

The Scope of Consultation and the Role of Administrative Tribunals in Upholding the Honour of the Crown: the *Rio Tinto Alcan* Decision ¹

By Peter R. Grant²

Introduction

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements (“EPAs”) which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the Commission’s approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

On October 28, 2010, the Supreme Court of Canada rendered its decision with respect to the Carrier Sekani Tribal Council’s [CSTC] challenge to the BC Utilities Commission’s [BCUC] approvals of a contract for the sale of excess power from Alcan to BC Hydro.

In considering this case it is very important to recognize the issue which the Supreme Court of Canada was asked to answer:

“The question is whether the British Columbia Utilities Commission (“the Commission”) is required to consider the issue of consultation with the CSTC Aboriginal nations in determining whether the sale is in the public interest.” (par. 1)

¹ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43

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On this issue the Court was unequivocal that the Commission is required to consider the issue of consultation. The Court further stated after giving the background post-*Haida*:

“This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation.” (par. 2) (emphasis added)

In considering the impact of the decision, it is critical to recognize that the Supreme Court saw its role as further developing the constitutional obligation to consult including what triggers a duty to consult and “the role of government tribunals in consultation”.

Background

As the Court summarized in its decision, the fact pattern is rather interesting. The CSTC initially did not intervene before the BCUC, but did apply for late intervention and also sought a reconsideration of the “Scoping Order” in which the BCUC had determined on October 10, 2007 that:

“Generally, insufficient evidence of consultation, including with Aboriginal nations is not determinative of matters before the Commission.” (par. 8)

In other words, the central issue goes to the role, if any, of an administrative tribunal in addressing consultation issues. The BCUC concluded after hearing the application for reconsideration of the Scoping Order that:

“...its decision on the 2007 EPA would have no adverse effects on the CSTC Aboriginal nations’ interests. The duty to consult was therefore not triggered, and no jurisdictional error was committed in failing to include consultation with the Aboriginal nations in the Scoping Order beyond the general consultation extended to all stakeholders.” (par. 14)

On appeal, the BC Court of Appeal held that the BCUC erred and should hear evidence and argument “on whether a duty to consult and, if necessary, accommodate the [CSTC Aboriginal nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.” (par. 17 citing par. 69 from the BC Court of Appeal)

Of significance is that the Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue and that “the Tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation.” (par. 20 citing par. 53 from the BC Court of Appeal)

Alcan and BC Hydro appealed the Court of Appeal decision to the Supreme Court of Canada. A principal argument they made was that the Court of Appeal “took too wide a view of the Crown’s duty to consult and the role of tribunals in deciding consultation issues.”

Triggering the Duty to Consult

Knowledge by the Crown of a Potential Claim or Right

The Supreme Court of Canada has addressed and clarified the issue of the “knowledge by the Crown” first raised in its earlier decision in *Haida Nation*. The Court stated:

“The threshold, informed by the need to maintain the honour of the Crown, is not high. **Actual knowledge** arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty may be impacted.... **Constructive knowledge** arises when lands are known or **reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated.**” (par. 40) (emphasis added)

Most Aboriginal nations in British Columbia have filed protective writs with respect to their Aboriginal title in order to protect their right to claim damages within statutory limitation periods. Many of these claims were filed in December 2003, six years after the *Delgamuukw* decision. Therefore, throughout British Columbia in the non-treaty area there is “actual knowledge”. While the Crown may try to resist that argument, the Supreme Court of Canada makes it clear that even in such circumstances, “constructive knowledge arises when lands are ... reasonably suspected to have been traditionally occupied...”. As though to underline the importance of this matter, the Court further stated:

“While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim.” (par. 40)

With respect to consultation in the central areas of Aboriginal title claims in British Columbia, almost all of those are “credible claims”. The trigger, based on knowledge by the Crown, is therefore critical.

