Federal Court  Cour fédérale

Date: 20240619

Docket: T-930-20

Citation: 2024 FC 925

Vancouver, British Columbia, June 19, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

COLD LAKE FIRST NATIONS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] When Canada created the Cold Lake Air Weapons Range [CLAWR or the Range] in 1954, it displaced many members of Cold Lake First Nations [Cold Lake or CLFN], who used the land for traditional sustenance. Cold Lake's claim for compensation was settled only in 2002. As part of the settlement, Canada granted Cold Lake access to parts of the Range and undertook to consult it before granting access to anyone else.

[2] Two other First Nations, Buffalo River Dene Nation [Buffalo River] and Birch Narrows Dene Nation [Birch Narrows], are suing Canada in relation to the establishment of the Range. Canada has entered into settlement discussions with these two First Nations. As part of the proposed settlement, Canada intends to grant them access to parts of the Range.

[3] For this reason, Canada gave notice to Cold Lake and sought its views. Cold Lake asserted that its access should be exclusive and that Buffalo River and Birch Narrows had not shown that their traditional use of the lands within the Range would entitle them to access. It requested a copy of an expert report regarding Buffalo River and Birch Narrows' traditional use, which was generated in the course of the settlement discussions. Canada refused to disclose this report. After more than three years of discussions with Cold Lake, Canada decided to grant Buffalo River and Birch Narrows access to most of the portion of the Range lying within Saskatchewan. Cold Lake is now seeking judicial review of this decision, arguing that Canada failed to discharge its duty to consult.

[4] The Court is dismissing Cold Lake's application. The duty to consult in this case does not give Cold Lake the right to be consulted regarding another Indigenous community's entitlement to access nor to question the grounds on which Canada decides to settle another community's claim. In this case, Cold Lake's submissions to Canada focused almost exclusively on the reasons why Canada would grant access to Buffalo River and Birch Narrows. This was outside the scope of the duty to consult.

[5] In contrast, the scope of the duty to consult encompassed the impacts that granting access to others would have on the exercise of Cold Lake's right of access, for example, through the depletion of scarce resources or the loss of economic opportunities. However, Cold Lake failed to put such concerns forward with any degree of particularity. Canada was not required to respond to concerns that were not minimally substantiated. Thus, Canada complied with its duty to consult.

I. Background

[6] In 1954, the Department of National Defence established the Cold Lake Air Weapons Range, sometimes known as the Primrose Lake Air Weapons Range. It covers approximately 10,000 square kilometres of land, straddling the border between Alberta and Saskatchewan. It is used for military training exercises involving supersonic flight and the dropping of live ammunition. For safety reasons, access to the Range is prohibited except with permission of the Commander of the 4 Wing stationed at the Canadian Forces Base at Cold Lake.

[7] The establishment of the Range has had severe impacts on First Nations whose traditional territories lay within its boundaries. The applicant, Cold Lake First Nations, traditionally used a significant part of the Range, in particular around Primrose Lake. Its members, who were forcibly displaced in 1954, could no longer rely on traditional activities for their sustenance and became largely dependent on government assistance.

[8] Cold Lake and other First Nations claimed compensation from Canada with respect to the devastating effects of the creation of the Range. In the 1990s, these claims were considered by

the Indian Claims Commission [the Commission], a body created pursuant to the *Inquiries Act*, RSC 1985, c C-11, to make recommendations regarding certain claims made by First Nations.

[9] The Commission recommended that Cold Lake's claim, as well as that of Canoe Lake First Nation [Canoe Lake], be accepted for negotiation. The Commission summarized its findings as follows:

> We were struck by the totality of the destruction of these communities. After the First Nations were expelled from their traditional lands, their pride and independence were quickly displaced as they faced an inescapable cycle of poverty, and a degrading and almost total dependence on government. The result of this devastation was alcoholism and crippling social ills which the community is still struggling to overcome.

[10] The Commission found that the creation of the Range breached Cold Lake and Canoe Lake's rights under treaties 6 and 10, respectively, and that Canada breached its fiduciary duty by "failing to provide adequate compensation or any means of rehabilitation" for Cold Lake and Canoe Lake.

