oceans “informed the Squamish Nation of the information it required to consider its request” and the Department “kept the Squamish Nation informed as the process unfolded.” (reasons, paragraph 81).

[12] The Federal Court went on to find that the decision of the Regional Director was substantively reasonable. The Federal Court found that the Regional Director “made a policy decision, which must take into account a number of competing factors within the complex nature of fisheries management.” (reasons, paragraph 95). The Regional Director “exercised her discretion reasonably by properly taking account of the competing factors, including the claims of other Aboriginal groups” (reasons, paragraph 95).

[13] Finally, the Federal Court found that there were "no breaches of procedural fairness in this process." (reasons, paragraph 114).

[14] This is an appeal from the judgment of the Federal Court.

II. The issues and summary of conclusions

[15] In my view, the following issues are dispositive of this appeal:

1. Did the Federal Court err in finding that Squamish's request for an increase in its allocation of Fraser sockeye for food, social and ceremonial purposes did not trigger the duty to consult or that, if triggered, the duty was at the low end of the consultation spectrum and was met?
2. Did the Federal Court err in finding that the Regional Director's decision was reasonable?

[16] For the following reasons, I find that the Federal Court erred. Specifically, Squamish's request for an increase in its allocation triggered the duty to consult, the duty owed was not at the low end of the consultation spectrum and the duty to consult was not reasonably and adequately discharged. It follows that the decision of the Regional Director was unreasonable. The remedy that flows from these findings is discussed in more detail below.

[17] Before I turn to consider the issues, it will be helpful to situate the issues by reviewing the applicable statutory and administrative regime, the certified tribunal record and the decision of the Regional Director.

III. The applicable statutory and administrative regime

[18] Section 4 of the *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15, confers broad authority on the Minister of Fisheries and Oceans over all matters relating to fishing. In the present context, this permits the Minister, or the Regional Director acting on the Minister's behalf, to set total allowable catch limits and allocations of fish caught for food, social and ceremonial purposes (also referred to as allocation mandates).

[19] In 1992, in response to the decision of the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Department adopted its Aboriginal Fisheries Strategy. In *Sparrow*, the Supreme Court held that where an Indigenous group has a right to fish for food, social and ceremonial purposes, this right takes priority, after conservation, over other uses of the resource. The Strategy applies when the Department manages a fishery and when a land claims settlement has not been finalized which puts a fisheries management regime in place.

[20] The Strategy provides a framework, consistent with the decision in *Sparrow*, for setting mandates and provides fishing opportunities through comprehensive fishing agreements and communal licences issued under section 4 of the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332. The Strategy seeks to manage fishing through the negotiation of mutually acceptable and time-limited agreements; however, when an agreement cannot be reached, the Department will review the consultations with the Indigenous group and issue a communal fishing licence.

[21] In 1993, the Department introduced its Policy for the Management of Aboriginal Fishing. The Policy states that Indigenous fishing for food, social and ceremonial purposes will have first priority, after conservation, over all other user groups and will only be restricted "to achieve a valid conservation objective, to provide for sufficient food fish for other [Indigenous] people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives." The Policy also states that the Department "shall consult with [Indigenous] people before taking decisions or actions that may affect [Indigenous] fishing for food, social and ceremonial purposes" and "will consult with respect to allocations."

[22] In 2006, the Department introduced the 2006 First Nations Access to Fish for Food, Social and Ceremonial Purposes (2006 Framework). This is an operational framework that lays out criteria, indicators and process steps to be followed to respond to requests from British Columbia First Nations for access to fish for food, social and ceremonial purposes, including allocation increases. The 2006 Framework consists of five parts, the most relevant being Part 2A, which deals specifically with requests for allocation changes.

[23] Around the time the decision of the Regional Director was made, the Department was working on reorganizing and synthesizing the 2006 criteria and indicators previously described in Part 2A of the 2006 Framework. This reorganization was partially in response to input received during consultations with First Nations with respect to requests to access fish for food, social and ceremonial purposes.

