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August 17, 2012

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FILED

Ms. Alanna Gillis
Acting Commission Secretary
British Columbia Utilities Commission
Sixth Floor – 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Ms. Gillis:

**RE: Project No. 3698640**
**British Columbia Utilities Commission (BCUC)**
**British Columbia Hydro and Power Authority (BC Hydro)**
**Application (the Application) for a CPCN for DCAT Project**

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As part of its written submissions, the West Moberly First Nation relied on the BC Supreme Court's decision in *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council),* 2011 BCSC 266. Enclosed is a copy of the BC Court of Appeal's recent decision in this case which was released on Thursday, August 9, 2012.

Yours very truly,

LAWSON LUNDELL LLP

Michelle Jones

MSJ/sfv
Enc.

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333

Date: 20120809
Docket: CA038926

Between:

**Adams Lake Indian Band**

Respondent
(Petitioner)
Appellant in the Cross Appeal

And

**Lieutenant Governor In Council**

Appellant
(Respondent)
Respondent in the Cross Appeal

And

**Sun Peaks Mountain Resort Municipality**

Respondent
(Respondent)
Respondent in the Cross Appeal

And

**Sun Peaks Mountain Resort Corporation**

Respondent

And

**The Thompson Nicola Regional District**

Respondent

And

**Union of British Columbia Indian Chiefs**

Intervenor

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Low
The Honourable Mr. Justice Tysoe

On appeal from: Supreme Court of British Columbia, March 4, 2012
(*Adams Lake Indian Band v. British Columbia*, 2011 BCSC 266, Vancouver Docket No. S105040)

| | |
|---|---|
| Counsel for the Appellant: | P.G. Foy, Q.C. & K.E. Walman |
| Counsel for the Respondent, Adams Lake Indian Band: | R.J.M. Janes & E.R.S. Sigurdson |
| Counsel for the Respondent, Sun Peaks Mountain Resort Municipality | G.J. Tucker |
| Counsel for the Respondent, Sun Peaks Mountain Resort Corp. | D.R. Clark, Q.C. & M.B. Gehlen |
| Counsel for the Intervenor: | C. Sharvit |
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 30, 31 and February 1, 2012 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>August 9, 2012 |

**Written Reasons by:**
The Honourable Mr. Justice Low

**Concurred in by:**
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe

**Reasons for Judgment of the Honourable Mr. Justice Low:**

[1] On 25 March 2010, the Lieutenant Governor in Council passed an order in council that authorized the issuance of letters patent to create Sun Peaks Mountain Resort Municipality ("the Municipality"). The Municipality's letters patent came into force on 28 June 2010. The order in council revoked the letters patent of the Sun Peaks Mountain Resort Improvement District and transferred all its assets to the Municipality. It provided that the bylaws of the improvement district would remain in force as bylaws of the Municipality until amended or substituted by the Municipality.

[2] At the time, the area covered by the Municipality was also governed by the Thompson-Nicola Regional District. The order in council authorized new letters patent for that body which had the effect of excluding the area covered by the Municipality from its jurisdiction. Those new letters patent transferred the relevant assets of the regional district to the Municipality.

[3] I consider it important to an understanding of this appeal to note that this was simply a replacement of one form of local government with another.

[4] On 9 July 2010, Adams Lake Indian Band ("Adams Lake") filed a petition for an order quashing the order in council on the basis that government consultation with Adams Lake about the incorporation of the Municipality had been inadequate. Adams Lake is part of a First Nation that has a land claim over a large area that includes the site of the Municipality. The land claim itself is not currently the subject of either litigation or treaty negotiation.

[5] Madam Justice Bruce heard the petition over five days in January 2011. She issued reasons for judgment on 4 March 2011, indexed at 2011 BCSC 266. The formal order was entered on 20 September 2011. The petition was allowed in part. The operative part of the order reads as follows:

> THIS COURT:
>
> 1. DECLARES THAT the Lieutenant Governor in Council approved Order in Council 158/2010 in the absence of the Province having

fulfilled its constitutional duty to consult with, and in the absence of adequate accommodation of, the Adams Lake Indian Band;

2. ORDERS THAT the Province conduct further consultation with the Adams Lake Indian Band in respect to the incorporation of Sun Peaks Mountain Resort Municipality in a manner that reflects the strength of the claims and the serious impact on the Adams Lake Indian Band's interests as identified in the Reasons for Judgment dated 4 March 2011;

3. ORDERS THAT deep consultation and accommodation where possible is appropriate in all of the circumstances;

4. ORDERS THAT the Province include the consultation concerning the incorporation in the ongoing consultation process concerning amendment of the Sun Peaks Master Development Agreement and transfer of timber administration;

5. ORDERS THAT Madam Justice Bruce retains jurisdiction to resolve issues that arise out of the application of the Reasons for Judgment dated March 4, 2011 during the course of the consultations;

6. ORDERS THAT the application of Adams Lake Indian Band to set aside or suspend operation of Order-in-Council 158/2010, is dismissed;

7. ORDERS THAT the application of Adams Lake Indian Band to set aside or declare the Letters Patent issued pursuant to Order-in-Council 158/2010 to be of no force and effect is dismissed; and

8. ORDERS THAT the Petitioner shall have its costs of this proceeding against the Respondents.



[6] The Lieutenant Governor in Council ("the Province") appeals. It says the chambers judge erred in declaring that there had been inadequate consultation. It asks this court to set aside the first five paragraphs in the operative part of the order.

