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# The Supreme Court of Canada clarifies the role of administrative tribunals in discharging the duty to consult

**By Nigel Bankes**

**Cases Considered:**

*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43

In the 1950s British Columbia authorized Alcan to develop the Nechako and Kemano Rivers for power purposes to supply Alcan's aluminum facility at Kitimat. This development occurred in the traditional territory of the Carrier Sekani Tribal Council (CSTC) First Nations. There was no consultation at that time. Since then Alcan has sold excess power from its facilities to BC Hydro (a Crown corporation) and in 2007 the parties negotiated an energy purchase agreement (EPA) to cover the period up until 2034. Sales have been growing in recent years as Alcan has found it more profitable to generate electricity than make aluminum: *Kitimat (District) v. British Columbia (Minister of Energy and Mines)*, 2008 BCCA 81.

BC Hydro was required to obtain the approval of the BC Utilities Commission (BCUC) for this agreement under the terms of s.71 of the *Utilities Commission Act*, RSBC 1996, c. 473. In considering such an application the BCUC is required to assess whether the contract is in the public interest having regard to matters such as the quantity of energy to be supplied, price, alternative sources of energy and "any other factor that the commission considers relevant to the public interest".

CSTC intervened late in the BCUC proceedings and sought to expand the coverage of the Commission's review to have the Commission consider whether the Crown had met its duty to consult Aboriginal people, whether the proposed power sale could infringe its Aboriginal rights and title, and also more generally as to the environmental impact of the agreement. The Commission refused to change the scope of the review. It had concluded as part of its Phase I examination of the issues that Alcan would remain responsible for the operation of the reservoir and would continue to optimize power generation; and that releases from the Nechako reservoir (into the Kemano River) for fish purposes would continue to be governed by the term of a settlement agreement between Alcan and the Department of Fisheries and Oceans. In light of these findings the Commission concluded that the EPA would have no adverse effects on the CSTC's interests.

CSTC appealed the BCUC's decision to the Court of Appeal. That Court held that the BCUC had to conclude that the duty to consult had been satisfied and that it could not do this as a preliminary manner. The Court of Appeal would have remitted the matter back to the Commission to consider evidence and argument on whether a duty to consult (and accommodate) exists and if so whether that duty had been fulfilled. On further appeal to the Supreme Court of Canada that Court emphasised that the Court of Appeal did not criticize the

Commission's conclusion that there was no adverse impact. As a result, suggested the Supreme Court of Canada (at para. 20), the Court of Appeal "appears to have taken a broader view than did the Commission as to when a duty to consult may arise."

The Supreme Court in a unanimous decision delivered by Chief Justice Beverley McLachlin reversed and affirmed the Commission's decision. I think that the decision is significant in two areas: (1) the duty to consult and past harms, and, (2) the role of regulatory tribunals in the context of the duty to consult.

**The duty to consult and past harms**

The Court emphasised (at para. 45) that "past wrongs, including previous breaches of the duty to consult" will not alone suffice to trigger a duty to consult in relation to a present action such as approval of the EPA. Thus, even where a First Nation continues to suffer from the impacts of past wrongs and activities, further decisions in relation to those activities will not trigger a duty to consult unless the new decision itself has the potential to impair Aboriginal or treaty rights (at paras 48 – 49, 51 – 54 & 84). Thus the duty to consult operates prospectively and seeks to prevent damage. Other remedies such as damages may be appropriate for past actions (at paras. 48 & 54).

**The role of regulatory tribunals in the context of the duty to consult**

As for the role of a regulatory tribunal in relation to the duty to consult – it all depends. And it all depends on the terms of the relevant provincial or federal statute. The legislature might impose the duty to consult on the tribunal (since the Crown can delegate its duty to consult: *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73), the legislature might charge the tribunal with ensuring that adequate consultation has occurred, or the legislature might give *both* of these duties or *none* of these duties to the tribunal (at para. 57). In other words, there are no hard and fast rules; it is simply a question of reading the relevant statutes. Gone is any suggestion that a tribunal with quasi-judicial functions may not, as a matter of law, discharge a duty to consult as well as a duty to impartially fulfill its adjudicative function - and indeed the Court manages to reach its decision in this case without even mentioning its decision in *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 SCR 159 which was the source of this idea (admittedly in the bad old days when the duty to consult was yoked with the Crown's fiduciary obligations (and again no mention of fiduciary duties here, just, consistently with *Haida Nation,* the honour of the Crown)).