[11] Other First Nations, including Buffalo River Dene Nation, also brought claims before the Commission in respect of the impacts of the creation of the Range. The Commission rejected these claims because, while these First Nations traditionally used the land within the Range, their traditional territory extended outside the Range and they were able to continue hunting and trapping after 1954, in contrast to Cold Lake and Canoe Lake. The Commission also found that the creation of the Range caused hardship to these First Nations "but on a much reduced scale" than the hardship caused to Cold Lake and Canoe Lake. Nevertheless, the Commission found

that Canada breached its fiduciary duty to Buffalo River by failing to provide compensation for the loss of commercial harvesting rights.

[12] Canada initially rejected the Commission's findings, but eventually began negotiating with Cold Lake. In 2002, Canada agreed to settle Cold Lake's claim. One component of that settlement is that Cold Lake would be granted access to part of the Range. For this purpose, Canada and Cold Lake entered into agreements with Alberta and Saskatchewan.

[13] The relevant provisions of the agreement involving Saskatchewan, which I will call the Access Agreement, can be summarized as follows. Cold Lake and its members are granted access to an area, called the Access Area, which roughly encompasses the western half of the Saskatchewan portion of the Range. Access is granted for a set of purposes including hunting, trapping, fishing, harvesting berries and wild mushrooms and cutting timber to build log houses in the community. Two specific areas, the Jimmy Lake Range and the Primrose Lake Evaluation Range, are excluded from the Access Area, but access to them may be granted on a case-by-case basis. Access is always subject to the approval of the Commander of 4 Wing, which shall not be unreasonably withheld. Canada also undertakes not to grant access to the Access Area to anyone else without first consulting Cold Lake.

[14] In 1996, two other First Nations, Buffalo River and Birch Narrows brought an action in this Court for compensation in respect of the creation of the Range. As mentioned above, the Commission rejected most of Buffalo River's claims. For its part, Birch Narrows did not bring any claims to the Commission.

[15] Canada engaged in settlement discussions with Buffalo River and Birch Narrows. In 2016, it gave notice to Cold Lake that it was contemplating granting Buffalo River and Birch Narrows access to the Saskatchewan part of the Range, as part of an eventual settlement with these two First Nations.

[16] Cold Lake's initial position, as expressed in a letter dated February 13, 2017, was threefold. First, Cold Lake questioned Buffalo River and Birch Narrows' entitlement to access. It stated that it had seen "no evidence that supports a claim of historical use by Buffalo River and Birch Narrows in the area." Second, it expressed the concern that the cumulative uses of land within and around the Range depleted its resources to the point that they had become insufficient to support its members. It stated that "given the cumulative encroachment of our traditional use areas, increased usage will have a direct and immediate harmful impact on the practice of our rights." Third, it emphasized that its current access "uniquely affords us the opportunity to contract with industry on projects in the Range" and that granting access to other First Nations would have a harmful impact on these opportunities.

[17] Further discussions, however, focused almost exclusively on the first of the above concerns. The evidence of these discussions, which lasted approximately three years, is limited to a small number of letters exchanged between the parties and to minutes of a few meetings taken by one of the parties. The parties' affiants were not cross-examined.

[18] It appears that Cold Lake repeatedly expressed the view that it "owned" its Access Area and that other First Nations should not be granted access without its consent or, at the very least,

without demonstrating their traditional use of the land in question. In this regard, Cold Lake was concerned with the insufficiency of the information provided by Canada. In May 2019, Canada gave Cold Lake a summary of the proposed agreement with Buffalo River and Birch Narrows, which would grant them access on substantially the same terms as Cold Lake. On June 3, 2019, Cold Lake requested a copy of the proposed agreement, a description of the proposed access area and the expert report substantiating Buffalo River and Birch Narrows' traditional use of the lands in question. Canada refused to provide this information, invoking settlement privilege.

