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LEGAL DEVELOPMENTS IN THE DUTY TO CONSULT

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Since the release of The Supreme Court of Canada decisions in *Haida*[1], *Taku*[2] and *Mikisew*[3], Canadian courts and administrative tribunals have struggled to apply the legal principles governing the duty to consult.

In the seminal cases of *Haida*[4] and *Taku*[5], the Supreme Court of Canada confirmed the Crown had a duty to consult when it contemplates action that could adversely affect asserted Aboriginal rights. A year later, in *Mikisew*[6], the Court confirmed there is also a duty to consult where Crown conduct could adversely affect Treaty rights. The duty to consult is grounded in the principle of the honour of the Crown. The Crown must conduct itself honourably in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of Treaties.[7]

Currently before the Supreme Court of Canada are two matters involving the duty to consult: *Rio Tinto Alcan Inc*. v. *Carrier Sekina Tribal Council ("Rio Tinto Alcan")* and *Minister of Energy, Mines and Resources et. al. v. Little Salmon/Carmacks First Nation et. al*. ("*Little Salmon*").

These cases will give the Supreme Court an opportunity to provide further guidance on the duty to consult and the honour of the Crown. They are likely to have very real consequences on the ground for Aboriginal groups, industry and regulators involved in consultation activities.

Rio Tinto Alcan Inc. v. *Carrier Sekina Tribal Council*

The *Rio Tinto Alcan* case raises important issues about the role of regulatory tribunals in considering the duty to consult and whether consultation should be considered when determining what is in the "public interest" in the context of regulatory approvals.

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].
[2] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 73 [*Taku*].
[3] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*].
[4] *Haida, **supra** - note 1*
[5] *Taku, **supra*** - note 2
[6] *Mikisew, **supra*** - note 3
[7] *Haida*, ***supra*** - note 1at 17.

The case arises from an application by Rio Tinto Alcan Inc. before the British Columbia Utilities Commission for approval of an Energy Purchase Agreement (EPA) whereby Rio Tinto was selling power to BC Hydro. The Commission had to determine whether the EPA was "in the public interest".

The Carrier Sekani Tribal Council sought to intervene at the Utilities Commission hearing on the issue of whether the Crown had fulfilled its duty to consult on the EPA. The Tribal Council had an asserted Aboriginal title claim to the water and related resources near the discharge of a reservoir created by Alcan in the early 1950s. Alcan had a permanent water licence for the reservoir. The Tribal Council claimed the diversion of water for Rio Tinto Alcan's use was an infringement of its s.35 rights and that no consultation had ever taken place about that infringement.

The Commission found, in a preliminary decision, that the EPA would have "no new physical impacts" on water flows and that the duty to consult was not triggered. The Commission went on to find that the failure to consult on the historical and continuing infringements of Carrier Sekani's asserted s.35 rights were not relevant where there were no new physical impacts caused by the EPA.

The BC Court of Appeal held the Commission was wrong to decide the consultation issue as a preliminary matter - it should have been decided within the scope of a full hearing on the merits. "The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the [Tribal Council] would win the point as a pre-condition for a hearing into the very same point."[8] The fact that there was an infringement without consultation and that a Crown agent, BC Hydro, took advantage of the power produced by the infringement by signing the EPA was enough, in the Court's opinion, to clear any reasonable pre-hearing hurdle to intervene. [9]

Contrary to what the Alberta Court of Appeal has said in another case[10], the B.C. Court of Appeal said it was not necessary to find an explicit grant of power in a board's statute to determine consultation questions. The B.C. Court said so long as the Commission had the statutory authority to decide questions of law, it was competent to decide whether the Crown had discharged its duty to consult. [11]

Based on the Supreme Court's direction in *Haida* that First Nations should be consulted early on in a development process, the B.C. Court of Appeal said that the regulatory board with the power to approve a plan must accept the responsibility to assess the adequacy of consultation.[12] In this case, the Commission was the only appropriate forum to decide the issue in a timely way.[13] The Court said the honour of the Crown

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[8] *Carrier Sekani Tribal Council v. British Columbia* (Utilities Commission), 2009 BCCA 67, 61[*Carrier Sekani*]
[9] *Carrier Sekani,* 62.
[10] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board*), 2005 ABCA 68 at para. 28.
[11] *Carrier Sekani*, 45-46.
[12] *Carrier Sekani,* 53.
[13] *Carrier Sekani,* 51.

requires that a regulatory tribunal decide any consultation dispute which arises within the scheme of its governing regulation.[14]

Like many regulatory statutes, the legislation governing the Utilities Commission focused on whether the EPA was in the "public interest". The Court said that the "public interest" cannot be defined solely in economic terms, and that the existence of the duty to consult and an allegation of its breach must form part of the "public interest" inquiry.[15]

On November 6, 2009 the Supreme Court of Canada granted Rio Tinto Alcan leave to appeal the decision of the B.C. Court of Appeal. The SCC Appeal hearing is tentatively set for May 21, 2010.

