
IMPLEMENTING DELGAMUUK'W

Biography of Jeff Rath

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Jeffrey Rath is a barrister & solicitor practicing in the area of Treaty & Aboriginal Rights law. Mr. Rath has been involved in litigating some of the leading consultation cases in the provinces of Alberta and British Columbia. Such cases include *Treaty 8 Tribal Association v. the Ministry of Forests*, at the Environmental Appeal Board of BC in 1993; *Halfway River First Nation and Ministry of Forests and Canfor at the Supreme Court of British Columbia* in 1996 and the *British Columbia Court of Appeal* in 1999; *R. v. Breaker* in Alberta in 1996 and 1998. Jeffrey Rath's firm, Rath and Co., is based just outside of Calgary in Priddis, Alberta.

I'd like to start off by thanking the Union [of B.C. Indian Chiefs] for inviting me here today and the Coast Salish people for having me in their territory. I'd also like to thank my friend Peter Di Gangi for his presentation, which I think is a fairly good starting point in summary for my remarks on consultation and consultation-based obligations of government.

In starting my remarks, and following on what Peter was saying about the federal Crown analysis of consultation law, it reminds me of a conversation I had with my son a couple of years ago when he was in junior high school. He was asking me to explain an oxymoron, and I said an oxymoron is a phrase that is internally contradictory, like military intelligence or federal justice. Really that's what sums it up when we are talking about Crown positions, is that the Crown is obviously trying as much as possible to minimize what their obligations are. Essentially what they have created with both of the documents that Peter and I were asked to review, both the federal Department of Justice paper and the paper on consultation guidelines for the government of B.C., really are nothing more than checklists or guidelines for bureaucrats in terms of how to "court-proof" themselves against the exercise or the insistence of First Nations that their rights be respected. Now I don't know if you want to do this by show of hands, but a question I have got is how many people here in the room were actually consulted with regard to either one of these documents? Anybody? I didn't think so, and that in it of itself is a part of the problem. I mean, there's a line from the Jack decision and some other cases that are saying, when you're talking about the regulation of treaty and aboriginal rights, First Nations people themselves need to be consulted with regard to the way in which the rights are being regulated. That's one of the crucial things that is missing from this whole process of bureaucrats sitting down in their offices and developing strategies to deal with your rights, is that all of these strategies are implemented or are designed with a view towards minimizing your rights and ensuring that you will have the least success possible in the event that you insist that your rights be respected and you take the various governments to court with regard to these rights.

The other question in dealing with consultation that doesn't often get addressed that I think is extremely important -- and Peter touched on it -- is the whole issue of "why consultation?" Too often, I find that in my practice that people on the government side, or even judges in the court, look at consultation almost as an end in and of itself. What you need to be looking at is, why is it... when you are thinking about consultation, think about, well why is it that Supreme Court in *Sparrow* established consultation as part of the justification analysis? What I find really helpful is to go back to *Sparrow* and look at what the court was saying in that case, which to me is essentially consultation, and the reason for it is to ensure that your rights are infringed "as little as possible" -- and those for me are the key words from the *Sparrow* analysis. So what you are trying to do -- and we'll deal with the issue of funding and we'll deal with some of the other thornier issues in a minute -- but in engaging in any consultation process with the government, what you are really trying to do is to obtain as much information as you possibly can from them with regard to whatever it is that they are proposing to do in your territory that you may have a problem with, from the standpoint of showing the government that what they are doing isn't going to infringe your rights "as little as possible."

As an example -- and I will just quickly just go over some recent cases we've been involved in -- a case called *R. v. Breaker* in Alberta: road corridor or wildlife sanctuary? The government brought it in, it was a highway going into Kananaskis country, largely because they didn't want -- the documents actually that we had a trial said -- were the sight of people (read Indians) skinning animals along the highway would be off-putting to tourists, so let's bring a road corridor or a wildlife sanctuary to shut down hunting in this area. But the real problem there wasn't *all* wildlife; the problem was elk and only within a particularly short period of time, which was March and April, during what all the biologists called "the critical winter rain." The government's reaction, because they wanted to, in essence, control all Indian hunting in this area -- and again keep in mind that they said, "oh, the corridor is not that wide," but effectively when you are talking the Rocky Mountains, it is the entire width in some places of the useable habitat in the area -- so what they did was they extended this corridor to all species at all seasons of the year when there is absolutely no need for it.

