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

By Nigel Bankes

Cases Considered:

Tsuu T'ina Nation v Alberta (Environment), 2010 ABCA 137

The Court of Appeal, in a reasons for judgement reserved decision written by Justice Clifton O'Brien on behalf of a unanimous three person panel (Justices Ellen Picard and Patricia Rowbotham concurring), has rejected the challenge made by two First Nations, the Tsuu T'ina and the Samson Cree, to the South Saskatchewan Water Management Plan (SS WMP). The First Nations challenged the Plan on the basis that the Crown had not fulfilled its constitutional duty to consult and accommodate when it developed and adopted that Plan. The Court found that: (1) the Crown *did* have a duty to consult (certainly with respect to the Tsuu T'ina, less clearly so with respect to the Samson Cree, at para.70), (2) the content of the duty to consult was at the very low end of the scale "having regard to the nature of the proposed government action, the seriousness of the appellants' rights and claims, and the potential adverse impacts upon those rights and claims" (at para. 95), and (3) the duty to consult had been satisfied (at paras 130 and 136).

I blogged at length on Justice LoVecchio's judgement at trial (see here) and there is a more completely referenced version of that comment in Resources. I will not rehearse all of the arguments discussed there and instead will confine this post to five points: first, the implications of the province's starting position that it had no duty to consult; second, some comments on the Court's assessment that the duty to consult had been satisfied, third, the Court's treatment of the province's claim that a legislative decision does not, as a matter of law, attract a duty to consult and accommodate, fourth, the Court's discussion of the possible application of the *Winters* Doctrine (*Winters v. U.S.*, 207 U.S. 564) in Canada, and finally a comment on the implications of the decision for the province's newly adopted land use planning framework.

The implications of the province's position that it had no duty to consult

On appeal, the province continued to take the position that it had no duty to consult and this for no less than three reasons: (1) the First Nations had not proven any potential for adverse impact on First Nation rights, (2) there was no legal basis for First Nation claims to water rights, and (3) the adoption of a plan was a legislative act and therefore did not attract the duty to consult. The question I want to raise here is whether, as a matter of law, it is permissible for the Crown to have any fall back position if the "no duty" argument fails. In other words should the Crown, as a matter of law, be allowed to take the position that "we have no duty to consult but if this Court finds that we had a duty to consult then we did in fact discharge that duty"? Now ordinarily, it is no doubt the case that counsel can run as many alternative arguments as counsel wishes while acknowledging the risk that one argument may well end up undercutting another. But is this the

case with the constitutional duty to consult? If "the honour of the Crown is always at stake" (at para. 64), and if "meaningful consultation" requires "cooperation and good faith efforts" (at para. 130(4)) and if the duty to consult goes beyond the procedural content of the duty of fairness and requires "demonstrable integration" of the results of consultation in project planning and implementation (*Halfway River First Nation v BC*, 1999 BCCA 470), then how do you fulfill the duty by accident?

The point is simply that if you don't believe that you have a duty at all, how can you possibly engage in good faith consultation? You may be engaged in *something* e.g. fulfilling the procedural statutory obligations imposed by the terms of the *Water Act*, R.S.A. 2000, c. W-3 on those government officials engaged in water management planning, but you can't be discharging your constitutional obligations if you don't believe that you have any and don't believe that the other party has an interest that you must take account of. And even if this argument doesn't wash as a matter of law (i.e. as a conclusive argument) then it should at the very least present a very serious obstacle to the Crown in demonstrating that it has protected its honour and that it has engaged in good faith negotiations. And this brings us to ….