Potential effects upon Alberta First Nations

It is expected that the appeal at the Supreme Court will focus primarily on the role of administrative tribunals in deciding disputes about the Crown's duty to consult. It will be interesting to see if the Supreme Court agrees with the B.C. Court of Appeal's finding that a tribunal has supervisory responsibility, routed in the honour of the Crown, to ensure that Crown actors engage an adequate consultation. If the Supreme Court agrees with the B.C. Court of Appeal in this regard, then consultation issues will likely become more extensively argued before regulatory tribunals.

The appeal will also give the Court an opportunity to provide guidance on what considerations are important in determining whether a proposed development is in the "public interest". The "public interest" test is common in the regulatory context. For example, legislation mandates that Alberta's Energy Resources and Conservation Board determine whether a proposed activity is in the public interest prior issuing an approval.[16] Any decision from the Supreme Court of Canada addressing the "public interest" test would have far-reaching consequences on regulatory proceedings in the context of natural resource development.

Minister of Energy, Mines and Resources v. Little Salmon/Carmacks First Nation

The *Little Salmon* case is about whether the duty to consult applies in the context of a modern land claim agreement.

The Little Salmon First Nation, the Government of Canada and the Yukon Government entered into a Final Agreement whereby the First Nation surrendered their Aboriginal rights and title in its traditional territory in return for settlement land, financial

[14] *Carrier Sekani*, 54
[15] *Carrier Sekani*, 42
[16] *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10, section 3; Other statutes in Alberta that use the "public interest" test include, *inter alia*: *Water Act*, R.S.A. 2000, c. W-3, *Natural Resources Conservation Board Ac*t, R.S.A. 2000, c. N-3; *Gas Resources Conservation Act*, R.S.A. 2000, c. G-4; *Oil Sands Conservation Act*, R.S.A. 2000, c. O-7; *Coal Conservation Act*, R.S.A. 2000, c. C-17.

compensation, harvesting rights and other measures. The First Nation ratified the Final Agreement in 1997. The Final Agreement gave members of the First Nation a right to harvest for subsistence on Crown land.

Later there was an application for a land grant to remove 65 acres from Crown land for agricultural purposes.

The Final Agreement specifically set out instances where the Crown was required to consult the First Nation. The disposition of Crown land was not included as a matter that required consultation under the Final Agreement.

A First Nation Elder had an exclusive right under Yukon's *Wildlife Act* to trap commercially on a portion of the land subject to the land grant application. If the land grant application was approved, the Elder would be unable to trap on the land grant area and First Nation members would no longer be able to harvest in the area subject to the grant.

As required by regulation and policy in the Yukon, the land grant application was reviewed in a two stage process by separate committees. The First Nation was not notified of the initial review hearing, but expressed their concerns before the second committee. Both Committees recommended the land grant be approved.

The First Nation continued to express its opposition to the land grant and sought a declaration from the Yukon Court that the honour of the Crown required the Yukon Government to consult with the First Nation and make all reasonable efforts to accommodate any rights that may be adversely affected by the land grant.

Both the Yukon Supreme Court and Court of Appeal held the duty to consult applied to the implementation and interpretation of the Final Agreement and was not ousted by the express terms of the Agreement.[17] The Court of Appeal held that the duty to consult had been fulfilled and the duty could only apply between the parties to the Agreement (Yukon and the First Nation), and not to individual members of the First Nation (the Elder with the trapline).[18]

The case was appealed to the Supreme Court of Canada with the appeal being heard November 12, 2009. The issue to be decided is whether the duty to consult and accommodate would apply in the context of the Final Agreement, which is a modern Treaty.

The Yukon government argued that in the context of a modern Treaty, there is no requirement to consult except for as expressly provided by the wording in the agreement. Unlike historic Treaties, such as Treaty 8, modern treaties are far more comprehensive, sophisticated and are expressed to be the entire agreement between

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[17] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources*), 2008 YKCA 13, 90 [*Little Salmon*].
[18] *Little Salmon,* 116.

the parties. The terms of modern agreements provide certainty to the parties, including, as in this case, the circumstances under which the parties are to consult.

The First Nation argued the duty to consult infuses every Treaty, including modern Treaties, because the duty finds its source in the honour of the Crown, which exists independent of the Treaty. It is important that this duty apply to modern land claim agreements to ensure the Crown-Aboriginal relationship operates in a trust-like manner, which promotes reconciliation, the very object of s.35.

The Supreme Court of Canada has reserved its judgement in *Little/Salmon*. Normally, the Court renders its judgment 6-8 months after an appeal hearing.

Potential effects of a decision

The Supreme Court's decision in *Little Salmon* is likely to have broad ramifications in areas covered by modern Treaties, such as the Territories and parts of British Columbia. Outside of these areas, we can expect that the Court's decision will provide more clarity around the duty to consult generally and the content of the honour of the Crown.