Supreme Court of Canada Confirms Utility of Administrative Law in Aboriginal Consultation Cases

Case Summaries and a Discussion of the Supreme Court of Canada's decisions in Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43; and Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53.

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Two recent decisions of the Supreme Court of Canada provide significant insight into the nature and purpose of the Crown's duty to consult with Aboriginal peoples—what it is, and just as importantly, what it is not—and the interplay of the duty with administrative law principles. Since the Court first established a general framework for the duty to consult in *Haida*[1], *Taku*[2] and *Mikisew*[3], interpretations of the duty have ranged from a simple interlocutory tool, tailor made for short term use in land based disputes between the Crown and Aboriginals, to an end in itself that threatened to make final resolution and reconciliation between the Crown and Aboriginal peoples an ever more distant goal. These two cases confirm that the purpose of the *Haida* consultation obligation, although a fundamental duty which the Crown must always scrupulously observe, is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed. It is not an end in itself but rather a mechanism to ensure that the settlement of land claims and reconciliation between the Crown and Aboriginal people is not rendered more difficult or even moot by continued encroachment on Aboriginal rights. In doing so, the Court confirmed the utility of administrative law principles, finding them to be "flexible enough to give full weight to the constitutional interests of the First Nation."[4]

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council

On October 28, 2010, the Supreme Court of Canada released its decision in *Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority v. Carrier Sekani Tribal Council* (the *"RTA Decision"*) wherein all nine justices unanimous confirmed the British Columbia Utilities Commission's (the "Commission") decision to accept the 2007 Electricity Purchase Agreement ("2007 EPA") between BC Hydro and Rio Tinto Alcan Inc. The energy at the heart of the 2007 EPA was generated by a dam constructed by Alcan in the 1950s which diverted water from the Nechako River. The member First Nations of the Carrier Sekani Tribal Council claim title and rights to the area of the Nechako River.

During the Commission's hearing process, the CSTC argued that the 2007 EPA was not in the public interest because no consultation had been undertaken with them. It alleged that the 2007 EPA would affect water levels in the Nechako River and that, in any event BC Hydro as the Crown was benefiting from a historic infringement (being the original construction and damming of the Nechako River) for which it alleged no consultation had ever been undertaken.

The Commission disagreed. It found that the 2007 EPA would not affect water levels in the Nechako River. Further, it assumed, without determining, the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult, but concluded that "more than just an underlying infringement" was required to trigger the duty to consult.

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

[2] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

[4] *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 47.

The Supreme Court of Canada upheld the Commission's finding that no duty to consult the CSTC had been triggered. It reiterated the elements of the test set out in *Haida* for when a duty to consult arises and clarified some significant uncertainties that had developed in the application of those requirements.

The Court also confirmed that the duty on a tribunal to consider consultation and the scope of that inquiry depends on the legislative mandate of the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation. The legislature may delegate an administrative tribunal the power to engage in consultation, assess the adequacy of consultation, engage in both these tasks, or in neither. The key question in every case is the legislature's intent. The Court however cautioned that while the legislature has the right to assign different roles to different actors, the duty to consult must be met in every case. Where these roles have not been assigned, the courts will step to provide remedies for failure to consult or to assess the consultation undertaken.

Beckman v. Little Salmon/Carmacks First Nation

On November 19, 2010, the Supreme Court of Canada released its decision in *Beckman v. Little Salmon/Carmacks First Nation* (the *"Little Salmon Decision"*) wherein in concurring judgments[5], the Court found that the Little Salmon/Carmacks First Nation ("Little Salmon/Carmacks") had been adequately consulted in respect of a decision by the Director of the Agriculture Branch of the Yukon government to approve an agricultural land grant to a private citizen.

The Little Salmon/Carmacks argued that a common law duty to consult was triggered and the consultation undertaken was inadequate. The Yukon government disagreed arguing that in parties had agreed in the *Little Salmon/Carmacks First Nation Final Agreement* (the "Final Agreement") on which situations gave rise to the duty to consult. As such, any duty to consult the Little Salmon/Carmacks had to be grounded in the Final Agreement; so long as the requirements therein had been fulfilled, the Crown's responsibility had been met.