[7] Adams Lake cross appeals. It says the judge did not err in her findings on the issue of consultation but that she did err in declining to quash the letters patent and the order in council. It asks this court to quash the order in council and set aside the Municipality's letters patent. In the alternative, it asks that the provisions in the order dismissing its full remedies be set aside and that its petition to quash be adjourned pending further consultation.

[8] The Province says the chambers judge erred:

(a) in law by failing to confine the duty to consult to potential adverse impacts flowing from the incorporation decision alone;

(b) in law in holding that the Province was required to make a preliminary assessment of the strength of the First Nation's title and rights claims generally, in addition to assessing the potential adverse impacts of the statutory decision to incorporate the Municipality;

(c) by misinterpreting provisions of the *Local Government Act* when identifying potential accommodation; by wrongly interpreting the terms of the letters patent when identifying potential adverse impacts; and by incorrectly interpreting the potential reach of a firearms bylaw passed by the Municipality.



[9] The Municipality supports the position of the Province in both the appeal and the cross appeal.

[10] The Thompson Nicola Regional District was named as a respondent in the petition but did not participate in the proceedings.

[11] Sun Peaks Resort Corporation ("the Corporation") was not named as a respondent in the petition and was not served with it. The Corporation's general manager saw the petition but, because of the nature of the relief claimed in it, he determined that it would have little effect on the Corporation's business. On 10 August 2011, Madam Justice Garson ordered that the Corporation be added as a respondent in this appeal. The Corporation contends that it should have been made a party to the petition because its rights and its public image are affected by these proceedings. It supports the arguments of the Province in the main appeal and says that appeal should be allowed and the petition dismissed. However, if we are disposed to dismiss the Province's appeal on the state of the existing evidentiary record, the Corporation says we should order a new hearing of the petition so that it can participate and present evidence. It has filed affidavit evidence in this court, not as fresh evidence for us to consider on the merits of the appeal, but to show that if it had been before the court as a party to the petition, the Corporation could have presented evidence that might have affected the outcome.

[12] For the reasons that follow, I would allow the appeal and dismiss the petition. It is therefore unnecessary to consider the cross appeal or the position of the Corporation.

## Background



[13] The Adams Lake, Neskonlith and Little Shuswap Bands together form the Lakes Division of the Secwepemc Nation. The Secwepemc ("Shwep-muh" or "Shwep-muk"), also commonly known in English as the Shuswap, claim title to a territory in south-central British Columbia comprising approximately 180,000 square kilometers, reaching from the Fraser River at the western edge to the Columbia River valley in the east, and bounded to the north and south by the Upper Fraser and the Arrow Lakes, respectively.

[14] It is part of the Secwepemc's claim that they have occupied this territory since "time immemorial", or for at least the last 10,000 years. The 3,500 years prior to the arrival of Europeans was a period of relative cultural and environmental stability: during this time the Secwepemc existed mainly as a political alliance, united by a common language—Secwepemctsin—and by shared cultural and spiritual beliefs. This commonality of language and culture enabled the chiefs of the area to regulate land use, to negotiate and implement treaties among themselves, and to organize territorial defence against neighbouring nations. The Secwepemc followed a traditional seasonal round of activities, including hunting, trapping, gathering plants, and fishing (especially for salmon), which necessitated travel throughout the region for most of the year, with a "settled" period during the winter.

[15] At present the Neskonlith and Adams Lake Bands together claim something over 1100 members. The Bands are independent members of the Secwepemc and are represented politically by the Shuswap Tribal Council.

[16] The Secwepemc have made various efforts since early days of contact to have their rights and title recognized by the Crown. In 1910, the Chiefs of the interior Nations of B.C., including the Secwepemc Chiefs, signed a formal

declaration to Sir Wilfrid Laurier, then Prime Minister of Canada, setting out their objections to the government's means of asserting rights over their traditional lands. Prime Minister Laurier encouraged the Nations in the pursuit of their rights; he lost the election the same year, however, and the interior Nations received less sympathetic hearings from his successors in government. In his first affidavit, Chief Nelson Leon deposed that the Secwepemc, along with other Interior and Coast Nations, made several other attempts in the early twentieth century to have their rights recognized, including a request to refer the "Indian land question" in B.C. to the Judicial Committee of the Privy Council, but without success.



[17] He further deposed that

> [r]ecently, [the Secwepemc] have refused to participate in the British Columbia treaty process because of the limited and narrow mandates and approaches adopted by the Federal and Provincial Governments. The Governments have made it clear that their mandates in the BC Treaty Process are premised on our nations 'modifying' or surrendering our rights. This means that we are forced to accept limited tracts of fee simple lands with limited hunting and other rights off (sic) those lands in exchange for giving up any claim to aboriginal title, ownership or control over our larger territories. The Secwepemc cannot accept such an approach which we see as leading to our people being severed from our lands as development and settlement progresses.

[18] In addition to the Secwepemc's broader claim to Aboriginal title, the Lakes Division Bands filed a claim in 1996 with the Indian Claims Commission to an area of land known as the Neskonlith Douglas Reserve, which they assert was granted to them pursuant to an 1862 agreement between the then-Chief of the Lake Secwepemc people and Governor Douglas. The area comprises 882,000 acres and includes the present Sun Peaks area. In a report entitled *Neskonlith, Adams Lake and Little Shuswap Indian Bands Neskonlith Douglas Reserve Inquiry*, released in June 2008, the Commission recommended that the claim not be accepted for negotiation on the grounds that the reserve was, by the commission's findings, never legally created.