[24] The Director of Salmon Management and Client Services, Pacific Region, affirmed that the criteria applicable at the time the decision of the Regional Director was made required requests for access to be "evaluated against a common set of criteria. [Food, social and ceremonial] access should reflect some balance between the diversity and abundance of resources that are locally available, community needs and preferences, and operational management considerations".

IV. The certified tribunal record

[25] The certified tribunal record is sparse. The Department certified that the record consisted of four documents: a letter from Squamish to the Department dated April 1, 2014, a letter from the Department to Squamish dated April 7, 2014, a briefing note for the Regional Director dated May 8, 2014 and the May 8, 2014 letter from the Regional Director to Squamish advising of her decision.

[26] The April 1, 2014 letter briefly reviewed the history of information provided to the Department and requested confirmation that with the information provided in a letter from Squamish dated December 18, 2013, the Department had what it considered sufficient information to proceed with Squamish's request. The April 7, 2014 letter advised that the additional information provided in the December 18 letter "was helpful in the ongoing analysis" of Squamish's request. The letter further advised that the Department must consult and consider the interests of other First Nations who might be potentially adversely affected by Squamish's request. That consultation was said to have been commenced and the Department had requested that input be provided to it by April 30, 2014.

[27] Examples of items missing from the certified tribunal record are letters from Squamish which outlined its issues and concerns, confirmed understandings reached at meetings with the Department and responded to requests for further information made by the Department. Given the view I take on the consultation process nothing turns on this omission, however it is difficult to understand from the tribunal record how the Regional Director was adequately informed about the information Squamish had provided in the consultation process.

V. The decision of the Regional Director

[28] In material part the May 8, 2014 letter advised Squamish that:

> The Department has reviewed your request for an increase of Fraser sockeye access. Our analysis takes into consideration factors such as community [food, social and ceremonial] needs, recent harvest levels, your community's preferences, the availability of species in your fishing area, including the Squamish and Capilano Rivers and the marine environment, and the implications for other First Nations. On this basis changes will be made to the Squamish [food, social and ceremonial] communal licence for 2014 and ongoing to provide a total of up to (in pieces) 30,000 sockeye, 8,500 chum, and 10,000 pink salmon, while opportunities for chinook and coho remain unchanged. As well, Squamish access to crab and prawn for [food, social and ceremonial] purposes continues, and the Squamish may wish to discuss potential [food, social and ceremonial] opportunities for marine finfish.
>
> …
>
> The very high demand for Fraser sockeye across First Nations is [*sic*] key factor in reaching this decision is [*sic*]. Well over 100 First Nations have licences to fish Fraser sockeye for [food, social and ceremonial] purposes, and [the Department] has received numerous requests for increases in licence amounts, while at the same time in many recent years not enough Fraser sockeye have returned to allow for harvest of the full [food, social and ceremonial] amounts. [The Department] has worked to arrive at a decision that balances the Squamish interest in Fraser sockeye with [food, social and ceremonial] allocations of other groups, of which many only have access to Fraser salmon, and with consideration to overall harvest constraints. In addition to Fraser sockeye, access to local salmon species (pink and chum) has been increased, and there may be other [food, social and ceremonial] opportunities in the marine environment that could be considered.

> This approach should provide some balance for Squamish across years in overall [food, social and ceremonial] access opportunities.
>
> (underlining added)

VI. Did the Federal Court err in finding that Squamish's request for an increase in its allocation of Fraser sockeye for food, social and ceremonial purposes did not trigger the duty to consult or that, if triggered, the duty was at the low end of the consultation spectrum and was met?

A. *The standard of review*

[29] It is well-settled law that on this appeal this Court is required to consider whether the Federal Court chose the correct standard of review and applied it properly to the decision of the Regional Director.

[30] The existence and extent of the duty to consult are legal questions (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, paragraphs 61-63). However, these questions are typically premised on an assessment of the facts and a degree of deference to the findings of fact of the initial decision-maker may be appropriate (*Haida Nation*, paragraph 61). In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, the Supreme Court held that a reviewing judge must not decide constitutional issues in isolation on a standard of correctness and should instead ask whether the decision of the decision-maker about the adequacy of the consultation and accommodation process was, on the whole, reasonable (paragraphs 77, 82). In this case, nothing turns on whether the standard of review is reasonableness or correctness because, in my view, it was neither correct nor reasonable to find that the duty to consult was not legally triggered.

