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Water management planning and the Crown's duty to consult and accommodate

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Cases Considered:

Tsuu T'ina First Nation v. Alberta, 2008 ABQB 547

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Alberta's new *Water Act* (R.S.A. 2000, c. W-3) calls for the development of water management plans (Part 2(1) of the *Act*). Once adopted, a water management plan will guide decision-making within the area of the plan on a range of matters, including the issuance and transfer of water licences. Because of concerns that the waters in parts of the South Saskatchewan River Basin (SSRB) were already over-allocated, the Government put a priority on developing a plan for the SSRB. The first phase of the plan was approved in June 2002 and the second and final phase was approved by Cabinet in August 2006 (http://environment.alberta.ca/documents/SSRB_Plan_Phase2.pdf).

In this case the applicants, the Tsuu T'ina Nation (a Treaty 7 Nation with a reserve immediately adjacent to Calgary and contiguous with the Elbow River) and the Samson Cree Nation (a Treaty 6 Nation with interests in the Battle River watershed and Pigeon Lake and therefore beyond the boundaries of the SSRB (at para 18)) sought judicial review of: (1) the Minister's decision to recommend the Plan for approval by Cabinet, and (2) Cabinet's decision to approve the Plan (under s.11 of the *Act*), on the basis that the Crown had failed to discharge its constitutional duty to consult and accommodate these two First Nations prior to making those two decisions. The applicants claimed that adoption of the Plan might have adverse effects on their aboriginal or treaty rights including not only an aboriginal or treaty right to water, but also rights to fish and hunt, and rights to the full use and enjoyment of their reserves.

Justice Sal LoVecchio summarized the principal recommendations of Phase II of the Plan as follows (at para 12).

1. Close the Bow, Oldman and South Saskatchewan River basins to further allocations, except for the purposes specified in a Crown Reservation;
2. Create a Crown Reservation of unallocated water in the above basins. Permit water allocated from the Crown Reservation only for Treaty 7 First Nations

Reserves, water conservation objectives, storage, and pending licence applications as of the date of the Crown Reservation;
3. Set water conservation objectives to improve the flow in the rivers for the Bow, Oldman and South Saskatchewan basins;
4. Set a water conservation objective for the Red Deer River; and,
5. Authorize the Director to consider applications to transfer all or a portion of the water allocation under existing licences in the SSRB.

Justice LoVecchio, giving lengthy reasons for judgement, dismissed the applications.

The core of the judgement might be stated as follows. First, applying an analysis of the duty to consult based on *R v. Sparrow* [1990] 1 SCR 1075 (on the basis that this was a case dealing with a completed government action and a proven right) and on the assumption (at para. 92) that adoption of the plan constituted a *prima facie* infringement of the aboriginal or treaty rights of the applicants, that infringement was justified both because the plan served a compelling and substantial purpose (at paras 94 - 96) (conservation of a scarce and valued resource) and because the plan was not inconsistent with the honour of the Crown. The Plan protected (or at least did not further erode) the First Nations' priority rights to water (at paras 98 - 100 & 122) and there was at least some (and adequate) consultation (at para 101).

Second, even if the relevant test for the duty to consult and accommodate was to be derived from *Haida Nation v. British Columbia* [2004] 3 SCR 511 rather than *Sparrow* (on the basis that this might be a case of a claimed rather than a proven right) the applicants still could not succeed. While the Crown had knowledge of the applicants' claim (at paras 111 - 113), and there was therefore a duty to consult (at para 113), the extent or scope of the duty to consult was at the low end of the spectrum and had been fulfilled (para 131), both because there was no or minimal adverse effect on the rights of the applicants (at paras 114 - 122), and because of the relative weakness of the applicants' legal claim (a claimed right rather than a proven right). The claim was weak, suggested Justice LoVecchio, because: (1) neither Treaty 6 nor Treaty 7 speak to specific water rights (para 129), (2) the potential application of the US *Winters* Doctrine (207 US 564 (1908)) "remains undecided in Canada" (para 127), (3) the establishment of an aboriginal right "would be even more problematic" than the claim of a treaty right (at 129), and (4) a claim based on riparian rights "also remains undecided" (at para 128).

In addition to these core elements, the judgement also contained one important digression in which Justice LoVecchio examined the question whether a decision that was classified as legislative (rather than administrative or quasi judicial) might engage the duty to consult. He concluded that it could not. But before examining that digression a few comments on the core elements are in order. I will comment first on the *Sparrow\Haida Nation* dichotomy before examining the way in which Justice LoVecchio found that any duty to consult that might have been owed had been satisfied.