**Sun Peaks development**

[19] The region known to the Secwepemc as Skwelkwekwelt, also spelled Skwelkwek'welt, and meaning "high alpine area", encompasses Mount Tod, Mount Morrissey, Mount Cahilty and Cahilty Meadows, the northern McGillivray Valley area, McGillivray Lake and Ilene Lake. It is part of the land claim that this area has served the local Bands as an important source of game, berries, and alpine plant species such as avalanche lily, and contains a number of spiritually sacred areas. The Municipality is located on the south slope of Mount Tod, and extends southward towards McGillivray and Ilene Lakes. Mount Tod lies approximately thirty-five miles northeast of Kamloops, B.C.

[20] Mount Tod began to be developed as a ski resort in 1961 with the construction of a lift and lodge. More runs were cut in the early 1970s; the next couple of decades saw limited expansion, with a few condominium developments and a few small runs and lifts added.

[21] In 1992, the Tod Mountain assets were purchased by Nippon Cable Company Ltd., a Japanese corporation. The following year the Province of British Columbia entered into a Master Development Agreement ("the MDA") with Tod Mountain Developments Ltd. (subsequently renamed Sun Peaks Resort Corporation). The Corporation also created a long-term Master Plan for a phased development. The Corporation is owned by Nippon Cable.

[22] The MDA is dated 13 April 1993 and has a termination date of 13 April 2044. It sets out the terms under which the Corporation may pursue its planned development. The agreement provides that projects undertaken will accord with the Master Plan and its Phasing Schedule, and that the Corporation is entitled to purchase Crown land within the Base Area Lands "to be developed in accordance with the land uses and densities specified in the Tod Master Plan" (Article II, s. 2.03). Within twelve months of the completion of each "recreation improvement" or each "lift or snowmaking equipment", the Corporation will apply for the appropriate leasehold tenure or licence, which will be determined within 120 days. The

Corporation covenants, *inter alia*, to comply with all Provincial laws and regulations and to abide by accepted industry standards, as well as to use all reasonable efforts to minimize any adverse environmental effects of development. The MDA further provides that the Province grants to the Corporation the exclusive right to control the Controlled Recreation Area for ensuring safety and order in the area, including the right to "regulate and prohibit the access and entry of all persons to the Controlled Recreation Area upon such terms and conditions as [the Corporation] may reasonably determine in its discretion" (s. 19.01).



[23] Schedule D is the Phasing Schedule. It is expressly stated to be non-binding. It contemplates four ten-year expansion phases. The MDA also provides that the Corporation will review and re-evaluate its Master Plan at least once every five years and submit any proposed alterations to the Province; the Province will not unreasonably refuse to approve changes, unless the objectives of the parties are impaired or rendered unattainable, or fail to comply with the Provincial Commercial Alpine Ski Policy.

[24] In accordance with the MDA, the Corporation began a phase of rapid expansion. Several new ski lifts and a snowboard park were constructed, as well as a golf course, several hotels, a snow-making reservoir, many cabins and condominiums, hiking and riding trails, a community centre, a conference centre, and many retail stores. Tourism began to increase rapidly as the resort became a year-round destination; summer activities included hiking, mountain biking, tennis, fishing and boating, horseback riding, flower viewing, golf and ATV/Hummer tours.

[25] The Master Plan was substantially updated by the Corporation in 2006. Following a lengthy summary of the developments completed to date, the 2006 Plan also provided a preliminary analysis for development of the lands called the "McGillivray Bench", located south-east of the main resort area.

[26] No consultation between the Province and the Bands occurred during the drafting and implementation of the MDA and the Master Plan. The chambers judge observed that there was an "already tenuous" relationship between the Province and

the Lakes Division Bands. This was exacerbated by the development of the ski resort and led to some members of the Secwepemc Nation resorting to "self-help" actions such as blockades and protests, some of which led to injunctions and criminal prosecutions.



**Incorporation**

[27] Prior to the incorporation of the Municipality, there were two local governing bodies that could exercise certain powers with respect to the area in question. Sun Peaks lay within the Thompson Nicola Regional District, which governed ten municipalities and ten unincorporated areas. The district had powers with respect to regional planning, land use, passing of bylaws, setting building standards, search and rescue, waste management and parks. There was no community plan for Sun Peaks. The district did not have the power to create a community plan or pass land-use bylaws without provincial government approval.

[28] A smaller local government body, Sun Peaks Resort Improvement District, was created in 1995. It covered the commercial and residential area of the Sun Peaks development but not the recreational area. It was governed by a board of directors that included four elected members, two provincially-appointed members (one to represent the Corporation) and a seventh member appointed by the regional district. None of the Bands had representation on this body. Its jurisdiction was to provide utilities, street lighting, snow removal and parks and recreation services. As already noted, the improvement district was dissolved by the order in council of 25 March 2010.

[29] In 2003, Sun Peaks local residents began informal discussion and investigation of the possibility of incorporation as a municipality. In 2005, a Governance Committee was formed to pursue this issue; in 2006 communications began with the B.C. Ministry of Community and Rural Development ("the Ministry of Community"), which provided the Committee with a grant to cover a study into the merits of incorporation. The study, which was completed in 2007, did not solicit the views of the local Bands. Chief Leon of the Adams Lake Band and Chief Judy

Wilson of the Neskonlith Band did attend the last public meeting and expressed their frustration about the absence of consultation with regard to incorporation and to the development of the area generally.

