R. v. Douglas: The Duty to Consult

On May 3, 2007, the British Columbia Court of Appeal gave their judgement in the case of four members of the Cheam First Nation charged with unlawful fishing without the authority of a licence under s. 78 of the Fisheries Act. The accused conceded that they had in fact engaged in the act of fishing for sockeye salmon without the required licences, but argued that the Fisheries Act and related regulations were an infringement of the Aboriginal rights protected by s.35(1) of the Constitution Act, 1982. The Crown conceded that the legislation infringed the accused's Aboriginal rights, but argued that the infringement could be justified.

The test for whether the infringement of an Aboriginal right is justified was set out in Sparrow and is twofold:

1. Was the government acting pursuant to a valid legislative objective?
2. Given the Crown's trust relationship and responsibility towards Aboriginals, has the honour of the Crown been upheld? [i]

It was not contested that the government's legislative objective (conservation) was valid.

The point of contention in the lower courts was whether the honour of the Crown had been upheld. In considering this, courts will consider both whether the Crown fulfilled its duty to consult with the affected persons and whether it gave sufficient priority to Aboriginal rights.

Consultation

The Court of Appeal used the standard for consultation set out in Halfway River First Nation v. British Columbia (Ministry of Forests) which imposes an obligation on the Crown to ensure the Aboriginal peoples are given necessary information in a timely matter and that their input is seriously considered. A reciprocal duty is also imposed on the Aboriginal group in question, and prohibits them from frustrating the process by imposing unreasonable conditions or refusing to meet or consult.

The Court noted that the Department of Fisheries and Oceans had consulted with all affected 'Fraser River' First Nations and that the Cheam did not fulfill their reciprocal duty, by failing to response to many of the Department's communications. The Cheam "deliberately frustrated all of the government's attempts to consult" [ii].

Priority

The Court of Appeal applied the test for priority set out in R. v. Gladstone, which queries whether, "the government has acted in a fashion which reflects that is has truly taken into

account the existence of aboriginal rights". [iii]

The accused contended the standard for priority had not been met because, although all involved Aboriginal groups including the Cheam First Nation were given certain allocations of fish and time frames of exclusive access to the salmon, commercial sports fishers were also given access. The Court of Appeal did not agree with the accused, finding that the Cheam First Nations were allocated a sufficient share for food, social, and ceremonial purposes and that the small number of fish allocated to the commercial fishers did not interfere with the Aboriginal right at stake.

Having found that that the standards for consultation and priority were met, the Court of Appeal concluded the infringement of the accused's Aboriginals rights was justified, and restored the accused's convictions.

Sources:

- R. v. Douglas et al, 2007 BCCA 265 (CanLII).
- Fisheries Act, R.S.C. 1985, c. F-14.

Further Reading:

- Backgrounder - Aboriginal Rights
- Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 BCCA 470 (CanLII).
- R. v. Gladstone, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723.

[i] R. v. Douglas et al, 2007 BCCA 265 (CanLII) at para. 33.
[ii] R. v. Douglas et al, 2007 BCCA 265 (CanLII) at para. 45.
[iii] R. v. Gladstone, 1996 CanLII 160 (SCC), [1996] 2 S.C.R. 723 at para. 63.