Some comments on the Court's assessment of the extent to which the Crown had fulfilled its duty to consult

In my post on the trial judgement I argued that Justice LoVecchio had not provided a very searching analysis of the claims of the First Nations that the Crown had not discharged whatever obligation it had to consult. The Court of Appeal's judgement is not open to that charge. The Court provides a detailed analysis of the depth and quality of the consultation before affirming the conclusion at trial based on the standard of review of reasonableness (at para. 29). A key point seems to have been that the "consultation was inhibited by the dictates of the First Nations who proscribed the manner of consultation" (at para 130(4), emphasis added). But the Court also acknowledges that there were some problems with the manner in which the Crown engaged with First Nations, especially as the Crown moved to finalize the terms of the Plan and have it adopted by Order in Council. Here is the Court's assessment of the end-game (at para. 129):

> It is difficult to resist the inference that during the summer of 2006 the Tsuu T'ina were led along with the idea that there would be further consultation before the Plan was approved, which happened at the end of August 2006. Rather than being straightforward by disclosing that the Plan was in the final stages of preparation and approval, the Minister, under threat of litigation, allowed the Treaty 7 First Nations to think that further meaningful consultation with respect to the Plan could occur before it was approved. In fact, it would seem that Alberta Environment was thinking of consultation after approval, which would deal with matters not within the terms of reference, but by no means made this clear to the Tsuu T'ina. (emphasis added)

In light of this how could the Court still find that the Crown had discharged its duty? Apparently on the basis that looking at the record as a whole the trial judge was entitled to reach the conclusion that he did (a standard of review point again) – here perhaps relying on the need for urgent action in order to close the basin to further allocations (at para. 130(5)) and also on the evidence of some accommodation (further allocations for First Nations permissible even in a closed basin (at para. 130(7)).

The Court's treatment of the province's claim that a legislative decision does not, as a matter of law, attract a duty to consult and accommodate

As noted above, the province took the view that the adoption of a plan is a legislative process and that legislative processes by their nature do not attract the duty to consult and accommodate. In taking that position the Crown relied in part on analogous arguments from administrative law and in part on the judgments in the Court of Appeal in *R. v. Lefthand*, 2007 ABCA 206. Justice LoVecchio at trial seemed to be attracted by these arguments although his judgement does not turn on the point. I provided an extended critique of that position in my blog on the trial judgement. How then did the Court of Appeal deal with argument? The Court discusses this argument at paras 48 – 57. The formal conclusion is that it was not necessary for the Court to reach a final conclusion on the matter (at para. 48): "The chambers judge discussed this issue at some length, but concluded he did not need to resolve it (para. 68). I agree …". The Court's principal reason for this conclusion was that while the applicants were originally seeking an order to quash the Order in Council they were now only seeking declaratory relief.

But reading on from here it seems evident that Justice O'Brien was skeptical as to the proper reach of the provincial government's argument:

> [52] In my view, the argument raised by the Crown does not go beyond consideration of whether or not the quashing of the Order in Council is a proper remedy. An inability to quash legislation, if that be the case, does not mean that consultation is not required when drafting plans for development of natural resources, nor does it preclude the availability of declaratory relief in appropriate circumstances.
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> [55] Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions. Here, the Director and the Department of the Environment were directed to develop a water management plan for the purpose of making recommendations to the Lieutenant Governor in Council for his approval. The *Water Act* requires consultation with stakeholders in developing a plan.
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> [57] In short, I am of the view that the fact that the plan was adopted by an order in council does not immunize the persons developing the plan from a duty to consult, if such a duty otherwise arises in the circumstances of the case.

In sum, while the Court has left the Crown to argue on another day that an order in the nature of *certiorari* will never lie to quash a legislative decision (at least where the basis of the application is breach of the duty to consult) this seems to be little more than form; since, as a matter of substance, the Court has plainly told the Crown that it cannot hide behind this position. But even as a matter of form the argument is surely doomed to failure. It is one thing to say that the duty to consult cannot be used to quash an Act of the legislature (which was not the applicants' argument), but it is quite another to say (and see my post on the trial decision for argument on this point) that any decision that is analytically a legislative decision rather than an administrative decision does not attract the duty to consult.