[31] The adequacy of the Crown's consultation effort is to be assessed against a standard of reasonableness. Perfect satisfaction of the duty is not required. The Crown is required to make reasonable efforts to inform and consult (*Haida Nation*, paragraph 62).

B. *Applicable legal principles*

[32] Before commencing the analysis, it is helpful to discuss briefly the settled principles that have emerged from the jurisprudence which has considered the scope and content of the duty to consult. The applicable principles are not in dispute; what is in dispute is whether, on the facts of this case (which are largely agreed), the constitutional duty to consult was triggered and, if so, was met.

[33] The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

[34] The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation*, paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of Crown action, including the strategic management of natural resources.

[35] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

[36] When the claim is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).

[37] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Indigenous groups a veto; subsection 35(1) guarantees a process, not a particular result. What is required is a process of balancing interests — a process of give and take. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (*Haida Nation*, paragraphs 42, 48 and 62).

[38] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claimed right in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

[39] Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation." (*Haida Nation*, paragraph 42). The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake." (*Haida Nation*, paragraph 45).

[40] At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

[41] As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, paragraph 49). Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious

consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

[42] Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of the impacts on Indigenous rights (*Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, paragraph 315).

[43] Consultation must focus on rights. In *Clyde River*, the National Energy Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*." (emphasis in original) (*Clyde River*, paragraph 45).

C. *The Federal Court erred in finding that the duty to consult was not triggered*

[44] The Federal Court correctly directed itself to the test to be applied to determine whether the duty to consult was triggered, and found that the first two elements of the test were met: the Department had knowledge of Squamish's asserted right to fish for Fraser sockeye and the Department was tasked with determining the quantity of Fraser sockeye that could be taken on a going forward basis under Squamish's communal fishing licence. However, the Federal Court

found that the third element of the test was not met: Squamish had failed to show that the Department's issuance of the communal fishing licence would adversely affect its asserted right to fish (reasons, paragraphs 66-70).

[45] The Federal Court gave two reasons for its decision. First, Squamish exercised its "asserted right to fish for sockeye salmon by virtue of the [food, social and ceremonial] allocation for this species. It is therefore difficult for the Squamish Nation to argue that its asserted right is adversely impacted by the decision under review." (reasons, paragraph 70). Second, Squamish failed to demonstrate how not being able to fish for 70,000 sockeye salmon pieces (as opposed to its 30,000 piece allocation) adversely affected its asserted claim to fish for sockeye for food, social and ceremonial purposes (reasons, paragraph 72).

[46] In my respectful view, the Federal Court erred at law in this analysis.

[47] The first reason given by the Federal Court was based upon a misapprehension of the basis of Squamish's asserted right to fish for Fraser sockeye. The basis of the claim is that prior to contact with Europeans, salmon was the principal food for the Squamish with sockeye being the major species harvested; the main source of sockeye salmon was the Fraser River. The Department's Aboriginal Fisheries Strategy and the issuance of Aboriginal communal fishing licences were management tools to conserve the fishery pending a final settlement of Squamish's asserted right to fish. They were not the basis of Squamish's asserted constitutionally protected right to fish.

[48] Any decision the Department made about Squamish's request for an increase in its sockeye salmon allocation would impact, potentially adversely, Squamish's future ability to exercise its asserted fishing rights. The potential for Squamish's allocation to be increased did not preclude the decision's overall effect from being adverse to Squamish if, despite any increase, Squamish was still unable to properly exercise its right.

[49] The second reason given by the Federal Court was based upon a misapprehension of the legal threshold Squamish was required to meet to show an adverse impact on its asserted right. While the Federal Court cautioned that Indigenous rights are not founded upon things such as a particular quantity of sockeye salmon, the Court went on to adopt a numeric approach that required Squamish to present evidence on how not being allocated 70,000 sockeye pieces adversely affected its rights.