[19] On July 30, 2019, Canada informed Cold Lake that it was contemplating three geographic options for granting access to Buffalo River and Birch Narrows: (1) the portion of the Range located in Saskatchewan; (2) the portion of the Range covered by Treaty 10; and (3) the portion of the Range traditionally used by Buffalo River and Birch Narrows, which needed to be further delineated. In all cases, the Jimmy Lake Range and the Primrose Lake Evaluation Range would be excluded. At a meeting held on December 12, 2019, Cold Lake expressed its preference for the third option.

[20] A direct meeting between representatives from Cold Lake and Buffalo River took place in March 2020, but did not result in an agreement. On June 30, 2020, Canada wrote to Cold Lake to advise that it had decided to grant Buffalo River and Birch Narrows access to the portion of the Range located in Saskatchewan.

[21] Cold Lake then brought the present application for judicial review, seeking an order prohibiting Canada from entering into access agreements with Buffalo River and Birch Narrows,

a declaration that Canada failed to comply with its duty to consult and an order for the production of the proposed access agreements, the expert report and other reports concerning Buffalo River and Birch Narrows' traditional use of the lands within the Range. Canada undertook not to sign an access agreement with Buffalo River and Birch Narrows until the conclusion of the present proceeding. However, I am informed that Canada entered into a settlement with these two First Nations and that their action in this Court was discontinued.

II. Analysis

[22] I am dismissing Cold Lake's application. For the reasons set out below, I find that Canada was not required to consult Cold Lake regarding Buffalo River and Birch Narrows' entitlement to access to the Range or the reasons for settling their claims. I also find that Cold Lake did not put forward concerns related to scarce resources or loss of economic opportunities with any degree of particularity. As a result, Canada fully and fairly considered Cold Lake's views and complied with the duty to consult set forth in section 7.6 of the Access Agreement.

A. *Analytical Framework*

[23] This case does not involve the constitutional duty to consult flowing from section 35 of the *Constitution Act, 1982*, which the Supreme Court of Canada described in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]. Rather, both parties agree that the duty to consult in this case finds its source in a contract, namely, section 7.6(a) of the Access Agreement, which reads as follows:

> For so long as CLFN is entitled to access to, entry upon and use of the Access Area under this Agreement, Canada agrees that it shall

> not grant access to any other person, for the activities permitted in Article 7 of this Agreement without the consent of Saskatchewan in writing and after having first consulted with CLFN with respect to such access.

[24] In turn, section 1.1(h) of the Access Agreement defines consultation as follows:

> "Consultation" means
>
> a. the provision, to the party to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;
>
> b. the provision of a reasonable period of time in which the party to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the party obliged to consult; and
>
> c. full and fair consideration by the party obliged to consult of any views presented;

[25] In spite of the contractual source of the duty to consult in this case, the parties agree that the case law that has developed under the *Haida Nation* framework may be relevant to interpret the above provisions. One feature of this framework is that the intensity or depth of the duty to consult is assessed on a case-by-case basis and may be set on a scale or spectrum from minimal to deep. A duty defined in the terms quoted above falls on the lower end of the spectrum: *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paragraph 74, [2010] 3 SCR 103.

[26] On judicial review, the existence and scope of the duty to consult are reviewed for correctness; other issues are reviewed for reasonableness: *Haida Nation*, at paragraphs 61–62; *Canada v Long Plain First Nation*, 2015 FCA 177 at paragraphs 83–91 [*Long*

Plain]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paragraphs 26–27, [2020] 3 FCR 3; *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2020 FCA 122 at paragraph 21, [2020] 4 FCR 678; *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at paragraph 8. While these principles were developed in the context of the constitutional duty to consult, I see no reason why they should not apply to the contractual duty to consult in the present case, and the parties have made no submissions in this respect.

B. *Scope of the Duty to Consult*

[27] Before this Court, Cold Lake's main submission is that Canada took too narrow a view of the range of topics that could be raised in the consultation process. In particular, Canada refused to discuss the fundamental issue of whether Buffalo River and Birch Narrows should be granted access to the Range at all. Canada also refused to disclose information that would have allowed Cold Lake to challenge Buffalo River's and Birch Narrows' claims that they traditionally used part of the Range. (To simplify, I will describe these issues as "entitlement" issues.) Cold Lake argues that in doing so, Canada failed to discharge its duty to consult pursuant to section 7.6 of the Access Agreement.

