R. v. Lefthand: Limits on Duty to Consult

In a decision dated June 26, 2006 the Alberta Court of Appeal confirmed that the Crown's duty to consult with Aboriginal peoples has certain limits.

Ezra Elliot Lefthand, the accused, was charged with fishing with bait in an area subject to a "bait ban" contrary to the Fisheries Act and the Alberta Fishery Regulations. The accused admitted to fishing in the area, but claimed that the bait ban was an unjustified infringement of his Aboriginal right to fish for food; section 35(1) of the Constitution Act, 1982 constitutionally protects such rights.

The trial judge found no prima facie (on its face) infringement of the accused's right and convicted Lefthand. The Court of Queen's Bench overturned the lower court's decision and acquitted the accused on the basis that the bait ban was an unjustifiable infringement of Aboriginal rights; the Queen's Bench decision focused on the Crown's lack of consultation with the affected Aboriginal peoples before the bait ban was enacted.

The Alberta Court of Appeal allowed the Crown's appeal and restored the accused's conviction and sentence. The entire court agreed on the result, although each judge wrote his/her own reasons. Justice Conrad found that there was no infringement of the accused's right to fish for food. Justices Slatter and Watson held that the accused's right had been infringed, but that the infringement was justified. In separate reasons, both judges found that the Crown's duty to consult had been fulfilled, and commented on the scope of the duty.

Both judges found that, "Aboriginal consultation was a documented part of the regulation-making process." [i] Several communications, including letters and a fax, were sent to the involved Aboriginal groups without reply. Justice Slatter found that, at this point, the Crown was entitled to proceed and that, "the obligation to consult does not include an obligation to repeatedly request input from the aboriginal group, nor to inquire as to why no response has been received. Likewise, no aboriginal group can effectively stall the development of public policy by delaying the provision of input, or by refusing to participate." [ii] Justice Watson further commented that:

[Consultation] does not require that all individuals in the community affected must necessarily be personally consulted in all situations, nor does it mean that consultation must necessarily be repeated to the same extent for every variation on a regulatory theme." [iii]

Sources

- Alberta Fishery Regulations, 1998 (S.O.R/98-246).
- Fisheries Act, R.S.C. 1985, c. F-14.
- R. v. Lefthand, 2007 ABCA 206 (CanLII).

Further Reading

- Daina Young, R. v. Douglas: Aboriginal Rights and the Duty to Consult, Centre for Constitutional Studies.
- Fred Wynne, Aboriginal Rights Background, Centre for Constitutional Studies.

[i] R. v. Lefthand, 2007 ABCA 206 (CanLII) at para. 43.
[ii] Ibid.
[iii] Ibid. at para. 194.