

# ONE STEP FORWARD AND TWO STEPS BACK: PROVINCE FOUND TO HAVE BREACHED ABORIGINAL CONSULTATION OBLIGATIONS FOR SECOND TIME

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In *Da'naxda'xw/Awaetlala First Nation v. British Columbia Hydro and Power Authority*, 2015 BCSC 16, for the second time, the Supreme Court of British Columbia has declared that the Province failed to fulfill its duty to consult with a Aboriginal group regarding the boundaries of a protected conservancy established in the Aboriginal group's traditional territories. However, the Aboriginal group did not succeed in its claim that the Province had guaranteed the awarding of a contract with BC Hydro for the purchase of hydro-electric power from a company with ties to the Aboriginal group.

## Key Points

- The Crown's failure to adequately consult with Aboriginal groups will not always result in a meaningful remedy being granted by the courts.
- Accommodations measures by the Crown must not be "pointless" and need to be based on correct assumptions.
- Legislative measures can require appropriate consultation and accommodation where such measures may impact an aboriginal group's traditional territory.

## Background

In 2008, BC Hydro issued a "Clean Power Call" seeking proposals to sell electricity to BC Hydro. Kleana Power Corporation, an independent developer and operator of hydro-electric projects, sought to compete in the Clean Power Call with a plan to sell electricity generated by a proposed hydro-electric project located within the traditional territories of the Da'naxda'xw First Nation. Income from the project would be shared by Kleana with the Da'naxda'xw.

The traditional territories of the Da'naxda'xw span the north end of Vancouver Island and Knight Inlet on the central coast of British Columbia. Kleana's hydro-electric project was proposed for the Upper Klinaklini River area at the head of Knight Inlet. Since 2002, the Upper Klinaklini area had been protected under land use

management legislation on a temporary basis. In 2008, the Province designated the area as a conservancy. Both of these designations meant that Kleana's proposed hydro-electric project was not a permitted use.

Prior to the conservancy designation, the Da'naxda'xw had requested that the conservancy boundary be amended so that Kleana's project could proceed. In 2007, the Province proposed that the project area would be removed from the conservancy so that Kleana could proceed with an environmental assessment and permitting requirements and seek an energy purchase agreement with BC Hydro as part of the anticipated Clean Power Call. In the event that Kleana did not proceed with the project, the area would be returned to the Upper Klinaklini conservancy and the original boundary would be restored.

In spite of this promise by the Province, legislation was introduced in 2008 that protected the full Upper Klinaklini River area without the Da'naxda'xw's requested boundary amendment. This unexpected change gave rise to a complaint by the Da'naxda'xw that they had not been adequately consulted regarding the conservancy and the Da'naxda'xw threatened legal action if the legislation was enacted without amendment.

The Da'naxda'xw's concerns led to what was described as a "rather unprecedented" meeting between the Da'naxda'xw and the Province's Minister of Aboriginal Relations, Energy Minister, Minister of Forests and various deputy ministers and senior staff. According to the Da'naxda'xw, at that meeting the Energy Minister assured them that if Kleana lost the opportunity to participate in the 2008 Clean Power Call as a result of a delay in amending the conservancy boundary, then the Energy Minister would direct BC Hydro to enter into negotiations with Kleana for an energy purchase agreement at a price for power that was linked to the results of the winning bids in the Clean Power Call. On the basis of this assurance, the Da'naxda'xw did not challenge the legislation designating the project area as a conservancy.

BC Hydro's Clean Power Call proceeded but Kleana was not among the project proponents that moved forward. BC Hydro asked for comfort, directly from the government, regarding the required amendment to the conservancy boundary. When Kleana representatives requested that the Environment Minister provide the required assurance, the Minister took issue with the assertion that there had been a commitment to amend the conservancy boundary.

In March 2010, BC Hydro announced that 23 proposals from the Clean Power Call had been selected for energy purchase agreements. Kleana's project was not selected and shortly thereafter Kleana was advised by BC Hydro that its project was no longer under consideration.