This is a lower threshold than the Crown has adopted since *Haida*. In one recent case (*Hupacasath v. The Minister of Forests*), the Aboriginal nation was required to return to the Court after two years of court-order consultation because the Crown kept insisting that the Hupacasath had to prove their strength of claim before substantive consultations could move forward. Hupacasath was in treaty negotiations and the Court had already

made a preliminary assessment of their strength of claim, but did not make a final determination on the legal issue of whether their Aboriginal rights and title was strong on fee simple lands.³

The second element of the trigger for consultation is “there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.” (par. 42)

The Court has endorsed the position of the BC Supreme Courts that the government action which engages the duty to consult “is not confined to government exercise of statutory powers”. (par. 43) However, the Supreme Court of Canada has clarified that government action which triggers the duty to consult “is not confined to decisions or conduct which have an immediate impact on lands and resources. Thus, the duty to consult extends to “strategic, higher level decisions” that may have an impact on Aboriginal claims and rights. (par. 44)

Later in its judgment the Supreme Court of Canada held, in assessing a 2007 EPA and the BCUC decision that “transfer or change control of licenses or authorizations” could have adverse impacts where it stated:

“It also concluded that the 2007 EPA did not “transfer or change control of licenses or authorizations”, negating adverse impacts from management or control changes.” (par. 77)

This is significant as it presupposes that change of operational control can have an adverse impact on asserted Aboriginal title and rights.⁴

When the Supreme Court of Canada applied its clarified test to the *Rio Tinto Alcan* case it is absolutely clear that the first test of actual and constructive knowledge is a simple test; the Court concluded that the CSTC Aboriginal nations’ claims were well known to the Crown “indeed it was lodged in the Province’s formal claims resolution process”. By this the Court was referring to the treaty process. On this basis, any Aboriginal nation in British Columbia which is engaged in the BC Treaty Process has a claim “well known to the Crown”. The BCUC determination that the decision or proposed Crown conduct did not have an adverse impact on an Aboriginal claim or right was based on the fact that this was about historic or past impacts. The Supreme Court of Canada found that this was reasonable. The Court made absolutely clear the remedy for the Aboriginal nation in these circumstances:

³ *Hupacasath v. Minister of Forests* [2008] BCSC 1505 pars 26-30

⁴ *Gitksan v British Columbia (Minister of Forests)*, 2002 BCSC 1701, par. 82

“The issue then is not consultation about the further development of the resource, but **negotiation about compensation for its alteration without having properly consulted in the past.**” (par. 83) (emphasis added)

The third element of the trigger is that the claimant must show “the possibility that the Crown conduct may affect the Aboriginal claim or right”. (par. 45)

Indeed, the Court goes on to describe that a “generous purposive approach to this element is in order” other than “mere speculative impacts”.

As the Court stated:

“The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation’s future negotiating position does not suffice.” (par. 46)

The Court certainly broadened and clarified the meaning of an “adverse effect”. In fact, the Chief Justice McLachlan’s language is clear that it saw it as a very broad effect where the Court stated:

“**Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right.** Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, **high-level management decisions or structural changes to the resource’s management may also adversely affect Aboriginal claims or rights even if these decisions have no “immediate impact on the lands and resources”**: Woodward, at p. 5–41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown’s power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.” **This is an adverse impact:** see *Haida Nation*, at paras. 72-73. (par. 47) (emphasis added)

This description by the Court makes absolutely clear that the behaviour of the Crown in considering whether there is an “adverse impact” by limiting it to site specific impacts is not justifiable. Overall, this has broadened the scope of the consultation obligation.

Damages for Breach of Consultation

The Court did indicate and has made clear that:

“An underlying or continuing breach...is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult.” (par. 48)

The Supreme Court of Canada found: “Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right” (par. 49) The effect of this determination by the Supreme Court is that there is a cause of action which can arise as a result of the failure of the Crown’s duty to consult.

The Supreme Court of Canada makes it clear that is a cause of action can arise as a result of the failure of the Crown’s duty to consult and damages can be claimed by the Aboriginal nation. In the context of a jurisdiction such as British Columbia in which treaty negotiations are the active effort at reconciliation, the present approach by the Crown that treaties are not intended to address past wrongs certainly will have to be reconsidered in this context. Furthermore, in situations such as the Carrier Sekani challenge, the past infringements on the fishing rights may well form a strong basis for a damages claim.