[50] Further, the duty to consult is procedural and arose prior to the Department's decision to allocate an increased amount of Fraser sockeye to Squamish. Thus, it was illogical and impractical to require Squamish to show, in advance of the decision, that it was adversely affected by receiving an allocation of 30,000 pieces.

[51] The duty to consult is triggered at a low threshold (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 55). What Squamish was required to demonstrate was an "appreciable", "apprehended, evidence-based potential or possible impact" on their right (*Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737, paragraphs 86, 105).

[52] Squamish's January 27, 2012 letter to the Department stated that: its allotment of sockeye for food, social and ceremonial purposes had not increased since the 1990s but its population had substantially increased; its members receive about 5 food, social and ceremonial fish per person, "which is not meeting our community's needs"; and this allotment does not allow Squamish members to meet their needs and sustain them through the year, especially given that many Squamish members live below the poverty line. The requested allocation would result in there being 20 fish per person per year. This information was reiterated in letters sent on July 13, 2012 and December 21, 2012. The December 21, 2012 letter also made the point that as members receive 5 sockeye or less there is insufficient sockeye to be stored for social and ceremonial purposes.

[53] The information provided by Squamish was sufficient to put the Department on notice that maintaining the current allocation could well have an adverse impact on Squamish's asserted constitutional right to fish for sockeye. The information was sufficient to trigger the duty to consult.

[54] I pause here to more fully deal with the Department's submission that Squamish did not demonstrate that the current decision had the potential to impose new adverse effects on Squamish's asserted right to fish.

[55] The duty to consult is designed to prevent damage and preserve Indigenous rights and claims while negotiations are underway (*Carrier Sekani*, paragraph 48). Pending settlement, the Crown is bound by its honour to balance societal and Indigenous interests in making decisions

that may affect Indigenous claims (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, paragraph 42). Upon receiving Squamish's request for an allocation change the Department was tasked with providing a fresh assessment of how its licencing system and restrictions on fishing would restrict or adversely impact Squamish's ability to assert its right in the years to come. Squamish's membership has substantially increased while its food, social and ceremonial allocation for sockeye salmon has remained the same, thereby diminishing and jeopardizing the ability of the Squamish to practice and pass on their heritage in a meaningful way as the Squamish population evolves. Consultation was essential to the Crown's ability to discharge the task before it and preserve Squamish's interest from fresh restrictions pending claims resolution.

[56] Finally on the point of whether the duty to consult was triggered, the Department acknowledges, correctly in my view, that Squamish's request for an increase in its Fraser sockeye allocation triggered the requirement that the Department consult with First Nations whose fishing rights might have been adversely affected by an increase in Squamish's allocation (affidavit of Jennifer Nener, Director of Salmon Management and Client Services, Pacific Region, paragraphs 82-93). Logically, if the Department was obliged to consult with other First Nations on Squamish's request it would follow that the Department was obliged to consult with Squamish, the First Nation whose fishing rights were at issue.

D. *The Federal Court erred in concluding that the duty to consult was at the low end of the consultation spectrum*

[57] After correctly stating that the depth of consultation required is proportionate to the strength of the asserted claim and potential adverse impact on that claim, the Federal Court relied upon its flawed conclusion that Squamish had failed to offer sufficient evidence of adverse impact on its asserted right to fish to conclude that, if triggered, the duty to consult was at the low end of the spectrum (reasons, paragraph 78).

[58] I have found that Squamish provided sufficient information to trigger the duty to consult. It follows that the Federal Court's conclusion that any duty owed fell at the low end of the spectrum must be revisited.

[59] As explained above, when triggered, the content of the legal duty to consult can range from a fairly minimal consultation to a duty to consult in a deep manner. This range allows the Crown to respond in a variety of different contexts when more or less consultation is necessary in order to fulfil the duty to consult. The Supreme Court has described this range as representing a spectrum of alternatives. However, the key principle is that wherever a factual situation falls in this range, or on this spectrum, the Crown is required to make a meaningful effort to act in a manner consistent with the honour of the Crown.