The Majority found that the duty of honourable dealing with Aboriginal people applies independently of the expressed or implied intentions of the parties and that consultation was necessary in this case to uphold the honour of the Crown. It was therefore imposed as a matter of law. However, in the present case the common law duty to consult had been adequately discharged. While the Minority disagreed that the common law duty to consult could be superimposed on the Final Agreement, it nonetheless agreed that the consultation undertaken was required under the Agreement and had been adequate.

In its decision, the Majority rejected the Little Salmon/Carmacks' argument that the duty to consult included a substantive right of accommodation, namely the right to have the private citizen's application denied. In doing so, the Majority stated that such an argument overstates the scope of the duty to consult and would amount to a veto over the approval process. In coming to a decision, the administrative decision maker is required to not only respect the rights and

[5] One supported by seven judges and another supported by two judges.

reasonable expectations of the First Nation and its members, but also those of other Yukon residents to good government. The decision maker balanced these interests and the decision to approve the application was reasonable.

Discussion

Both cases are significant in the context of the evolving nature of Canada's distinctive approach to reconciliation with Aboriginal peoples and will be of considerable interest to all those practicing aboriginal law. However, the cases are also of broader interest for those whose practices are infused with the theory and practice of administrative law.

The relationship between administrative law concepts of natural justice and procedural fairness on the one hand and the Crown's obligation to Aboriginal people on the other has long been the subject of debate.[6] In *Haida*, the Supreme Court of Canada identified the duty to consult to protect asserted rights prior to resolution. However, *Haida* provided little guidance either in theory or in practice, on how to reconcile a statutory decision maker's express statutory obligations with the new found obligation imposed by the Court. Taken together, the *RTA* and *Little Salmon Decisions* provide considerable guidance on both the theory and practice of Aboriginal consultation.

From a theoretical standpoint, the Court made clear that administrative law principles are not to be abandoned as soon as Aboriginal rights are invoked. To the contrary, administrative law norms can be employed to assist in realizing the objectives that the Supreme Court of Canada established on the path to reconciliation. In *Little Salmon*, the Court noted the "link" between constitutional doctrine and administrative law and its "procedural safeguards" including not only natural justice but the broader notion of procedural fairness. The Court expressly confirmed:

> Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation.[7]

From a practical standpoint, administrative tribunals must continue to look to their enabling statutes to determine their authority. The court will not seek to have tribunals assume far reaching consultation obligations that the legislature had no intention of conferring upon them. They are fundamentally creatures of statute and are only permitted to perform the functions delegated to them. The legislature can choose to require a tribunal to play a role in discharging a duty itself, adjudicate the adequacy of other crown actors to discharge the duty, both of these roles or neither. While the legislature has flexibility in choosing which actor will perform which role, the honour of the Crown requires that the in every case the duty be met. Where the Crown chooses not to assign these roles, courts are in place to assess consultation or provide appropriate remedies where there has been a failure to consult.

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[6] See for example *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 S.C.R. 159.

[7] *Little Salmon Decision* at para. 47.

In our view, the honour of the Crown as it is now emerging is a resilient and powerful constitutional principle that no government can ignore. Where the honour of the Crown gives rise to a duty to consult, it must be met.[8] However, we believe that the duty is, at its core, procedural, not substantive. The procedural nature of the duty is expressly stated in the *Little Salmon Decision*:

> "The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise."[9]

The facts in the *Little Salmon Decision* arose in the context of a modern treaty where the duty to consult was on the low end of the spectrum. Narrowly construed, this language may be said to not apply in the context of non-treaty lands or where deeper consultation is required. However, in our view, the discussion provides guidance that extends to all consultation situations. The *RTA Decision* says that the consultation obligation cannot be cut off from its roots, which is to preserve Aboriginal interests.[10] The duty recognizes that government and Aboriginal groups must work cooperatively and together to reconcile their interests.[11] Consultation confers no right of veto.[12]

If the consultation obligation confers no substantive right to a certain outcome under general law, whether constitutional law or otherwise, then after the consultation obligation has been met, the Crown actor must decide. This is as true in the non-treaty situation as it was in the *Little Salmon Decision*. So long as the decision is made reasonably with full knowledge of the Aboriginal interests at stake, the Court will recognize the Crown's sovereign obligation to make the decision.