Indeed, for those Aboriginal nations in which there have been historic breaches of the duty to consult which have led to significant damages to the resources upon which they rely, there may well be strong motivation to commence lawsuits for damages arising out of those failures. This case has made it clear that damages as a result of historical wrongs and failure to consult and accommodate give rise to compensation.

The Carrier Sekani Theory of Consultation

The theory of consultation advanced by the Carrier Sekani was rejected by the Supreme Court of Canada because the Court focused on the basis of the consultation obligation as being “the need to preserve Aboriginal rights and claims pending resolution” (par. 53), This is a logical extension of the *Haida* principles. However, It must be emphasized that the difficulty since *Haida* and *Taku* in engaging in proper consultation has often resulted by the Crown’s resistance to the “strength of claim” analysis and minimization of “actual knowledge” as well as the potential impact. Notwithstanding the Supreme Court of Canada’s conclusion that consultation is not intended to address past failures to consult and past damages, the Court’s analysis of the triggers for

consultation should be a positive and strong aid in meaningful consultation at both strategic and operational levels for most Aboriginal nations within British Columbia

Tribunals' Role in Consultation

In considering the role of administrative tribunal's in Crown Consultation the Court described the consultation as not a question of law and stated:

“[Consultation] is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.” (par. 60)

The Supreme Court of Canada recognized that:

“administrative tribunals are confined to the powers conferred on them by the legislature [and] the fear is that if a tribunal is denied the power to consider consultation issues...the government might effectively be able to avoid its duty to consult.” (par. 62)

However, the Court endorsed the BC Court of Appeal's finding that the duty to consult is triggered when government decisions have the potential to adversely affect Aboriginal interests and this is a constitutional duty.

The Supreme Court made it clear that if the government specifically takes steps to limit administrative tribunals then the Aboriginal people will need to seek appropriate remedies in the courts.

The Supreme Court of Canada's decision to find that the BCUC has jurisdiction in view of its legislative mandate makes it clear that it is going to tend towards finding jurisdiction in tribunals. The Supreme Court recognized that the BCUC mandate “focused mainly on economic issues” but under its general power to consider questions of law it had enough jurisdiction to “include the issue of Crown consultation with Aboriginal groups”. The Court relied on the language that it could consider “any other factor that the Commission considers relevant to the public interest”.

The Court disregarded the restriction in the *Administrative Tribunals Act* that a tribunal does not have jurisdiction over constitutional matters. (par. 71) It is clear from how the Court analyzes the legislation that the Supreme Court of Canada, wherever the “public interest” is a factor involved in the tribunal's activities which

will be the case in most situations, will find that it has jurisdiction. It is significant how the Court described the duty to consult where it stated:

“The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*.” (par. 70)

It is even more significant that although the Court recognized that “In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question”, there was no clear intention to exclude from the Commission’s jurisdiction the duty to consider whether the Crown has discharged its duty to consult. (par. 72)

The Supreme Court limited the power of the Commission to actually “engage in consultations in order to discharge the Crown’s constitutional obligation to consult”. Once again, the Supreme Court of Canada sets out a definition of consultation and states:

“Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests.” (par. 74)

Role of Crown through BC Hydro

The finding by the Supreme Court of Canada of carefully looking at the Commission’s decision as to whether or not the proposed Crown conduct with the 2007 EPA could adversely impact the CSTC’s Aboriginal rights is illuminating on a more general basis. In fact, the creation of a Joint Operating Committee in which BC Hydro would be directly involved is a basis to ensure that there will be further consultation with respect to decisions being made in the future. The Court found explicitly that “BC Hydro, as a participant on the Joint Operating Committee and the reservoir management team, **must** in the future consult with the CSTC Aboriginal nations on any decisions that may adversely impact their claims or rights.” (par. 92) (emphasis added)

In other words, the effect of the 2007 EPA would be to strengthen the position of the CSTC. The Court’s determination that BC Hydro as the Crown representative must consult in the future strengthens the position of the Carrier Sekani.

This will also be of significance with respect to other nations in which a Crown agency such as BC Hydro increases (rather than as in the case of *Haida* where it decreases) control over the ongoing activities of the project.