[30] In early 2007, the Shuswap Nation Tribal Council, as well as their member Bands Adams Lake and Neskonlith, wrote to the Regional District and to Sun Peaks to express their opposition to the incorporation of the Municipality and to request a meeting to discuss meaningful consultation and accommodation with regard to the proposed incorporation and the Sun Peaks area generally. On 14 May 2007, Ida Chong, Minister of Community and Rural Development, informed the Committee and the local First Nations groups that the Province would assume responsibility for the necessary consultations.

[31] In the summer of 2007, the Province determined that consultation would be led jointly by the Ministry of Tourism, represented by Ms. Psyche Brown, and the Ministry of Community, represented by Ms. Cathy Watson.

[32] The first consultation meetings occurred on 18 and 19 July 2007. At these meetings, in which Ms. Watson met with each Band separately, Chief Leon expressed his concern at the impacts of Sun Peaks's development to date on the Band's traditional territory and at the lack of any consultation or accommodation, as well as the Band's concern that incorporation would create a new government body over lands subject to unsettled and inadequately addressed Aboriginal rights and title. He also expressed his desire to jointly define the consultation framework. These concerns were likewise expressed by the other Lakes Division members.

[33] In September 2007 the Province decided that the Ministry of Tourism would lead the consultation process. It was decided that consultation would take into account issues concerning the development of the resort, proposed amendments to the MDA, and implementation of the *Resource Timber Administration Act*, which proposed a change in authority over timber rights in the Sun Peaks area.

[34] On 6 December 2007, Ms. Brown initiated the consultation process by writing to the Bands with proposed terms of reference (these were later modified); she said she anticipated monthly meetings and completion of consultation within six to twelve months. Ms. Brown attempted to arrange meetings but encountered considerable scheduling difficulties in the months that followed. It was not until 5 May 2008 that Ms. Brown met again with the representatives of the Bands. Apparently no substantive issues were addressed at this meeting. A few days later, Chiefs Wilson and Leon sent identical letters to the Minister advising that they were not yet prepared for consultation on the proposed incorporation as no agreement had been reached with regard either to process or to funding. The Chiefs emphasized that a global framework regarding consultation would need to be reached prior to the commencement of negotiations.

[35] On 28 May 2008, Ms. Brown emailed to the Bands a draft consultation framework. The ensuing months were again marked by scheduling difficulties as Ms. Brown attempted to schedule meetings with the Bands to settle the terms of the framework agreement. On 6 August 2008, Ms. Brown emailed the Bands a new draft consultation agreement. At a meeting two days later, the draft agreement was discussed briefly, but the principal topic was the Chiefs' request for more information as to the impacts of incorporation on their interests. Another meeting was scheduled for 8 September 2008.

[36] Two representatives of Chief Leon attended this meeting in his stead. Ms. Watson provided information as to the difference between a regional district and a municipality. She told the Bands that the municipality would be bound by the terms of the MDA. She also answered questions concerning, *inter alia*, municipal boundary extensions, the process of incorporation, the legal effects of incorporation, and the inability to share tax revenue. The Bands expressed their concern that the larger issue of Aboriginal title needed to be determined before incorporation could go through. Ms. Watson told the Bands that incorporation was not tied to the other issues. She asked the Bands to provide a detailed summary of their concerns and funding requirements. The Bands provided no such summary.

[37] On 14 October 2008, Ms. Brown met again with the Bands to discuss a new draft agreement that had been prepared by the Bands. It included an estimate of $250,000 in funding to be paid to the Bands. Following this meeting, the Little Shuswap Band broke away from the joint negotiation process due to the slow progress.

[38] On 3 November 2008, Ms. Brown and Ms. Watson again met with the Chiefs and provided a revised draft consultation agreement. This one was in an entirely new format, and contemplated consultation with regard to three proposed decisions: proposed amendments to the MDA to extend the term by ten years and to permit Sun Peaks Resort Corporation to authorize recreational activities without government permission, and a proposal to transfer administrative authority over timber resources on Crown lands within the Sun Peaks area, to the Ministry of Community. The draft agreement also set out the incorporation process as a subject of consultation. It provided a proposed completion date of 31 July 2009 and $10,000 in funding by the Province to cover the Bands' costs of consultation. During the meeting, Ms. Brown advised that there would likely be additional funding; she emphasized the need for all parties to move forward as quickly as possible with regard to the incorporation consultation specifically. In a letter sent 19 December, Ms. Brown forwarded a draft budget indicating an increased level of funding of $28,300 per Band.

[39] In a meeting with Ms. Brown and Ms. Watson on 5 January 2009, the Chiefs proposed the following accommodation: co-management of the new municipality by the Bands and the municipal council; input into environmental issues, particularly concerning mining and fishing; and accommodation for past infringements of the Bands' rights. Chief Leon expressed his preference for a veto role, but was also interested in an advisory role; he said that his principal concern was that the Band be able to share in the economic benefits of the resort's development and that they receive in particular some benefit in return for the rights acquired by the new municipality.

[40] From February to April 2009, Ms. Brown was away on vacation; her delegate attempted to have the consultation agreement signed in her absence, but without success. Ms. Watson meanwhile provided more information about the effects of incorporation, namely the services over which the municipality would assume responsibility. On 15 May, the Assistant Deputy Minister for Community, Mr. Mike Furey, wrote to the Chiefs to outline generally the progress on consultation to date, including information provided to the Bands, funding offers, failed attempts to negotiate a consultation agreement, and the Bands' potential concerns. He characterized their concerns as, first, potential impacts on claimed Aboriginal rights and title; second, impacts on traditional and sacred use sites; and third, the provisions of the 1993 MDA. Mr. Furey stated that the provisions of the MDA lay outside the scope of the incorporation process, as the MDA would continue to govern the municipality; he said that the Bands' concerns would be better addressed in the process of consultation with regard to the proposed amendments to the MDA.