[60] Without pigeonholing this case to be at some precise point on the spectrum, I will consider what on the record before the Court the Crown was required to do in order to make a

meaningful effort to act in a manner consistent with the honour of the Crown and in furtherance of the goal of reconciliation.

[61] In the present case, Squamish asserted that the harvest, consumption, social and ceremonial use of fisheries resources have been a central feature of Squamish culture and economy since time immemorial. Squamish asserts that "the practice of harvesting and use of fisheries resources, including sockeye salmon from the Fraser River, for at least [food, social and ceremonial] purposes, form the basis for a modern day aboriginal right, pursuant to s. 35 of the Constitution Act, 1982." (affidavit of Syetáxtn, paragraph 20). The Department has not contested this asserted right.

[62] At paragraph 52 above, I summarized the information provided by Squamish about the impact of the Fraser sockeye salmon allocation upon it. The information included advice that an allocation of 5 salmon per person for food, social and ceremonial purposes did not meet the community's needs, nor did it allow Squamish members, many of whom lived below the poverty line, to meet their needs and sustain them through the year. This information was not refuted by the Department. Nor did the Department respond to Squamish's request that the Department confirm that the information provided by it was considered by the Department to be sufficient information to proceed with its request (April 1, 2014 letter from Squamish to the Department, contained in the certified tribunal record). The Department's April 7, 2014 response to Squamish was simply to the effect that the information provided in a letter dated December 18, 2013 "was helpful".

[63] Given the importance and fundamental nature of the asserted right, the Department's non-contestation of the asserted right and the advice about the impact of the Fraser sockeye salmon allocation upon the Squamish people, in my view the duty of consultation required, at the least, an interactive process which included a meaningful two-way dialogue in which the Department did more than passively request and receive information from Squamish. Meaningful two-way dialogue required the Department to provide responses that were responsive, considered and meaningful in response to the concerns Squamish expressed and the information it provided.

[64] The duty of consultation also required the provision of written reasons to show that Squamish's concerns were considered and how its concerns were taken into account when reaching the final decision. As explained above, managing the Fraser sockeye fishery entails significant challenges that implicate conservation concerns and the rights of other First Nations. Given the complexity and number of competing interests to balance in this case, reasons were necessary to communicate to Squamish that its rights were considered and addressed. Without reasons the basis of the Department's decision would be unknown, potentially fostering the impression of arbitrariness.

[65] Thus, more was required than consultation at the low end of the consultation spectrum as found by the Federal Court.

E. *The duty to consult was not adequately discharged*

[66] I now turn to consider how the process followed by the Department failed to adequately discharge the duty to consult.

[67] First, as evidenced by the affidavit of Jennifer Nener, the process followed by the Department failed to result in meaningful two-way dialogue in which the Department did more than request and receive information and describe generally the process to be followed. Nowhere did the Department and Squamish meaningfully discuss the merits or frailties of Squamish's request, or alternative means of meeting the needs of the Squamish people.

[68] The consultation process with Squamish is detailed by Ms. Nener at paragraphs 30 to 81 of her affidavit. From this it is apparent that:

- The correspondence and meetings that occurred in 2011 are properly characterized as process events: the Department advised Squamish that the process to consider the request for a larger allocation would take some time and asked for information; Squamish agreed to develop more detailed information.
- In 2012 the Department received additional "information and clarity from the Squamish Nation, but, as is usual with these types of requests, additional discussion and information gathering was necessary before making a decision." As Squamish's focus shifted to an increase of Fraser sockeye based on a per capita allocation, the Department responded that any allocation change request must take into account a variety of factors. The Department also advised that Squamish's request was more complex because Fraser sockeye were shared by other First Nations. Brief discussion took place about whether the Squamish would deal with other First Nations directly, and the Department's view of the need to consider harvesting other species for food, social and ceremonial purposes.

- In 2013 the Department continued to request further information and Squamish expressed its view that it intended to consult directly with other affected First Nations. Squamish provided additional information in its letter of December 18, 2013.
- In 2014 Squamish sought confirmation that, in light of the contents of the December 18, 2013 letter, the Department was in a position to process the request for an increase in allocation. The Department confirmed that the letter was of assistance and advised that the Department was reviewing the allocation change request. In response to an April 1, 2014 letter in which Squamish indicated it was assuming that there were no remaining outstanding information requests, the Department did not point to any missing information but explained that it had started its consultation with other affected First Nations.