The *Sparrow* vs *Haida Nation* dichotomy

In his judgement, Justice LoVecchio effectively claims that there are now two lines of

consultation cases, one stemming from *Sparrow* and one stemming from *Haida Nation*. In his view, the *Sparrow* analysis applies whenever we are dealing with something called a "completed government action" and a proven right, whereas the *Haida Nation* analysis applies in those situations in which a right is claimed rather than proven and the government action is still "anticipated". Justice LoVecchio suggests that this distinction is embodied in the various judgments in the Alberta Court of Appeal's decision in *R. v. Lefthand*, 2007 ABCA 206. But is this an appropriate distinction? I think not and for several reasons.

First, there is nothing in *Haida Nation* to support the view that the Court was intending to create two separate approaches to the duty to consult. Rather, it seems that the Court in *Haida Nation* was trying to provide a more satisfactory rationale for the duty to consult than that which had been provided by *Sparrow*. The difficulty inherent in *Sparrow* was that one reading of the case seemed to suggest that the duty to consult was only triggered as a result of an infringement (*TransCanada PipeLines v Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont CA). If this was correct this was a very impoverished approach to consultation which ignored its potential to avoid or limit infringements of aboriginal and treaty rights.

The Court in *Haida Nation* firmly rejected the link between (and the need to prove) a *prima facie* infringement and the duty to consult. Instead, the Court sought to place the duty to consult on more secure but somewhat different conceptual underpinnings. Thus the *Haida* Court and subsequently the *Mikisew Cree Court* (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 511) emphasised that the duty to consult and accommodate was not tied to the concept of infringement but instead was grounded in the honour of the Crown.

Second, the distinction between completed and anticipated action seems misconceived, and especially so given the *procedural* emphasis of the duty to consult. Not only is it a distinction that may be difficult to draw in practice but it is also a distinction that arguably should not be of much legal significance. For example, in the case of a government decision to authorize, say, Alpac Forest Products to cut timber, it may be reasonable to distinguish between the situation before, and the situation after, Alpac has actually acted on that decision and cut the timber, but why is it important to distinguish between the situation in which the government is preparing to issue the cutting permit and the situation two days later when the government has made that decision?

This distinction may be important in administrative law in terms of the remedy to be sought (there can only be an application to quash a decision that has already been made; anything prior to that will be premature), but the effect of the distinction in administrative law does not change the nature of an applicant's complaint (e.g. if the applicant claims a denial of procedural fairness, the claim does not become an infringement of substantive rights once the decision has been taken) or the burden of proof on the applicant (i.e. the test does not suddenly become proof of a *prima facie* infringement of substantive rights rather than denial of procedural fairness on a balance of probabilities). It is well established in administrative law that an applicant for relief on the grounds of procedural fairness does not have to show that the decision would have been different (or even a *prima facie* case that it would have been different) had she been offered the

opportunity to be heard. It is a very rare case (*Mobil Oil Canada Ltd v. Canada -Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202) where the court will conclude that the outcome on the merits is so obvious that it is unnecessary to send the matter back and require the original decision maker to re-consider the matter in a way that takes account of the outcome of the procedural challenge.

In sum, the concept of *prima facie* infringement does not belong in the re-worked and post *Haida Nation* duty of consultation. It does not belong because the requirement for a *prima facie* infringement as a trigger to the duty undermines part of the purpose of consultation which is to allow the parties to identify and explore the aboriginal interests that are at stake. Just as a reviewing court will not necessarily know all of the facts and arguments that an aggrieved person will adduce in their favour to influence a particular statutory decision maker or an exercise of discretion, neither will a reviewing court be aware of the body of evidence, customs and concerns that a First Nation might seek to draw to the attention of a decision maker, or the studies that a First Nation might seek to commission to fully understand the implications of a particular proposal; particularly one as far reaching as a long term regional water planning document.

At the end of the day, the dichotomy between *Haida Nation* and *Sparrow* was not central to Justice LoVecchio's conclusions since, as stated above, he applied both tests and found that there was no infringement of the applicants' rights; partly because any requirement for consultation had in fact been fulfilled, and partly because of his conclusion that the Plan protected the priority interests of the applicants, and partly because of his finding that the Plan did not entail adverse effects for the applicants. I now turn to those issues.