So you know those are the types of things that you need to do, as a technique -- and, again, we can deal with a thorny issue of funding in a second. But even in the event the funding isn't available, then force them to do your work for you and don't give up on the consultation process until you have got every single shred of paper from their files, virtually, because that is their obligation. It is a positive obligation and this is, I would argue, at the lowest end of the spectrum -- but we will deal with the consent requirement in a minute -- to provide you all of the information that you need as First Nations people to ensure that your rights are impacted "as little as possible." That means all the wildlife studies that they have, that means all the bureaucratic correspondence that relates to the issue, that means their entire file, if you can get your hands on it, because of course what you will find -- and I have found as a matter of practice -- once you get your hands on their files, I mean there is just a treasure trove in there that you can use to ensure that the project only goes ahead in the most modified form because of the fact that, when these files were generated, there wasn't a lot of thought going into the fact that First Nations people would someday be looking over their shoulders and looking at e-mails where various chiefs were referred to in derogatory fashions, or the rights were minimized, or treaties were made fun of, or all these types of things that we found typically exist on government files where they didn't think that First Nations people would be reading them after the fact. And again, the other thing that you do through this process, or the other thing that you are going to find, is that, notwithstanding the fact that the government is always talking about how well they manage their resources in this province or in any province, is you're going to find in a lot of cases that there is an absolute dearth of information on the files from which they can make reason decisions. So they want to regulate wildlife in an area, as an example. Often times they won't even have accurate up-to-date wildlife counts. Then think about that in the context of big seismic programs, or think about it in the context of logging programs where all this new access is being created or all of this habitat is being destroyed -- especially when you are talking about the application of herbicides and so on -- and they have absolutely no way internally to correlate how all the herbicides or all the new access or any of these other impacts are going to work with the tens of thousands of hunting licenses that they issue in a particular area. So those are all of the things that, really, you should be requiring the government to answer, and you should be almost be developing lengthy check lists that you are going to require of them before you're even to the stage where you have sufficient information to even begin the consultation process. That's what I would say is the minimum level that the Supreme court is talking about.

Now the other end of the spectrum is the most fun, for me, because for years we've had Delgamuuk'w One stuffed down our throats. Oh, don't have a veto, so let's play the Ryan and Schultz game! Let's aggravate chiefs and councils to the point where they finally say "no," and then we can pull out Ryan and Schultz and say, "ah, you don't have a veto, you're acting in bad faith," and now we can carry on and pretend like you don't exist. We have all experienced this. What we have now is the Supreme Court saying, "well hang on, some situations may require consent." Again, following what my friend was saying, don't buy into the fact that consultation relates only to title and title ends; it also applies to your rights. When you think about where consultation comes from, it comes from Sparrow, which wasn't a title case, it was a fishing case relating to an aboriginal right, okay? When you think about all the cases that we've been arguing in northeastern B.C., where the consultation obligation has been confirmed time and time and time again, those aren't title cases; those are all cases where we are talking about treaty rights, you know, rights to hunt and... it's a lot more expanded than that but in essence that's where it all starts. Don't let them fool you into thinking that's the extent of the obligation.

Another interesting case -- and then I think we could leave it open for discussion and I'll deal with the funding issue quickly -- there is a case called R. v. Sundown in Saskatchewan. This is another one of my favourite cases lately, just because it irritates Saskatchewan so much. Mr. Sundown built a cabin on the shore of a lake in a provincial park -- some of you may be familiar with this case. So what happens is, the Saskatchewan -- and this was not as a title right, because building a cabin and hub-and-spoke hunting was part of their pattern of hunting that they exercised under the treaty as a treaty right, or in lower mainland B.C. you could read it as an aboriginal right -- so he builds his cabin in conjunction to his right to hunt; court rules that he has that right to do that. Saskatchewan Court of Appeal confirms that he has this right. So ask yourself in the context of Delgamuuk'w -- and this is what the provincial Crown is really afraid of -- ask yourself in the context of that case, when the Supreme Court says consent in some cases, whether the government of Saskatchewan, out of spite, could bulldoze Mr. Sundown's cabin to build a marina in this provincial park or, without a by your leave or mere consultation -- e.g., we're going to talk to you about it or were going to notify you that we are going to bulldoze your cabin and your possessions -- or ask yourself in that instance whether or not they may in fact require consent. I would think that the way that the courts are going to go with this -- and I'll admit it is an open question -- is that in certain circumstances like that, consent may in fact be required. So, again the whole story hasn't been told on the issue of consultation. There's a lot of things that are going to need to be developed out of what is meant by consent and so on. But, really the way I am seeing the case is going -- notwithstanding what I would consider the aberration of the culturally modified trees cases that we were just talking about -- things are moving largely in the direction of First Nations, and when we are talking about

consultation it is probably the most potent weapon that First Nations have to control -- pending the confirmation of title -- to control development in your territory, that you're unhappy with what's taking place notwithstanding your outstanding title claims. So those are my remarks and I guess at that point we'll leave it open to questions.