

## Who decides if the Crown has met its duty to consult and accommodate?

By Nigel Bankes

### Decision commented on:

Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, Osum Oil Sands Corp., Taiga Project, August 24, 2012.

In a letter decision of August 24, 2012 (hereafter LD) the ERCB decided that it lacks the jurisdiction to determine whether or not the Crown in right of Alberta had discharged its duty to consult and accommodate the Cold Lake First Nation (CLFN) with respect to the impacts of a proposed SAGD (steam assisted gravity drainage) in situ bitumen project (the Taiga Project).

### The Decision

CLFN filed an objection to the Taiga Project. The Board granted CLFN standing and scheduled a public hearing on the Taiga Project application which commenced on July 18, 2012 only to be “concluded on the same date [when] CLFN withdrew its objection” to the application (LD at 1). Prior to that, however, CLFN had filed a Notice of Question of Constitutional Law, pursuant to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 (*APJA*) raising the following question (LD at 1):

Has the Crown in Right of Alberta discharged its duty to consult and accommodate CLFN with respect to adverse impacts arising from the Osam Taiga Project upon CLFN’s Treaty Rights? (Emphasis added)

The Board’s decision describes the relief sought as a “determination and a declaration” (LD at 2). The Board decided on July 17 that it lacked the jurisdiction to consider the question with reasons for that decision to follow. This is a comment on those reasons.

The Board begins its reasons by setting out what it considered to be the relevant provisions of the Board’s statutes underlying the application (the *Energy Resources Conservation Act*, RSA 2000, c E-10 (*ERCA*) and the *Oil Sands Conservation Act*, RSA 2000, c O-6 (*OSCA*)). For present purposes perhaps the most important provision here is s.3 of the *ERCA* which provides that:

Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment. (Emphasis supplied)

Following this, the Board referred to the *APJA* (noting that the Board is listed in the Designation of Constitutional Decision Makers Regulation, AR 69/2006), and concluding under both the common law and the *APJA* (LD at 6), “that it has the power to decide constitutional questions.” However, this conclusion was not determinative of the issue because this power is not an unlimited power. In particular, the Board can only decide constitutional questions insofar as those questions are related to the Board’s statutory mandate. As to its mandate, and drawing upon the earlier references to the *ERCA* and *OSCA*, the Board concluded that it (LD at 7):

... sees nothing in its mandate ... which extends its authority to reviewing the Crown’s consultation with respect to aboriginal or treaty rights in circumstances where the Crown is not the applicant. The Board’s mandate requires it to assess impacts of projects; the Board’s mandate does not allow or require the board to assess and supervise Crown conduct, including consultation with First Nations.

The Board supported its general conclusion by reference to the leading Alberta decision on the standing of First Nations in matters before the Board: *Dene Tha’ First Nations v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para 28; and it supported the distinction that it made between cases in which the Crown is not the applicant and cases in which the Crown is the applicant by referring to *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 53 and 58 (see my post on *Carrier Sekani* [here](#), and the ensuing discussion in the comments).

This latter point was important because CLFN had argued that a Board which has the duty to decide matters of public interest must of necessity assess whether the Crown had fulfilled its obligations prior to the Board exercising its statutory powers. In response, the Board distinguished *Carrier Sekani* from the present case on the grounds that the proponent in *Carrier-Sekani* was an agent of the Crown. The implications of this claimed distinction are huge since the distinction will apply in just about every other case before the Board. This is because, apart from those very few cases in which the Crown will be the proponent under the *Hydro and Electric Energy Act*, RSA 2000, c H-16 -- projects for which the regulator is now the Alberta Utilities Commission (AUC) rather than the ERCB -- the limited role of the Crown and Crown corporations in the economy of Alberta all but ensures that the Crown will never be the proponent.

The Board framed the distinction in the following terms (LD at 7):

In *Carrier Sekani*, the Court found that, in the context of a Crown proponent which itself owed the duty to consult, the duty to consult created a “special public interest” which fit within the tribunal’s obligation to consider factors relevant to the public interest. As recognized by the Court, the subject of the application before the tribunal, which was a contract formed by the applicant Crown agent which breached a constitutional duty upon the Crown, could not be in the public interest.