While the affidavit lists the meetings held between representatives of the Department and Squamish, the meetings appear to have focused on reiterating the complexities of allocation requests and on clarifying the process for consultation and information exchange. Missing is any description of any interaction between the parties in which they grappled in good faith with Squamish's concerns and preferences and the legitimate concerns of the Department as manager of a complex fishery.

[69] The non-interactive nature of the process is consistent with the process mandated in the 2006 Framework which outlines the steps to be taken when a First Nation requests a permanent

or temporary allocation increase. The Federal Court outlined the steps at paragraph 15 of the reasons which I reproduce:

> The *Access Framework* outlines the [Department] process for considering an allocation increase in excess of the mandate limits, as follows:
>
> a. Upon receiving a request from a First Nation, the Area representative engages other Area staff as appropriate and obtains as much information as possible from the First Nation, including supporting rationale, and documentation of current harvest levels. The Area representative provides the [Regional Headquarters-Aboriginal Fisheries Strategy] Manager with a copy of the request and supporting information.
>
> b. The [Regional Headquarters-Aboriginal Fisheries Strategy] Manager contacts the Treaties and Aboriginal Policy Senior Negotiator, who then engages the appropriate Regional Negotiator.
>
> c. The [Regional Headquarters-Aboriginal Fisheries Strategy] Manager provides the Area representative with summary data on current [food, social and ceremonial] allocations for the requesting First Nation, and neighboring First Nations, for comparison.
>
> d. The Area representative takes the lead in completing the evaluation, and involves other [Department] staff.
>
> e. When a draft evaluation has been prepared, the area representative seeks feedback from other [Department] staff, who use the criteria in the *Access Framework* to develop a final evaluation and recommendation. A decision note is prepared for the [Director General].
>
> f. Once the [Director General] approves the request, a communal licence is issued.
>
> g. If the decision is for no allocation increase, staff send a letter to the First Nation, outlining the decision rationale.

[70] This process may be an effective process for administering fisheries management. It is not, however, a process consistent with the interactive, good-faith give-and-take required in order for meaningful consultation to take place.

[71] To illustrate, there is no evidence of any discussion about the extent that an unsolicited, increased allocation to Squamish for chum and pink salmon would accommodate Squamish's needs. Squamish now responds that while some community members, especially those living in the Squamish Valley, harvest these species for food, social and ceremonial purposes, the abundance of these stocks is generally low. According to Squamish, while there is an occasional good year for pink salmon, this is not the norm and there are conservation concerns with pink and chum. Squamish also responds that, relative to other salmon species, chum and especially pink salmon have a low value for food, social and ceremonial purposes (affidavit of Syetáxtn, paragraphs 39 and 40).

[72] I note as well that, because Squamish was required to report the number of fish caught annually under their licence, the Department possessed data for the years preceding the decision that set out the total catches reported by Squamish. Exhibit LL to the Nener affidavit shows that for the years 2011 through 2013 Squamish reported catches of chum salmon varying between 435 and 741 pieces. With the exception of the 2013 year, low level catches of pink salmon were reported.

[73] What emerges from this illustration is how bereft of meaningful dialogue the process was. Squamish did not ask for, but received, the ability to take 4,500 more pieces of chum salmon in circumstances where Squamish was not catching even 25% of its existing chum salmon allocation. Chum catch levels declined after the decision to 35 pieces in 2014 and 202 pieces in 2015. It follows that the rationale for the unsolicited increase in chum and pink salmon allocations is not apparent from the record.

[74] This is not meaningful dialogue or meaningful consultation.

[75] There is a second basis on which to conclude that the duty to consult was not adequately discharged: the Regional Director's reasons failed to demonstrate that Squamish's concerns were considered and that those concerns were taken into account.