Are there any default rules or presumptions that will help us in ascertaining the role of a tribunal (or indeed any statutory decision maker, see *R v. Conway*, 2010 SCC 22)? I think so. First, the Court suggests that a tribunal that has the authority to decide points of general law will also have the power and the duty to ascertain whether there is a duty to consult and whether the Crown has fulfilled its consultation obligations – at least, that is, unless the legislature expressly denies a tribunal this additional constitutional responsibility. In this case, the provincial legislation provided that the BCUC had no jurisdiction over constitutional questions but the Court interpreted this as applying to division of powers issues, problems of applicability (i.e. interjurisdictional immunity, and on this see the Court's recent decision in *Quebec (Attorney General) v Canadian Owners and Pilots Association,* 2010 SCC 39) and *Charter* questions (all at para. 71) and *not* the duty to consult: "[the legislation does] not indicate a clear intention … to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant aboriginal interests" (at para. 72).

Second, the same conclusion (effectively a presumption) does *not* follow with respect to a tribunal assuming the duty to consult. The power to decide question of law does not imply a duty to consult (at para.60): "A tribunal has only those powers that are expressly or implicitly conferred upon it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or implied authorized to do so". In this case the provincial legislation had not conferred this authority/duty on the BCUC (at para. 74).

Third, a tribunal with the authority to decide if the duty has been fulfilled should provide whatever relief it considers appropriate (at para. 61) (shades here of s.24(1) of the *Charter* and *Conway*, above). Fourth, where the tribunal has no authority to consult or to decide on whether the duty has been fulfilled, "the Aboriginal peoples affected must seek appropriate remedies in the Courts" (at para. 63).

Those I think are the two main points of interest in the judgement but here are three additional observations. First, there is a very heavy emphasis in this judgement on the duty to consult as interim relief pending final settlement (see paras 33, 50, & 60) and as an alternative to injunctive relied (although there also is a tipping of the hat to the duty as generative of a constitutional order (at 38) (see reference to Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433 - but do they understand what that means?)). One of the implications of this is that it is hard to get a sense of the implications of this decision in the context of treaty rights. There is a passing mention of treaty rights and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 (at para. 48) but not much beyond that.

Second, in addition to commenting on the role of BCUC in the context of consultation the Court also commented on the responsibilities of BC Hydro as an agent of the Crown and indeed affirmed the duty of Hydro (at para. 3) "to consult the CSTC First Nations on future developments that may adversely affect their claims and rights." Thus the Court noted that (at para. 81) "BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia." And this was not a situation in which the duty to consult might be triggered because the Crown was divesting itself of land or resources such that it would (at para 47) "remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown" – but this was because (at para 91),

> … the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

In other words the duty to consult will be asymmetrical – the more that a government hews to social democratic ideals and retains ownership of resources (or worse still the means of production, distribution and exchange) then the more likely it is that it will retain more onerous consultation obligations.

The third point is connected and it relates to the Commission's findings of fact. The Commission's decision (and ultimately the Court's) turns very much upon the conclusion that the EPA would not change the way in which Alcan operated its facilities and that if it didn't sell this power to BC Hydro it would sell it to somebody else (at paras. 86 & 92). Now I haven't gone and looked at the terms of the EPA and I am not completely up to speed on the state of deregulation of the power market in BC, but in a dynamic energy market with intermittent sources such as wind increasingly coming on stream, hydro power (especially for peaking rather than base load purposes) becomes increasingly valuable and all other things being equal an operator will choose to use its hydro resources to maximum advantage. In other words, this hydro resource will be increasingly valuable to BC Hydro and future operations may well change from historic operations as the supply mix changes. I guess this is the sort of thing on which BC Hydro might have to consult in the future (as indicated in the last paragraph) but one wonders why entering into the agreement itself did not trigger the duty to consult if, as the Court does emphasise, organizational and structural changes (at para. 90) far removed from operational decisions, may, in principle, trigger.

I will try and add something in the next few days on the implications of this decision for the Energy Resources Conservation Board in Alberta – unless that is one of you ABlawg readers out there in cyberspace chooses to relieve me of that self-imposed responsibility! Another idea to pursue is to ask what this decision might lead us to expect when the court hands down its decision in *David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources et al. v. Little Salmon/Carmacks First Nation et al.* (heard 12 November 2009).