It is true that acting honourably may require the Crown to accommodate Aboriginal interests, if appropriate. The knowledge and understanding acquired through consultation must be acted upon if it is to have purpose. This may mean adjusting the location of planned development or providing for mitigative measures where impacts on Aboriginal interests are otherwise unavoidable.[13] However, the purpose of accommodation is to preserve claimed existing substantive rights pending proof. There is no free standing substantive right to any accommodation without that the underlying claim and unless it would not be honourable to proceed without accommodation in place. Provided that the Crown has in good faith engaged

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[8] *RTA Decision* at para. 2.

[9] *Little Salmon Decision* at para. 14.

[10] *RTA Decision* at para. 50.

[11] *Ibid* at para. 34.

[12] *Little Salmon Decision* at para. 14.

[13] See for instance *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* 2010 BCSC 359.

with an affected Aboriginal group and given full and fair consideration to its concerns, the courts should not substitute their judgment of what is honourable for that of the Crown. The principle of deference and the judicial restraint that it implies are as important in the context of the duty to consult as they are administrative law.

Employing administrative law principles in the service of reconciliation is eminently sensible. At a fundamental level, Aboriginal persons are members of the Canadian polity and the principles that unite Canadians apply equally to them. Thus, where Aboriginal people are entitled to consultation, it is natural to look to administrative law to inform how the duty should be fulfilled. Albeit on different basis, in both cases the contents of the procedural rights will vary depending on the circumstances of a case. In both administrative and aboriginal law, the courts have described a spectrum with which we are to determine the extent of the procedural rights entitled to the individual (in the case of administrative law)[14] and the Aboriginal group (in the case of aboriginal law).[15] Where a duty of procedural fairness or duty to consult arises, minimal requirements for both these spectrums include the right to notice, to make submissions, and to have those submissions considered as part of the decision-making process.

This is not to say that the procedural protection of consultation will never exceed those of procedural fairness. The fact that accommodation may be required separates the consultation obligation from the duty to act fairly because the latter will always give rise to procedural remedies[16] whereas accommodation will require substantive action where the Crown's honour demands it. However, so long as the Crown has acted reasonably, the Court will remain reticent to determine when that requirement exists and how it is met where it does.[17]

Thus, it is becoming clear that after consultation, the task of the Crown when making a decision is to balance the competing needs of Aboriginals with the needs of other individuals and indeed society as a whole. So long as the Crown understands and acts reasonably on its constitutional obligations when undertaking this balancing, the Courts will not interfere with its decisions. As Binne J. concluded: "Whether or not a court would have reached a different conclusion on the facts is not relevant."[18]

The implications of this refinement of the principles underlying the duty to consult are made even more useful by the Court's comments on tribunal jurisdiction in the *RTA Decision*. By squarely rejecting the notion that tribunals can be imbued with a supra legislative authority to

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[14] *Indian Head School Division No. 19 (Saskatchewan Board of Education) v. Knight,* [1990] 1 S.C.R. 653 at 682-85; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 18-28.

[15] *Haida* at para. 30.

[16] Illustrations of the pure procedural nature of the duty to be fair are most readily found in cases involving legitimate expectation such as *Old St. Boniface Residents' Association Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170 *Reference re Canada Assistance Plan,* [1991] 2 S.C.R. 525, and *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.

[17] The Court's recognition of the need to balance a variety of interests is clearly articulated by Binnie, J at paragraph 34 of the *Little Salmon Decision.* He characterizes Treaties as being designed to achieve that balance in a manner that is more fair and efficient then is achieved by the *ad hoc* mechanisms of the common law.

[18] *Little Salmon Decision* at para. 88.

either conduct or assess the adequacy of consultation, the Court has preserved well functioning concepts of administrative law and avoided the significant confusion that would have inevitably accompanied a contrary finding. The legislature remains under no obligation to create a tribunal, and entitled to choose the functions of a tribunal once created. Despite this, the Crown cannot seek to avoid its obligations by simply not assigning them. As stated by the Court, the obligation to consult must be met, and the courts will step in where necessary. As a result, there is no need and no basis to adjust rules of interpretation to needlessly embellish the authority of regulatory tribunals in this respect. The core principles of administrative law remain intact and their usefulness to aboriginal law has flourished.

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