[76] Instead, as demonstrated at paragraph 28 above, the reasons were generic, advising that the Department's "analysis takes into consideration factors such as community [food, social and ceremonial] needs, recent harvest levels, your community's preferences, the availability of species in your fishing area … and the implications for other First Nations." (underlining added). A key factor was said to be the "very high demand for Fraser sockeye across First Nations". Accordingly, the Department advised that it had "worked to arrive at a decision that balances the Squamish interest in Fraser sockeye with [food, social and ceremonial] allocations of other groups, of which many only have access to Fraser Salmon, and with consideration to overall harvest constraints."

[77] No explanation was given as to how the Department concluded that 30,000 pieces (and not a greater or lesser number of pieces) would be an appropriate allocation of sockeye. No explanation was given as to why Squamish's allocation was increased for chum and pink salmon. Similarly, no indication was given that the Department had heard and given real consideration to the importance of sockeye to the Squamish and to the extent Squamish members prefer sockeye and value it over other species of salmon.

[78] While the decision referred generically to "the availability of species in your fishing area, including the Squamish and Capilano Rivers and the marine environment" no response was made to Squamish's previously provided explanation of why on-reserve coho and Excess Salmon to Spawning Requirements coho opportunities on the Capilano River were not an appropriate substitute for an adequate allocation of sockeye, or to its contention that there were conservation concerns with respect to both pink and chum salmon stocks in its territory, while other salmon species like chinook and coho were of even more limited abundance.

[79] To conclude on this point, the failure of the Department during the consultation process to dialogue meaningfully with Squamish and to provide responses that were responsive, considered and meaningful in response to the concerns of Squamish, and the failure of the reasons to show that Squamish's concerns were considered and taken into account resulted in a failure to reasonably and adequately comply with the duty to consult.

VII. Did the Federal Court err in finding that the Regional Director's decision was reasonable?

[80] The Regional Director's decision was made without adequate consultation with Squamish. This is an error of law (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, paragraph 48). It follows that for this reason alone her decision was unreasonable and the Federal Court erred in concluding otherwise.

[81] As this is sufficient to dispose of this appeal I do not intend to deal with Squamish's additional argument that the Federal Court erred in finding that Squamish's right to procedural fairness was not breached beyond stating that Squamish's arguments on this point are properly

characterized as substantive challenges to the reasonableness of the decision of the Regional Director.

VIII. Remedy

[82] As a result of the Department's failure to consult adequately with Squamish, I would allow the appeal, set aside the judgment of the Federal Court and order the respondent to pay the costs to the appellants in this Court and the Federal Court.

[83] Because the May 8, 2014 decision of the Regional Director increased Squamish's allocation of sockeye salmon, I would not quash the decision of the Regional Director. Rather, I would declare that the May 8, 2014 decision of the Regional Director was made in breach of the Crown's duty to consult with the Squamish Indian Band in respect of its asserted right to fish for food, social and ceremonial purposes.

[84] Assuming that Squamish remain of the view that their allocation of Fraser sockeye is inadequate, the effect of this declaration will be that the parties will be required to begin a fresh round of consultation concerning Squamish's request for an increased allocation. I offer the following *obiter* comments in an attempt to facilitate this future consultation.

[85] As set out in the Department's Policy for the Management of Aboriginal Fishing (Exhibit SSS to the Nener affidavit), the Department's management of Aboriginal fishing reflects the current state of the law on Aboriginal fishing rights. Consequently, Indigenous "fishing for food,

social and ceremonial purposes will have first priority, after conservation, over other user groups."

[86] Thus, the policy recognizes, and is based upon the recognition of, the constitutionally protected right to fish for food, social and ceremonial purposes asserted by Indigenous peoples. The Department then manages the fishery pending the negotiation of settlements that put a fisheries management regime in place.

[87] In my view, a number of points flow from this.

[88] First, when allocating mandates it is important that Department staff keep front of mind that they are effectively caretakers, managing a resource for, among others, a group or groups who claim a constitutionally protected right to access that resource. This concept should infuse the consultation process.