[41] On 10 June 2009, Ms. Brown met with Chief Wilson. The Bands' view continued to be that the draft consultation agreement was too narrow in focus and that incorporation should be delayed until all the consultation issues had been resolved. They discussed a number of other matters, including possible accommodation such as revenue-sharing and acquisition of Crown lands by the Bands. Chief Wilson again expressed the concerns of the Bands about incorporation.

[42] On 2 July 2009, Mr. Kevin Krueger, the Minister of Tourism, met with Chief Wilson and told her that in the government's view, consultation with regard to the incorporation process itself was complete. Chief Wilson objected and stated the Bands' view that the framework for consultation had never been settled. Following this meeting, Ms. Brown did not attempt to set up any more meetings regarding consultation on the incorporation decision. She continued to try to schedule meetings with regard to the remaining issues, such as the MDA amendments, but the Bands were of the view that no further meetings would be fruitful in light of the

limited scope of the framework agreement and what they regarded as inadequate funding and accommodation.

[43] In a letter dated 2 November 2009, Mr. Furey advised the Bands as follows:

> In response to comments received during consultation with you, the Province proposes the creation of an advisory committee that would include First Nations representatives to provide advice to the new municipal council on land matters. In addition, the new municipality will need to consider consultation with First Nations in the development and amendments to the municipality's Official Community Plan which will require the approval of the Minister of Community and Rural Development. ...
>
> [The MDA] will not be affected by a change of local governance. Should the Sun Peaks Community incorporate as a mountain resort municipality, the official community plan will need to be consistent with the MDA.



[44] On 4 December 2009, the Minister of Community directed that a referendum be held among the 400 residents of Sun Peaks regarding incorporation. On 4 January, Chief Wilson wrote to the Minister of Tourism to state that consultation had not been adequate with respect to incorporation.

[45] On 7 January 2010, a Neskonlith Band representative requested a copy of the MDA, a consultation record, and the strength of claim analysis. Ms. Brown responded that there was no consultation record, but that the strength of claim analysis was being prepared.

[46] At a telephone conference on 29 January, Chiefs Leon and Wilson issued a joint statement that included the following:

> We therefore request that the province not attempt to make any unilateral decisions regarding the Sun Peaks Master Plan, municipal incorporation, tenure transfers, and by-law amendments, in the absence of the Aboriginal Title issue being addressed. Any meaningful dialogue has to involve federal representatives and decision-makers who can address Aboriginal Title issues and has to respect the indigenous prior informed consent requirement. All relevant information has to be provided and sufficient funds and time has to be allotted to study the potential impact of any proposed developments or changes on our Aboriginal Rights and Title. In conclusion:
>
> There should be no new municipalities created in Secwepemc territory without the agreement of the Secwepemc people and until there is recognition of our Aboriginal Title.

[47] On 30 January 2010, a majority of voters who participated in the referendum voted for incorporation. Correspondence followed between the Chiefs and the Province, the former essentially reiterating their desire to have all issues related to Sun Peaks addressed in the same consultation process (including the issue of Aboriginal title), as well as their request that no further decisions be made pending the outcome of this consultation.

[48] On 25 March 2010, the Lieutenant Governor in Council issued Order in Council 158/2010 authorizing letters patent for the Municipality.

[49] The letters patent provide that the boundary of the Municipality will conform to the Sun Peaks Controlled Recreation area, the area covered by the MDA. They also provide for the mandatory creation of three advisory committees, which cannot be dissolved before the end of 2014, to represent businesses, non-resident owners, and First Nations, respectively. Further, the Minister may appoint one councillor to ensure that there is always a representative of the Corporation on the municipal council.

[50] The letters patent also provide that the Municipality must, before 28 June 2012, prepare an official community plan dealing with land use, to be submitted to and approved by the minister; in the meantime, all by-laws addressing land use must receive ministerial approval.

**Chambers judgment**

[51] The chambers judge found that there should have been a preliminary assessment of the strength of the claim for Aboriginal title and rights before the recommendation for incorporation of the Municipality went from the Ministry of Community to the Lieutenant Governor in Council. The judge did her own preliminary assessment and concluded that the claim for rights to hunt, to gather plants and to undertake spiritual practices in the area in question was strong. In addition, she found "a good *prima facie* claim" to Aboriginal title to the Sun Peaks area.

[52] At para. 181 of the reasons, the judge stated that incorporation was "an integral part of the expansion and development of the resort and, in particular, the influence of the [Corporation] over the policies of the municipal council". She rejected the argument of the Province that the real issue was whether Community could separate consultation on incorporation from consultation about the continuing development of the resort by the Corporation. At para. 188, she held that the Province had "continually failed to realize the real and substantial connection between the incorporation decision and the Sun Peaks development in general".



[53] The chambers judge stated her final conclusion thus:

> [201] I have concluded the Province failed to adequately consult with the Band prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council and that the accommodation arising from the consultation was not within the range of reasonable outcomes. Thus it is appropriate to declare that the Province did not fulfill its constitutional duty to consult with the Band with respect to the incorporation of the Municipality prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council. I am also satisfied that the court has jurisdiction to order the Province to engage in a consultation process with regard to the incorporation of the Municipality to uphold the honour of the Crown and in a manner that reflects the strength of the claims and the serious impact on the Band's interests identified by the court in this judgment. Nothing short of deep consultation and accommodation where possible is appropriate in all of the circumstances. It is also appropriate to order the Province to include consultation about the incorporation of the Municipality in its ongoing consultation process with the Band concerning the MDA and the transfer of the timber administration.