[28] An important parameter of the *Haida Nation* framework is the assessment of the depth of the duty to consult. The issue here is somewhat different. It relates to the *breadth* rather than the *depth* of the duty. The breadth of the duty is the range of issues that can properly be the subject of consultation. In this respect, Cold Lake is arguing that Canada took entitlement issues off the table, even though they were a legitimate issue for consultation.

[29] In my view, entitlement issues were not within the scope of the duty to consult, even though Buffalo River's and Birch Narrows' claims pertain to the same area Cold Lake has access to. There is no precedent for extending the scope of the duty to consult to entitlement issues. As explained below, such an extension would be incompatible with the basic features of the negotiation process. It would make reconciliation more difficult.

[30] An analysis of the test for triggering the duty to consult explains why Cold Lake's submission must be rejected. The circumstances in which a duty is triggered implicitly define its breadth. Of course, as Cold Lake pointed out, the constitutional duty to consult may apply in situations of concurrent rights or claims. See, for example, *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204 [*Sambaa K'e*]; *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154; *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932; *Metis Settlements General Council v Canada (Crown-Indigenous Relations)*, 2024 FC 487. However, this does not mean that an Indigenous community must be consulted about the validity or merits of another community's claims or rights as soon as the two communities' claims overlap. Rather, a duty to consult is only triggered where an Indigenous community shows that proposed government conduct potentially impacts the exercise of its rights protected by section 35.

[31] Cold Lake has not brought any cases to my attention in which an Indigenous community triggered a duty to consult by raising doubts regarding another community's entitlement to a proposed settlement in the absence of a reasonably defined impact on the exercise of its section 35 rights. There is no precedent for the proposition that a third party's entitlement is within the scope of the duty to consult.

[32] Indeed, extending the scope of the duty to consult in the manner proposed by Cold Lake is unwarranted and would hamper reconciliation, which has been described as the "fundamental objective of the modern law of aboriginal and treaty rights": *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paragraph 1, [2005] 3 SCR 388. Reconciliation relies heavily on negotiations between federal and provincial governments and specific Indigenous groups in order to settle grievances out of court: *R v Desautel*, 2021 SCC 17 at paragraph 87, [2021] 1 SCR 533. In many cases, the circumstances giving rise to a claim and the source of the rights involved are specific to each Indigenous community. Settling the claim involves the mending of a bilateral relationship between the community and Canada.

[33] Where negotiation focuses on a specific bilateral relationship, third parties should not be allowed to invoke the duty to consult to gain unrestricted access to the discussions between the parties and effectively transform a bilateral process into a multilateral one. The law protects the bilateral aspect of negotiation by ensuring its confidentiality, in particular through settlement privilege: *Association de médiation familiale du Québec v Bouvier*, 2021 SCC 54 at paragraph 95. Negotiation would be severely hampered if the parties had to answer to third parties or if the outcome of their discussions could be scrutinized by third parties. Reconciliation would only be made more difficult.

[34] To be sure, there are cases where two Indigenous communities are making claims to the same finite resource. If the government proposes to recognize or grant rights to one community, this may well trigger a duty to consult another community if the latter can show that the proposed measure is likely to affect the exercise of its rights. In this regard, *Sambaa K'e* is a case

in point: the proposed agreement with one First Nation would not have left sufficient land available to settle another First Nation's claim on similar terms. In such a situation, however, the duty focuses on the measure's impact on the second community, not on the first community's entitlement, whether legal or political, to the measure. Thus, the manner in which the breadth of the duty to consult is currently understood is sufficient to afford meaningful protection to Indigenous Peoples' rights.