The consultation analysis

The core of the applicants' claim was that the Crown had breached its constitutional duty to consult and accommodate. In light of this, it is really quite remarkable how readily Justice LoVecchio dismisses the substance of the applicants' claim. The relevant section of the judgement is found in the *Sparrow* part of the analysis where LoVecchio, having assumed a *prima facie* infringement, and having found that the plan did not prejudice the applicants' priority position (see below), goes on to note that:

> [101] Although the consultation methods employed by the government would likely be considered on the low end of the spectrum proposed by Chief Justice McLachlin in *Haida*, consultation did take place. It is not my intention to review in any great detail each and every meeting or letter exchanged.
>
> [102] When the Return is reviewed, it is clear there were invitations to participate in the process by the government to the Applicants. Meetings were held with the Applicants to discuss water needs. The government hired a consultant to assist the Applicants in their review of the proposed plan.

> [103] Each side has a very different perspective on what transpired. It is not my intention to dissect their divergent views as this decision is not really driven by a need for an extensive process.

Apart from a few further references to the conclusion that a duty to consult was owed and a brief reference to the "low end of the scale" (at para 131) in the *Haida Nation* part of the analysis, this was the Court's only discussion and analysis of the factual basis of the consultation claim. Given the scope of the planning process and the issues at stake it is not immediately obvious that this dismissive treatment of the applicants' lengthy submissions was adequate. It may have been, but Justice LoVecchio's reasons hardly demonstrate or require that conclusion. It is almost as if, while proceeding on the basis of the assumption of *prima facie* infringement, Justice LoVecchio is second-guessing himself and therefore concluding that the consultation analysis was secondary. Why else would he conclude that it was unnecessary to examine the nature and quality of the consultation process that the Crown had followed?

The applicants' brief of the facts and law runs to some 132 pages. By my conservative estimate, at least half of that brief is devoted to assessing the evidence relating to the quality of the consultation. The brief contains several statements from government officials recognizing the limits to the consultation procedures in which the province engaged. It is not my intention to evaluate the merits of those submissions and arguments. My point is simply to suggest that the body of material adduced by the applicants on the duty to consult and the breach of that deserved a more searching analysis and assessment than is evident in Justice LoVecchio's judgement. This was a hard case; not an easy case.

No adverse effect\adequate respect for priority

It is convenient to deal together with these two issues even if the "no adverse effect" issue arises as part of the *Haida Nation* analysis and the respect for priority issue arises as part of the *Sparrow* analysis. The core idea that is common to Justice LoVecchio's treatment of these issues in the two parts of his judgement is that the acts complained of (recommendation and adoption of the plan) did not make the applicants' legal position any worse than it already was. If there was prejudice to the legal position of the applicants, that prejudice had been created by the priority system (first in time, first in right, paras 35 - 36) embedded in the long-standing water legislation of the province. The Court put it this way at para. 122:

> The SSRB Plan is aimed at improving the overall health of the basin and does not deal with the right to hunt and fish. If there is presently any adverse impact on the water use of the Applicants, (either directly or as an adjunct [to] their other rights) it is a result of the priority system as set out in the *Water Act* and the licenses already granted. These are historical facts and not the result of the decisions under review or the SSRB Plan.

In fact, according to the Province and echoed by Justice LoVecchio, there were reasons for thinking that elements of the Plan might have improved the legal position of the applicants. For example, the plan closes the entire South Saskatchewan Basin (with the exception of the Red

Deer) to further allocations. It also establishes water conservation objectives (WCOs) for various water bodies, and the Crown reservations created by Order in Council as part of the approval of the Plan held out the possibility of "First Nations priority over other new allocation seekers after conservation targets are met" (para 98) which would accord with "the Aboriginal priority established in *Jack*" (para 99).

All of this may well be the case but I wonder if that is the relevant question, or at least the only relevant question? Part of the issue might have been whether the Plan might have, or should have, further improved the position of the applicants? After all, a Plan is concerned with imagining different futures. Some versions of the future may represent a linear extension of the status quo; other versions may chart a very different future, a future which seeks to rectify historic injustices rather than compounding them.

I (in conjunction with my co-author Arlene Kwasniak) commented on the SSRB Plan in another context. In that comment we suggested a couple of ideas that might have been more aggressively pursued in the context of the planning process if we were really serious about improving aquatic ecosystem health in the South Saskatchewan Basin.

In that comment we argued that the Plan proceeded on a premise that was unnecessarily deferential to the rights of senior licence holders (largely irrigation districts). It is true that the *Water Act* (s.18) protects (grandparents) existing licensees, and it is also true, as Justice LoVecchio observes (at para. 36), that "There is currently no statutory authority in Alberta for any statutory decision maker to rearrange the priority system, or to alter the statutory priority system". But the protected rights are only as good as the terms of the various licences and in some cases existing licences do permit variations to be made to protect the aquatic ecosystem. Second, we argued that the proposed WCOs were themselves deficient on the basis that they were not in fact based on the best available science and ought to have been considerably more protective of the aquatic environment.