[54] The judge limited the relief to a declaratory order and a direction to consult further. She declined to quash the order in council or to suspend that claim for relief pending further consultation. She did not determine whether the court had the power to quash the order in council.

[55] Finally, at para. 214 the judge said that she would personally "retain jurisdiction to resolve issues that arise out of the application of these reasons for judgment during the course of the parties' consultation process".

**General principles**

[56] The duty of the Crown to consult and appropriately accommodate the interests of bands who have asserted as yet unresolved claims to Aboriginal title and rights over specific areas of Crown land has been the subject of discussion in the leading cases of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650. Certain general principles emerge from those cases that are applicable to the present case.

[57] Section 35 of the *Constitution Act, 1982* recognizes and affirms "(t)he existing aboriginal and treaty rights of the Aboriginal peoples of Canada". In *Haida Nation*, the Court stated at para. 38 that "consultation and accommodation before final claims resolution ... is an essential corollary to the honourable process of reconciliation that s. 35 demands". The Court then set out broad directions for consultation with respect to intended Crown authorization of use of land subject to known claims of Aboriginal title or aboriginal rights, or both. Chief Justice McLachlin described the scope of the Crown's duty thus (my emphasis):

> 43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like

> mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. 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. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.



[58] I see the application of this direction in the circumstances of the present case to be this: The Province had to balance the interests of the residents and property owners of Sun Peaks with respect to their desire for incorporation with the interests of Adams Lake and the other Bands with respect to their claim to Aboriginal title and rights over the same land. The incorporation of the Municipality was otherwise not a complicated or difficult administrative recommendation by the responsible government ministry; nor was it a complicated or difficult legislative decision, based on the ministry recommendation, for the Lieutenant Governor in Council to make. The only complication was the need to consult the Bands and, possibly, bring about the incorporation in such a way as to accommodate their Aboriginal interests.

[59] At para. 53 in *Rio Tinto*, the Court said that the duty to consult concerns "the specific crown proposal at issue" and not the "larger adverse impacts of the project of which it is a part". It continued: "The subject of the consultation is the impact on the claimed rights of the current decision under consideration". I consider this statement of the law to be important to the analysis in the present case. See also *Rio Tinto* at paras. 45 and 51 to 54.

**Scope of judicial review**

[60] The petition of Adams Lake pleaded the history of the development of Sun Peaks under the MDA, including an assertion that there had been "no meaningful, or woefully inadequate, consultation or accommodation of Secwepemc Aboriginal title,

rights, and interests in the development of the resort". Before getting to the issue of incorporation, the petition asserted (my emphasis):

> 20. The Secwepemc, including Adams Lake, have tried to consult with the Province concerning the issues around Sun Peaks. The Province has represented that various initiatives will be undertaken for the purpose of furthering consultation but has yet to actually carry out those [processes]. Further, there are significant issues outstanding between the Secwepemc and the Province concerning the adequacy of those processes, including the adequacy of funding, the timeliness, and effectiveness of those processes given that development continues at Sun Peaks without consultation.



[61] The petition continued with allegations that the Province had breached its duty to consult and accommodate with respect to incorporation of the Municipality. It concluded with the following particulars of the breach (my emphasis):

> 34. The duty to consult has been breached because the Crown:
>
> a) did not properly approach the assessment of the adequacy of consultation, because it assessed the adequacy of the consultation before obtaining a strength of claim assessment, which is an essential component of assessing the adequacy of consultation;
>
> b) failed to provide Adams Lake with the preliminary strength of claim assessment;
>
> c) failed to afford Adams Lake with an opportunity to comment on the strength of claim assessment;
>
> d) acted dishonourably by failing to honour its promise to provide Adams Lake with a copy of the strength of claim assessment;
>
> e) acted dishonourably by failing to honour its promise to afford Adams Lake with an opportunity to comment on the strength of claim assessment; and
>
> f) assessed the consultation as being complete when there were still significant ongoing consultation efforts which would or could be adversely affected or made less effective by the decision to incorporate.

[62] The only remedies sought in the petition were the quashing of the order in council and a direction "to resume consultation". Upon a reading of the petition as a whole, this could only have meant consultation about incorporation of the Municipality. The petition included no specific complaint about the adequacy of

ongoing consultation with respect to proposed amendments to the MDA or with respect to the proposed transfer of timber administration.

[63] In my opinion, the adequacy of consultation on any matters other than incorporation was not properly before the court. Consultation on the more important and more fundamental issues continued after incorporation and should not have been addressed by the court in the circumstances of this case. It is not generally the role of the court to supervise ongoing consultations and provide directions as to how they are to be conducted. It is only where there has been a breach by government of the duty to consult that a legal remedy might be sought, usually by way of a petition for the suspension or quashing of a government initiative. Pleadings define the issues before the court and the inquiry by the court should be limited thereby. The court should avoid involvement in ongoing consultations.

[64] It seems to me, therefore, that the petition in this case raised three questions: (1) Could the Province sever the incorporation issue from the other consultation issues extant between the parties? (2) If it could, what was the potential impact of incorporation on the Aboriginal claims? (3) Having regard to the impact, was the consultation about incorporation, standing alone, adequate and was the accommodation reasonable?