The Da'naxda'xw and Kleana continued to advance the boundary amendment through the process directed by the Province until the Environment Minister advised in April 2010 that he did not intend to recommend an amendment to the conservancy boundary. The Da'naxda'xw and Kleana responded with an application to the Supreme Court of British Columbia for judicial review of the Minister's refusal to recommend an amendment.

## **The First Ruling**

A decision was rendered by the Court in May 2011. The Crown was found to have a duty to consult with the Da'naxda'xw with respect to their request to amend the conservancy boundary and the Environment Minister was found to have breached that duty. As a result, the Court quashed the Minister's decision, declared that the Minister had a legal duty to consult with the Da'naxda'xw, with a view to considering a reasonable accommodation, and declared that the Minister had failed to fulfill his constitutional duty to adequately consult with the Da'naxda'xw.

The consultations ordered by the Court proceeded with eventual result being the amendment of the conservancy boundary as the Da'naxda'xw had originally requested.

After the conservancy boundary had been amended, the Da'naxda'xw and Kleana requested that the Energy Minister direct BC Hydro to enter into negotiations for a power purchase agreement with Kleana, as they asserted had been promised back in 2008 at the "rather unprecedented" meeting. The Minister did not act on this request and the Da'naxda'xw and Kleana again applied to the Supreme Court of British Columbia for judicial review.

After the commencement of legal proceedings, the Minister directed BC Hydro to enter into negotiations with Kleana. This direction was considered insufficient by the Da'naxda'xw and Kleana as they believed that the commitment to them also included a right to have the project considered on the same terms as other projects in the 2008 Clean Power Call.

## **The Second Ruling**

The Da'naxda'xw and Kleana's dispute with the Province came before the Supreme Court of British Columbia for a second time in the Summer of 2014 and a decision was rendered in early January of 2015. The Court determined that on the critical factual issue, the Da'naxda'xw and Kleana failed to prove that the Energy Minister made a clear commitment that, once the conservancy boundary was amended, he would direct BC Hydro to negotiate an electricity purchase agreement with Kleana on the basis of factors and terms that applied to power projects under the 2008 Clean Power. Rather, the commitment was limited to merely directing BC Hydro to enter into negotiations with Kleana. This conclusion was reached by the Court on the basis of the equivocal evidence of what occurred at the meeting, letters sent subsequent to the meeting that narrowed the scope of the commitment, and the limited power of the Energy Minister to give direction to BC Hydro.

While the Da'naxda'xw and Kleana failed to convince the Court on this key issue, the Court nevertheless went on to find that the Da'naxda'xw were entitled to further relief to remedy the breaches of the duty to consult

found by the Court in the earlier 2011 proceedings.

The Court held that if the Province had fulfilled its duty to consult in a timely way prior to the introduction of the original conservancy, the conservancy boundary probably would have been amended in time for Kleana's project to be fully considered in the 2008 Clean Power Call. The breach of the duty to consult deprived the Da'naxda'xw and Kleana of the opportunity to have a complete assessment made of the project before the Clean Power Call closed and rendered the boundary amendment irrelevant because the project will never be built. Therefore, the accommodation that was arrived at following the consultations earlier by the Crown was pointless. The Court held that when a form of accommodation is pointless, it cannot be consistent with the honour of the Crown or be adequate to discharge the Crown's duty to consult with the Da'naxda'xw.

### **Conclusion**

The Court concluded that the Province therefore failed to fulfill its duty to consult as the Court had earlier ordered and the Da'naxda'xw were entitled to a remedy on that basis. However, the Court refused to direct a particular form of accommodation as requested by the Da'naxda'xw and instead limited the remedy to declarations that the Province failed to consult with the Da'naxda'xw and has a legal duty to consult with the Da'naxda'xw, with a view to considering a reasonable accommodation. Whether a third trip to the courts will be required to finally determine what the correct level of consultation and accommodation is remains unknown.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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