I am not claiming here that the applicants ought to have recognized the merits of these arguments and adopted them as their own; I merely refer to them to support the proposition that it should not have been enough for the province to show that the decision in question does not further prejudice the legal position of the applicants. Given the historical disadvantages that First Nations have suffered (as discussed in *Sparrow*), the fact that there were other improvements or ameliorations that might have been made as a result of further or better quality consultation should also have been relevant to an assessment of the adequacy of the consultation conducted as part of this planning process. My review of the applicants' brief of fact and law suggests that the applicants did draw the attention of the Court to some of these and other possibilities including the use of storage and the possible purchase of existing licences. Each of these might have had the potential to better the position of First Nations within the basin. But none of this emerges in the judgement.

Thus, Justice LoVecchio's claim that the Plan "is in line with *Jack*" (and therefore respects the indigenous claim to priority) might be true *prospectively* (if there is any remaining surplus to

allocate after respecting all existing allocations) but it hardly addresses the question of whether the *existing* allocation respects the *Jack* priority scheme. But the answer to that, as we all know, is clear: it does not. The province's first in time, first in right system is actually a system that ignores the priority claim of those indigenous people who were actually here first.

But it is also important to examine the claim that this was a Plan that did not make the First Nations worse off than they already were. This forms, as I have suggested above, an important part of Justice LoVecchio's reasoning. But it is also apparent that Justice LoVecchio had his doubts about this. For example, he concludes that the advent of water trading in Alberta will intensify the use of existing entitlements (at para 138 and see also para 8): "it would logically stand to reason that more water will be consumed, exacerbating the water shortage. That negative impact may only be partially offset by any [water conservation] holdbacks imposed. The Government by its own words suggests a crisis already exists." In other there was evidence, which Justice LoVecchio accepted, that this water management plan could cause prejudice to indigenous interests.

The relevance of the administrative\legislative decision dichotomy

Justice LoVecchio devotes a considerable part of his judgement to the question of whether the recommendation and adoption of the Water Management Plan was a legislative or an administrative decision. At the end of the day I do not think that this reasoning was essential to Justice LoVecchio's conclusions (which is why it does not figure in my statement, above, of the "core" of Justice LoVecchio's judgement) but the discussion is important because it requires us to consider the extent to which administrative law rules and principles (and specifically procedural fairness rules) are relevant to cases dealing with the duty to consult.

Although the applicants presented and argued the case as a case dealing with the constitutional duty of the Crown to consult, the province evidently defended the case as if it were an ordinary administrative law case raising issues of procedural fairness. Justice LoVecchio (as noted above) did ultimately deal with the consultation issues head on but he began with, and seems to have preferred, the administrative law characterization of the issue. Such a characterization invited two supporting or additional reasons for dismissing the application. The first such reason related to the Minister's recommendation to Cabinet. This recommendation, argued the province, could not be subject to attack since it was simply a recommendation and "the court will only quash something that is a determination or decision. It will not quash a recommendation" (at para. 54). Justice LoVecchio evidently accepted that argument.

More significant (since it could bite against both decisions) was the argument that the decisions in question (the recommendation to adopt and the subsequent adoption of the plan) were legislative in nature and therefore, on long-standing authority (the key case is still *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 SCR 735), could not attract a duty of fairness.

I think that it is probably fair to say that, analytically, the development and adoption of a planning document like a water management plan (WMP) is a legislative process rather than an

administrative or judicial process. After all, a WMP is designed to serve as guidance for subsequent decisions. It sets general standards and does not decide particular cases, resolve disputes, or determine the rights and interests of parties. In short, if this were an ordinary administrative law attack on the SSWMP it would fail (provided of course that the province had followed the processes required by the *Water Act* (s.7(2)(d)). In sum, I agree with this part of Justice LoVecchio's judgement (at paras 60 - 65) and I agree with his refusal to make a distinction between the Minister's decision to propose the plan for approval and the Cabinet's decision to approve. But is that enough? Is this distinction, familiar enough in administrative law, relevant in the context of the duty to consult and accommodate?

Here, the applicants' argument was not a mere administrative law argument; it was pitched as a constitutional argument. So what reasons does Justice LoVecchio give for applying the administrative law line of cases? Justice LoVecchio seems to have been particularly influenced by the separate and far-reaching opinion of Justice Slatter in *R v. Lefthand*, 2007 ABCA 206.

In that case Justice Slatter stated that:

> [38] The duty to consult is of course a duty to consult collectively; there is no duty to consult with any individual. There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected: ***Authorson v. Canada (Attorney General)***, [2003] 2 S.C.R. 40. It cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*. It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a *prima facie* breach of an aboriginal right is sought to be justified: *Mikisew Cree* at para. 59.