The Court's discussion of the possible application of the *Winters* Doctrine in Canada

In assessing the content of the duty to consult and accommodate, *Haida Nation v British Columbia (Minister of Forests),* [2004] SCR 511 advises that decision-makers and ultimately the Courts must take account a variety of factors including the strength of the claim. In its concluding remarks on this point the Court of Appeal agreed with the trial judge that the applicants' claims to water rights which were being pursued in the action commenced by statement of claim would "not be an easy case to win" (at para 79). It is hard to disagree with this assessment given the absence of directly relevant Canadian authority but I do want to draw attention to how readily the Court reaches the conclusion that it is "doubtful that the [*Winters*] doctrine is applicable in Canada". The Court's discussion of this is at para. 75:

> As observed by the chambers judge, the *Winters* doctrine, which implies the right of reserve lands to water rights, has not been applied in Canada. It is doubtful that the doctrine is applicable in Canada, as its application in the United States has been limited to states that regulate water through a system of prior appropriation – a system which has never existed in Canada: see Scott Hopley and Susan Ross, "*Aboriginal Claims to Water Rights Grounded in the Principle Ad Medium Filum Aquae, Riparian Rights and the Winters Doctrine*" (2009), 19 Journal of Environmental Law and Practice, at 21-23. The *ad medium filum aquae* presumption, which is rebuttable, is a common law rule by which ownership of the bed of a non-tidal river or stream belongs in equal halves to the owners of riparian lands.

I do not believe that the reasons that the Court gives for its conclusion on this point are especially convincing. First, while western Canada does not have a prior appropriation system we do have a prior allocation system and it is hard to see that the distinction between the two (self help vs government administered) is a material distinction in the context of applying *Winters*. And the comment on *ad medium filum* does not seem to take us anywhere. The more fundamental point is that *Winters* is effectively a treaty interpretation case; and is it really that hard to imagine a fairly convincing argument to the effect that a treaty promise to create reserves in an arid area of the country (and with the demise of the buffalo and the prospect of settled agriculture as an alternative) includes a commitment of water rights for the lands set aside with an appropriate priority to meet the irrigation or other development needs of the First Nation? The *Marshall* decision ([1999] 3 SCR 456) of the Supreme Court of Canada (where the Court recognized a constitutional right to harvest for livelihood purposes based upon a negative covenant by the First Nation) certainly suggests that the Court is capable of creative approaches to treaty interpretation in the interests of identifying the shared intentions of the parties to the treaty.

What are the implications of this decision for land use planning in the province?

The *Tsuu T'ina* decision deals with water management planning under the terms of the *Water Act* but is clear that we are also on the verge of developing regional land use plans in the province on the basis of the *Alberta Land Stewardship Act*, R.S.A. 2000, c. A-26.8. Two such planning processes are underway: one in the South Saskatchewan region and one for the Lower Athabasca. These plans once adopted will have considerably more legal bite than water management plans (WMPs) under the *Water Act*. This planning process will trigger the Crown's duty to consult and if necessary accommodate and the *Tsuu T'ina* decision supports that assertion. I do not believe, for the reasons given above, that the Court's discussion of the Crown's legislative process argument undermines this claim.

There is one interesting feature of the South Saskatchewan regional planning process that is worth commenting on in the present context. This is the "carve-out" from that process of any consideration of the province's water allocation system. Thus, the Terms of Reference for the South Saskatchewan Regional Plan (which is both broader – it includes the Milk – and narrower – it excludes the Red Deer - than the Basin itself) provide as follows:

> It is recognized that water supply and demand are key factors in development and growth for the South Saskatchewan Region. Changes to the water allocation system are not within scope of the RAC's work. The Government of Alberta has initiated a separate process to review Alberta's water allocation system. (Terms of Reference for Developing (*sic*) the South Saskatchewan, November 2009 at, emphasis added)

Given that the water allocation system (and the manner in which it deals with the grandparented rights of irrigation districts) is likely the most important planning issue in the region, this seems passing strange. But for present purposes the key point must be that the "separate process" that is referred to here will likely also engage the duty to consult and accommodate; and thus far, the two key elements in that separate process, the recommendations of the Water Council and the recommendations of the Ministerial Advisory Committee (both issued in November 2009) don't seem to have had much engagement with First Nations.

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