[65] The Province's first ground of appeal is that the chambers judge erred in not confining the duty to consult analysis to the incorporation issue alone. The Province says there was no legal requirement that it conduct one consultation process on all issues at the same time. The Province argues that the chambers judge melded the consultation issues and treated them as one amalgamated process.

[66] At para. 148 of her reasons, the chambers judge said this (my emphasis):

> I agree with the Attorney General that the change in local government from a regional district/improvement district form of governance to an incorporated municipality on its face placed the Band in no worse position tha[n] it was before incorporation. The Band's claim to aboriginal rights and title with respect to Sun Peaks was neither extinguished nor reduced by the change in local government. Incorporation did not involve the alienation of Crown lands or private property within Sun Peaks. Moreover, the Band's ability to protect

> its claims through involvement in local government decisions was actually improved by the creation of an advisory committee. The Band had no similar representation on the Regional District or the Improvement District.

[67] The Province contends that the judge should have ended the consultation analysis at this point and gone on to consider whether the accommodation with respect to incorporation was reasonable. However, in the ensuing paragraph, the judge appears to have contradicted her own conclusion:

> [149] This superficial analysis, however, is not a sufficient inquiry into the issue of adverse impact. A close examination of the facts, even under this "before and after" comparison approach, reveals that from a practical perspective there were significant alterations in the spheres of influence and the balance of power, as between the Band and the Sun Peaks Development Corporation, with a corresponding reduction in Provincial government influence over the acts of the local government due to the independence gained through incorporated status.

[68] In my opinion, there is no basis in the evidence for this conclusion. I see nothing superficial in the analysis found in para. 148 above. It appears to me that the judge arrived at the conclusion found in her para. 149 by mixing into her analysis the continuing issues relating to the development of the resort. For example, later in the judgment she said this (my emphasis):

> [158] I also agree with the Band's submission that the increased independence of the new local government, particularly with regard to sub-division and zoning approval authority, enhances the ability of the Municipality to make decisions that favour its smaller electorate whose interests are generally aligned with the Sun Peaks resort. The advantages of independence were recognized by the 2009 Update Technical Report at p. 87:
>
> > The increased autonomy would flow from the independent powers given to municipalities under the Community Charter and the Local Government Act. The main decision-makers - the municipal council - would be accountable to local electors. There would be less reliance on remote bodies like the Province and the TNRD [Regional District], where the decision makers are not elected by the Sun Peaks voters.
>
> [159] As the Attorney General has identified in its submission, it is the development of Sun Peaks by the Sun Peaks Resort Corporation that is the focus of the Band's concerns with respect to the protection of the aboriginal rights and title it asserts over Sun Peaks. The Band maintains the continued expansion and development of the resort interferes with its traditional use and enjoyment of the lands and is inconsistent with its claim to aboriginal title over

> the lands. Thus to enhance the power of the corporation to control and direct the policies of the Municipality to suit its vision of the future for resort development clearly has a potential to create an adverse impact on the interests claimed by the Band. This change is clearly a new and "novel" impact in regard to the past failures to consult about the development at Sun Peaks.
>
> ...
>
> [188] In my view, after July 2009 the Province was only going through the motions to complete the incorporation consultation and get the work of the Governance Committee back on track. Indeed, after this date Ms. Brown sought only to resume consultations with regard to the MDA and the transfer of the timber administration. Moreover, the bands legitimately lost interest in attending more meetings as a result of what Mr. Krueger had said and because the government continually failed to realize the real and substantial connection between the incorporation decision and the Sun Peaks development in general. Up to this point it is apparent that the Province had failed to direct their minds to the real concerns of the bands in respect of the development and the potential impact a change in local government could have on the expansion of the Sun Peaks resort and the influence of the Sun Peaks Resort Corporation on the Municipality. I find nothing in the conduct of the Band that frustrated the consultation process. The Band did not put improper barriers in the way of appropriate accommodations being reached. A careful examination of the evidence indicates the Band did not oppose incorporation altogether; instead, they opposed a decision on the incorporation before the other issues involving Sun Peaks were resolved.



[69] These passages and others show that the chambers judge included in her analysis the continuing land-use issues and the issues advanced by the Bands as to the past development of Sun Peaks. Continuing land-use issues involve the proposed amendments to the MDA and the changes to timber resources supervision, the subjects of ongoing consultation. Past development impact issues remain to be addressed in a final judicial or negotiated determination of the claim to Aboriginal title and rights – see *Rio Tinto* at para. 49.

[70] In my opinion, the suggestion that the Corporation would somehow have control over development through the Municipality that it would not otherwise have had is speculative at best. Land use is a matter between the Province and the Corporation under the MDA and is not affected by the incorporation of the Municipality. Land-use issues remain subject to consultation where required.

[71] As to the first of the three questions, it follows that I agree with the Province that the chambers judge erred in not confining the consultation and accommodation analysis to incorporation as a stand-alone matter. There was no demonstrated reason for requiring the executive decision on the incorporation of the Municipality to await completion of consultation on the other issues. The Ministry of Community explained the legal effect of incorporation during consultation and was entitled to take the position that it was a discrete issue that would be considered separately. The ministry received little input from the Chiefs on the issue, except for assertions about the lack of consultation in the past with respect to the creation and development of the property as a resort. The Chiefs chose to not present focused arguments on the issue of incorporation *per se*. This tactical position did not require the Province to complete consultation with respect to all issues before any could be resolved. The Province did not breach its duty to consult by treating the incorporation of the Municipality as a stand-alone issue.



**Impact, consultation and accommodation**

[72] The second and third questions can be considered together.