Justice LoVecchio quotes a slightly truncated version of this paragraph (at para. 57 of his judgement, but nothing turns on the truncation) before also quoting a very difficult passage from Justice Watson's short concurring judgement in *Lefthand* in which Watson seems to suggest that legislative *processes* of Parliament are immune from judicial review while the *result* may be subject to review on constitutional grounds. Justice LoVecchio then concludes his analysis on this point by observing (at para. 59) that "To the extent that *Lefthand* has said there is no duty to consult for legislative acts that decision is binding on me."

There are several reasons for thinking that this is all less than satisfactory. First, while the ratio of *Lefthand* might well be binding upon a trial judge, Justice LoVecchio has hardly succeeded in ascertaining the ratio of *Lefthand* (but to be fair, that is a very difficult undertaking). But second, even if one can read Justice Watson as supporting Justice Slatter's broad observations, it seems clear that Justice Watson's comments should be confined to the law making processes of statutes

whether in Parliament or a provincial legislature. For example, there is no reason in principle why a court should refuse to review the procedure followed by a Minister in developing a set of regulations if, for example, the statutory empowering provision (or the Constitution: *Nunavut Tunngavik Inc v. Canada (Minister of Fisheries and Oceans)* (1998), 162 DLR (4th) 625 at para. 15) required the Minister to give notice to, and consult with, affected parties. And third and most importantly, there is the broader question of whether Justice Slatter is correct in thinking that no legislative process (which Justice LoVecchio extends down to a water planning process) should, as a matter of principle, be subject to review based on the duty to consult. I think that it is fair to be skeptical of this claim given the constitutional foundation of the applicants' claim but also given the far reaching implications of this conclusion. It runs the risk of proving too much, for if there is no duty to consult with respect to a legislative process such as the development of a water management plan, there can be no duty to consult on the development the province's emerging land use planning framework. And how bizarre would that conclusion be? Some of the most significant decisions about acceptable land uses would not trigger a consultation duty.

A good starting point for considering this issue is the Court's decision in *Sparrow*. That case involved "the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the Fisheries Act …. and the regulations under that Act" (at para 2, emphasis added). In sum, what was at issue was not only the licence but also the regulations behind the licence. In light of that, what would be the appropriate focus of any consultation which might be required in order not to infringe on aboriginal or treaty rights? Should the consultation be confined to setting the terms of the permit or should it extend to the regulations behind the permit? There is little reason for thinking that the *Sparrow* Court would have taken a narrow view of the matter. Instead, the Court suggested (per Dickson CJC and LaForest J) that in justifying any infringement it would be necessary to ascertain "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries" (at para 82). While that passage may be criticized for suggesting that the duty to consult might be satisfied merely by informing the Musqueam people, there is no suggestion here that there should be no consultation with respect to the content of regulations before they were passed.

The Court's decision in *R v. Gladstone*, [1996] 2 SCR 723 also emphasises that consultation needs to extend to the entire structure of the regulatory scheme pursuant to which the regulator determines the existence of a harvestable surplus and allocates that to the various categories of the fishery. In other words, *Gladstone* recognizes that, to be effective, consultation has to reach behind any particular administrative decision (e.g. the issuance of a specific permit) and examine the broader regulatory scheme of which the particular permit may be a part.

I think that *Haida* also supports this broader approach. One of the province's arguments in *Haida* (at para 75) was that its duty to consult was limited to the issuance of cutting permits and other operational plans. The court rejected that argument noting that behind the issuance of a cutting permit were all sorts of strategic level decisions (such as the determination of an Annual

Allowable Cut) that would effectively determine the cutting permit decision. For that reason, the Court suggested that the duty to consult must reach further back in the chain of decision-making and planning than the immediate decision. While the Court certainly did not endorse Justice Lambert's much more far reaching decision in his additional reasons in the Court of Appeal, the judgement does suggest that it was important to look behind the immediate and most concrete decisions and scrutinize the process to examine the nature of the consultation that had occurred.

In sum, I think that all of these cases suggest that consultation must be effective and meaningful; consultation is not simply an opportunity to blow-off steam. There is no suggestion in these cases that the Court will allow governments to hide behind administrative law categories where those categories will undermine effective consultation. Rather, these cases suggest that, just as satisfaction of the rules of natural justice and procedural fairness may operate as an implied condition precedent to the validity of a statutory decision, so too may the constitutionally based duty to consult serve as a condition precedent to the validity of government decisions and regulations that may have an impact on aboriginal or treaty rights.