October 29, 2010

Supreme Court of Canada Clarifies (some of) the Limits of the Duty to Consult

***Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority v. Carrier Sekani Tribal Council*, 2010 SCC 43**

On October 28, 2010, the nine justices of Supreme Court of Canada issued a unanimous judgment in this appeal that confirmed the decision of the British Columbia Utilities Commission (the "Commission") to accept the 2007 Electricity Purchase Agreement between BC Hydro and Rio Tinto Alcan Inc. for filing.

The decision is important for what it says about (i) when the Crown duty to consult with Aboriginal groups is triggered—and when it is not; and (ii) the role of administrative tribunals.

1. BACKGROUND

In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, under Energy Purchase Agreements ("EPAs"). The 2007 EPA is the latest such agreement.

The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the 1950s dam project. They asserted, however, that the 2007 EPA for the purchase and sale of the power generated by the project should be subject to consultation.

The 2007 EPA was subject to review before the Commission, which was charged with determining whether the purchase of electricity was in the public interest. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest.

The Commission held a hearing and concluded that the EPA would not affect water levels in the Nechako River. The Commission assumed 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. Since the CSTC had failed to demonstrate that the 2007 EPA would "adversely affect" their Aboriginal interests, the Commission concluded the duty to consult was not triggered and that it need not consider further evidence on consultation.

The British Columbia Court of Appeal allowed the appeal. Alcan and BC Hydro appealed to the Supreme Court of Canada. A record number of eighteen interveners also made submissions.

2. THE SUPREME COURT OF CANADA'S DECISION

(a) *When Does the Duty to Consult Arise?*

The Chief Justice, writing for a unanimous Court, reiterated the elements of the test set out in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, which can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

In respect of the second element (contemplated conduct), the Court confirmed that such action is not confined to government exercise of statutory powers nor 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—even if these decisions have no "immediate impact on the lands and resources".

In respect of the third element (adverse effect), the Court held that there must be a causal relationship between the proposed government conduct and a potential for adverse impacts on pending Aboriginal claims or rights. The Court was clear that:

- "Past wrongs, including previous breaches of the duty to consult, do not suffice";
- "Mere speculative impacts…will not suffice"; and
- "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."

The duty to consult is confined to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

(b) *The Role of Tribunals in Consultation*

The Court also confirmed that the duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation.

- The legislature may choose to delegate to a tribunal the Crown's duty to consult.
- Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place.
- Tribunals may have neither of these duties, one of these duties, or both.

If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts.

(c) ***The Commission's Jurisdiction and its Decision in this Case***

In this case, the Court concluded that:

- the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place, but the *Utilities Commission Act* did not empower the Commission to engage in consultations; and
- the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult.

Accordingly, the Court allowed the appeal and confirmed the decision of the British Columbia Utilities Commission approving the 2007 EPA.

The full text of the decision can be found at:
http://scc.lexum.umontreal.ca/en/2010/2010scc43/2010scc43.html

Lawson Lundell LLP represented the successful appellant, BC Hydro.

To discuss the implications of this decision for your organization, please contact one of the lawyers listed below.

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