[89] Second, because the Aboriginal Fishing Strategy and departmental policy recognize the priority of Indigenous fishers who assert constitutionally protected rights, it may well be unnecessary and unhelpful to request or require that the Department conduct a strength of claim analysis. It is to be remembered that in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, the National Energy Board did not identify either the strength of the asserted Indigenous rights or the depth of consultation required (paragraph 61). Nonetheless, the Supreme Court found that the duty to consult had been adequately discharged. Even without identifying the strength of the asserted rights or the depth

of consultation required, the Board did not minimize or fail to apprehend the importance of the asserted rights, considered the project's potential for negative impacts, and provided a number of accommodation measures designed to minimize the risks and to respond to concerns (paragraphs 53-57).

[90] Third, Squamish's request for an increase in its allocation of Fraser sockeye is complicated by the fact that this fish stock is claimed by other First Nations who also assert a historic right to fish Fraser sockeye for food, social and ceremonial purposes. Of necessity, this requires the Department to balance a number of conflicting rights-based claims. To do so equitably, the Department requires accurate information about a number of matters, including:

- The Indigenous group's current and requested allocations of all species and stock of fish, and information pertaining to community interests and needs;
- How the current and requested allocation compares to the amount of fish that the Indigenous group reports to have caught, or "catch data";
- An evaluation of the availability of the species in their food, social and ceremonial licence area, and what if anything may be preventing the First Nation from harvesting their food, social and ceremonial fish in their current fishing area with reasonable effort;
- An evaluation of potential conservation concerns both for the stock requested, and potential by-catch species (e.g. stock assessment / science branch issues or closures that have been identified); and,

- Impacts for other users who fish the same species or stocks, such as other Indigenous groups, and whether the requesting First Nation has discussed the request with other First Nations.

[91] Squamish should provide requested information to the Department on a timely basis. Prompt responses providing the requested information in the required detail not only facilitate prompt decision-making, but also fulfil Squamish's obligation to consult in good faith and to not take unreasonable positions to thwart the Department. Put another way, in the consultation to come Squamish will have "not only … the opportunity but the obligation to carry their end of the consultation process and provide information in support" of their claim for an increased allocation (*Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15, 408 D.L.R. (4th) 165, paragraph 51).

[92] This requirement will, for example, in all likelihood require Squamish to provide information such as catch information about its on-reserve fishery in the Capilano River that is not managed by the Department, and information about how Squamish determines the needs of its membership for fish for food, social and ceremonial purposes.

[93] Finally, in order to trigger the duty to consult, the proposed government action must affect the future exercise of the claimed Indigenous right at issue (*Carrier Sekani*, paragraphs 45, 46). The duty to consult is forward-looking and prospective. It follows that while the historical context may inform the scope of the duty to consult and recognize the existing state of affairs

(*Chippewas of the Thames First Nation*, paragraph 42), the original allocation of Fraser sockeye to Squamish is not a matter to be addressed through fresh consultation.

[94] Moreover, in this Court Squamish's submissions centred in large part on a comparative analysis of the per capita allocation of Fraser sockeye granted to it compared to that allocated to other First Nations. However, notwithstanding these submissions, I would not have found the decision of the Regional Director to be unreasonable on the basis that she did not expressly consider and address the question of allocation parity. I reach this conclusion for two reasons. First, the 2006 Framework emphasizes flexibility: because "the relative importance of the indicators will vary with each request, no weighing scheme was developed" and the criteria evaluation "is not intended to be determined by a mathematical approach". It follows that the presence or absence of any one factor, including per capita allocations, would not be determinative. Second, while the 2006 Framework contemplates consideration of parity, it also explicitly includes consideration of other criteria. These criteria were referenced by the Department during the consultation process and were considered in the decision of the Regional Director. To repeat, a single factor such as a comparative analysis cannot be determinative of Squamish's request.

[95] Finally, the existence of Indigenous rights is specific to all Indigenous communities (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, paragraph 69). The consultation process will therefore benefit from a detailed explanation from Squamish of the scope of its asserted right, the specific use of sockeye in its food, social and ceremonial practices, and the allocation's potential effect on its members as its population changes.

[96] It is hoped that the parties will find these *obiter* comments of assistance.

"Eleanor R. Dawson"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	WOODS J.A. RIVOALEN J.A.
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