[35] While the above discussion is based on principles derived from the case law pertaining to the constitutional duty to consult, I fail to see why the scope of a contractual duty to consult would be broader. It is true that agreements intended to settle Indigenous claims must be given a generous interpretation consistent with the Crown's "obligations of honourable conduct, reconciliation and fair dealing": *Long Plain*, at paragraphs 117–120. In this regard, Cold Lake argued that the Access Agreement should be interpreted in a manner that promotes economic self-sufficiency. While I agree with these general principles, the promotion of economic self-sufficiency does not warrant extending the scope of the duty to consult to other Indigenous communities' entitlement.

[36] Hence, the duty to consult that arose when Canada contemplated granting Buffalo River and Birch Narrows access to Cold Lake's Access Area did not allow Cold Lake to scrutinize the reasons why Canada wished to grant such access. In other words, it did not allow Cold Lake to be consulted on entitlement issues.

[37] Because Cold Lake did not have a right to be consulted about Buffalo River and Birch Narrows' entitlement, Canada was not required to provide it with information regarding its settlement discussions with these two First Nations. In particular, the expert report concerning these two First Nations' traditional use of the lands within the Range was irrelevant to the consultation, and Cold Lake was not entitled to receive it pursuant to section 7.6 of the Access Agreement. Thus, it is not necessary to determine whether that report is subject to solicitor-client privilege or settlement privilege.

[38] Relying on the principles of judicial review laid out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 86, [2019] 4 SCR 653, Cold Lake argued that Canada's decision to grant access to Buffalo River and Birch Narrows should be transparent and justified. It said that there could be no justification or transparency unless Canada discloses the expert report concerning traditional use. Only then would Cold Lake be in a position to assess whether granting access to Buffalo River and Birch Narrows is justified. However, appealing to the principles of judicial review does not enlarge the scope of the duty to consult. The requirements of transparency and justification do not pertain to entitlement issues in this case because the latter are beyond the scope of the duty.

[39] At the hearing, Cold Lake argued that Canada's willingness to grant access to Buffalo River and Birch Narrows results in an unfair situation and the application of a double standard. Cold Lake had to devote considerable time, resources and energy to presenting its claim to the Commission and negotiating a settlement with Canada. It argues that Canada has been much less demanding of Buffalo River and Birch Narrows. Moreover, it underscores the fact that the

Commission dismissed Buffalo River's breach of treaty claim and that Birch Narrows did not make a claim at that time.

[40] Nevertheless, some degree of disparity of outcomes must be tolerated if reconciliation is to be achieved by way of negotiation with Indigenous communities. If outcomes were preordained or uniform, negotiation would be meaningless. In any event, a close reading of the Commission's second report shows that it found that Buffalo River traditionally used some land within the Range. Moreover, one cannot assume that the evidence on which Canada based its decision to settle is the same as the evidence Buffalo River presented to the Commission. It may also be that Canada is currently more willing to settle Indigenous claims than it was 30 years ago. None of this requires Canada to consult Cold Lake about the grounds for its decision to settle Buffalo River's and Birch Narrows' claims.

C. *Adequacy of the Consultation*

[41] Having determined the scope of the duty to consult, I can now determine whether it was fulfilled. Section 7.6 of the Access Agreement, which was quoted above, sets forth three requirements: adequate notice, sufficient time to prepare submissions and full and fair consideration of Cold Lake's views. At this stage of the analysis, adequacy of the consultation is reviewed on a reasonableness standard and perfection is not required: *Haida Nation*, at paragraph 62.

[42] There is no serious dispute that the first two requirements were satisfied. Canada first gave notice to Cold Lake of its intentions in late 2016, more than three years before the decision

communicated in June 2020. Canada provided Cold Lake with a detailed summary of the proposed access agreement in May 2019 and outlined the three options with respect to the proposed access area in a letter dated July 30, 2019. From that point on, Cold Lake had enough information to understand the general nature, if not the precise intensity, of the proposed measure and was in a position to make informed submissions.

[43] This brings us to the last issue, namely, whether Canada fairly and fully considered Cold Lake's views. To answer this question, one must first ascertain what views Cold Lake put forward. As I mentioned above, this must be done on the basis of a fairly narrow evidentiary record.