[73] As for the impact of incorporation of the Municipality on the Aboriginal claims, the Province says the chambers judge erred in concluding that Adams Lake has a "good *prima facie* case" of Aboriginal title to the Sun Peaks property. The test for Aboriginal title is set out in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220. The Crown says that on the application of that test, the claim to title is weak. We are concerned here with an alpine area to which, on the evidence, the Secwepemc people resorted only periodically. It is arguable that this is not sufficient to found a claim to title under *Marshall* and *Bernard*.

[74] I agree with the Province, however, that it was not necessary in this case for the Ministry of Community or the court to do an analysis of the strength of the claim to Aboriginal rights and title. As will become clear, the impact of incorporation on the Bands' claim to rights and title was and remains insubstantial. This is so regardless

of the strength of the claim that would have been revealed by a strength-of-claim analysis.

[75] As the Court said in *Rio Tinto* at para. 51, there must be a "demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right" before the need for consultation and possible accommodation will arise. The causal connection between the incorporation of the Municipality and the assertion of an adverse impact in this case is difficult to see. I have not been able to discern it clearly in the evidence or in the arguments advanced. I expect this is because the assertion of impact was centered on the more general issues of the past development of the resort, the proposed amendment of the MDA and the proposed changes to timber administration.



[76] As I said at para. 3 above, the incorporation of the Municipality only substituted one form of local government for another. I do not see that the new form of local government has any greater opportunity to infringe upon Aboriginal rights than did the forms of local government previously in place. I agree with the following submission made by the Province in its factum:

> ... Incorporation changed the structure of local government but not the overall powers of government vis-a-vis Aboriginal rights and title. In relation to Section 35 rights, Regional Districts, Improvement Districts and the Province have the same bundle of powers as Regional Districts, Municipalities and the Province.

[77] It is also correct that incorporation of the Municipality leaves the Province with the same bundle of obligations under *Haida Nation* and the other authorities as existed prior to incorporation. I do not see that the incorporation has changed in any material way either the obligation of the Province to consult or the right of Adams Lake to be consulted, as and when required by law. The impact of incorporation of the Municipality was more formal than substantive.

[78] In my view, it follows that the consultation with respect to the issue of incorporation of the Municipality as described above was adequate. The Ministry of Community provided information about the structure of the intended mountain resort

municipality and the legal effects of incorporation. It also gave the Bands more than sufficient opportunity to respond. The process was as thorough and as comprehensive as the circumstances required. I disagree with the conclusions of the chambers judge to the contrary. Those conclusions were coloured by broader consultation considerations than were appropriate or necessary. The judge erred by not analyzing the adequacy of consultation with respect to the incorporation matter alone.



[79] I also consider that the accommodation made by the Province was reasonable. As the chambers judge noted, there was a requirement that the Municipality form a First Nations advisory committee, at least until the end of 2014, a First Nations role that did not exist under the existing form of local governance.

***Local Government Act*; Letters Patent; and Firearms Bylaw**

[80] The Province raised three issues that arose out of the consultation analysis done by the chambers judge.

[81] First, at para. 195 of her reasons the chambers judge was critical of the Province for not considering certain powers that can be exercised by or reserved to the Province on the incorporation of a mountain resort municipality under ss. 11(3.1) and 11(3.2) of the *Local Government Act*. The judge said that broad discretion in these subsections "amply illustrates the limited nature of the actual accommodation adopted as a means of addressing the Band's interests in Sun Peaks". This passage is another illustration of the court's failure to consider the impact of incorporation alone. But it also contains a misinterpretation of the legislation. The two subsections apply only to mountain resort municipalities incorporated on the recommendation of the Minister without a vote of the residents of the area.

[82] Second, at paras. 153 and 154 of her reasons, the chambers judge expressed concern that the Province had appointed a representative of the Corporation to the municipal council. This, she said, "greatly enhanced the corporation's ability to control development within Sun Peaks". The judge also said

that the Municipality might appoint the Corporation as its representative on the board of the regional district. With respect, the first conclusion fails to recognize that development of the resort is governed by the MDA. The second conclusion is contrary to the Letters Patent of the Municipality which provide in s. 11(2) that the councillor appointed by the Minister cannot be appointed "as a regional district director or an alternate regional district director".



[83] Finally, at para. 152 of her reasons the chambers judge expressed concern about the Municipality's adoption in the fall of 2010 of a bylaw restricting the use of firearms. She said that this bylaw "had a direct and immediate impact on the Band's aboriginal right to hunt within Sun Peaks". I agree with the Province that there was no evidence of this alleged effect. In any event, the Municipality gave evidence that it was prepared to exempt Band hunters from the bylaw. The Municipality has now repealed the bylaw. Even if the bylaw remained on the books and was enforced against Band members, the Band or the members so affected could seek a constitutional exemption. I do not see the bylaw as an example of an impact of incorporation on the Aboriginal claims at large in this case.

## Conclusion

[84] It was proper for the Ministry of Community to consider incorporation apart from the other outstanding issues. Incorporation was an issue that fell at the low end of the consultation spectrum. Any impact of incorporation on the Aboriginal claims is difficult to discern; at best, it was minimal. The accommodation made by the Province was reasonable in the circumstances.

[85] The Province asks that the consultation declarations in the order under appeal be set aside. That would leave dismissal of the substantive remedies sought by Adams Lake intact without a clear disposition of the petition. It is my opinion that an unequivocal result would be more appropriate. I would therefore allow the appeal, set aside the order in its entirety and dismiss the petition.

[86] We are grateful to counsel for their helpful submissions in this complex appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Tysoe"