[44] The record shows that Cold Lake mainly expressed concerns regarding Buffalo River and Birch Narrows' entitlement to access to the Range. These concerns were framed in terms of either Cold Lake's exclusivity over its Access Area or the insufficiency of the evidence of Buffalo River and Birch Narrows' traditional use. At the hearing of this application, Cold Lake conceded that the Access Agreement does not grant it exclusive access. As I noted above, entitlement issues are not within the purview of Canada's duty to consult Cold Lake pursuant to section 7.6 of the Access Agreement. Nevertheless, the evidence shows that Canada listened to Cold Lake's views and delayed its decision to allow for direct discussions between Cold Lake, Buffalo River and Birch Narrows. In its June 30, 2020 letter, Canada explained its decision as follows:

> We understand that CLFN's view is that [the Indian Claims Commission] process proved that CLFN made its living from the CLAWR lands prior to its establishment which is not the case for other Indigenous groups. At the same time, we understand CLFN

> acknowledges that other Indigenous groups, including BRDN and BNDN, used the lands that now form the CLAWR but say that was not to the same extent as CLFN.
>
> . . .
>
> In reaching a decision on our proposal, we have considered the concerns expressed by CLFN, together with the fact that several Indigenous groups, including BRDN and BNDN, used areas within the lands that now form the CLAWR to varying degrees and for various purposes prior to 1954.

[45] Even if entitlement issues were included in the scope of the duty to consult created by section 7.6 of the Access Agreement, I would find that the above explanation, read against the backdrop of the evidentiary record, shows that Canada gave full and fair consideration to Cold Lake's views. As mentioned above, section 7.6 requires consultation at the lower end of the spectrum described in *Haida Nation*. Canada was not required to agree with Cold Lake nor to involve Cold Lake in the decision-making process in a manner that would be more typical of a duty to consult at the deeper end of the spectrum.

[46] In its February 13, 2017 letter, Cold Lake also put forward issues regarding the scarcity of resources and loss of economic opportunities. These issues come within the scope of the duty to consult created by section 7.6. However, Cold Lake did not press them in later correspondence or discussions. As far as I can tell from the record, Cold Lake's subsequent submissions focused almost exclusively on the entitlement issues mentioned above.

[47] While one can understand concerns regarding the scarcity of resources or the loss of economic opportunities in the abstract, Cold Lake had to provide Canada with information showing that such impacts were likely to materialize if access were granted to Buffalo River and

Birch Narrows. The record before this Court does not show that Cold Lake did so. As a result, there was little for Canada to consider in this regard. If Cold Lake made the strategic decision to focus its submissions on entitlement issues instead of actual impacts, it cannot blame Canada for not discussing these impacts further.

[48] The alleged insufficiency of the information provided by Canada with respect to the terms of the proposed access does not excuse Cold Lake's silence. It may be difficult to make meaningful submissions when the precise contours of the proposed activity remain unknown. In this case, however, it became clear, in May 2019 at the latest, that Canada was contemplating giving access to Buffalo River and Birch Narrows on substantially the same terms as the access given to Cold Lake. While the precise frequency of such access cannot be predicted in advance, Cold Lake could have made meaningful submissions based on what it knew. Moreover, Cold Lake did not require the traditional land use expert report to make submissions regarding the impact of granting access to Buffalo River and Birch Narrows. The expert report was only relevant to entitlement issues.

[49] To summarize, Cold Lake did not provide sufficient information for Canada to determine that granting access to Buffalo River and Birch Narrows would adversely impact the exercise of Cold Lake's access rights. The two paragraphs dealing with the issue in Cold Lake's February 2017 letter did not provide enough detail, and the issue was not raised again over the course of three years of discussions.

III. Disposition

[50] For these reasons, Cold Lake has not shown that Canada failed to discharge its duty to consult pursuant to section 7.6 of the Access Agreement. Accordingly, its application for judicial review will be dismissed.

[51] Canada is not seeking its costs. Accordingly, there will be no order as to costs.

JUDGMENT in T-930-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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