The Board is not satisfied that in this matter, where the proponent is not the Crown or a Crown or a Crown agent and thus does not owe the constitutional duty, the ERCB’s public interest mandate extends to assessing the adequacy of Crown conduct (consultation) which has yet to be completed.

The Board went on to say that the Crown did not become a party to the proceedings so as to allow or require the Board to supervise any possible Crown consultation obligations simply by virtue of the procedural provisions of the *APJA*.

From the Board's perspective, the Board's own consultation process (as provided for in a number of the Board's Directives) allows the Board "to hear from First Nations" (LD at 8) but "is just one component of a much broader consultation process" (LD at 8) with the ultimate decisions about the adequacy of that process resting with the Crown itself. Other governmental decisions about the project would need to be made "before the Taiga project could proceed" (eg under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12) (LD at 8) and thus, even if the Board had jurisdiction to rule on whether or not the Crown had fulfilled its obligations, "such a declaration would be premature" (LD at 8). Similarly, the Board was of the view that while it might make orders and direction to give effect to the purposes of the *ERCA* and the *OSCA* (LD at 8) "a declaration such as the one sought by CLFN does not fall within the scope of the Board's mandate as set out in those enactments".

The Board acknowledged that the result of its decision would be that any concerns as to the adequacy of the Crown's consultation would have to be resolved in the courts, leading, at least in CLFN's view to "expense and delay" (LD at 9). However, such considerations were essentially irrelevant where (LD at 9) "the legislature" as here "has determined not to give the Board the legislative mandate to deal with Crown consultation ....".

## Comments

I have organized this comment around two questions. First, is the Board correct to claim that *Carrier Sekani* supports the jurisdictional distinction between cases involving the Crown as a proponent and cases involving a private proponent? My conclusion is that the holding in *Carrier Sekani* is not confined to those cases in which the applicant to a statutory tribunal is an agent of the Crown. Second, is the Board correct to claim that any declaration as to the adequacy of consultation would necessarily be premature in any case in which the Government of Alberta has further decisions which it needs to take before a project can proceed? My conclusion is that this too is incorrect. The duty to consult is tied to the exercise of statutory powers and not to projects.

I will post a separate blog on a third issue, namely the Board's practice with respect to its so-called "[letter decisions](#)."

## **Is the Board correct to claim that *Carrier Sekani* supports the jurisdictional distinction between cases involving the Crown as a proponent and cases involving a private proponent?**

As noted above, the ERCB in this case seems to suggest that the Board's general responsibility to assess whether or not a project is in the public interest only allows it to determine if the Crown has fulfilled its duty to consult and accommodate if the applicant for the statutory approval is an agent of the Crown. It is true that the applicant in this case was not the Crown - but is that a relevant distinction?

I do not believe that *Carrier Sekani* offers any support for this distinction. On my reading (see earlier blog) *Carrier Sekani* was primarily concerned with drawing and applying a distinction between two different issues: (1) the circumstances in which a regulatory tribunal itself might

have a duty to consult and accommodate, and, (2) the circumstances in which a regulatory tribunal might have the power\duty (regardless of the answer to (1)) to decide whether the Crown had fulfilled any duty in might have to consult and accommodate in relation to a statutory power that the regulatory tribunal was proposing to exercise.

*Carrier Sekani* decided that in each case the question was principally a question of statutory interpretation. More specifically, the Court acknowledged in the case of question 2 that the power\duty might be conferred expressly or implicitly. In my view the case is authority for the proposition that where the legislature confers on a statutory decision-maker the power to decide questions of law, such a statutory decision-maker also has the power to determine questions of constitutional law (including question of Charter law, division of powers questions, questions as to the applicability of provincial laws and questions relating to respect for existing aboriginal and treaty rights) *unless* there is something to indicate that the legislature has decided that these matters should only be determined by the ordinary courts.

The last point is important since it creates a presumption which favours the conclusion that a tribunal will have the power to determine these matters if the tribunal has the authority to decide questions of law. The legislation at issue in *Carrier Sekani* and the discussion of that legislation makes this clear. That legislation purported to *remove* constitutional questions from the purview of the British Columbia Utilities Commission (BCUC) (i.e. here was a statutory scheme that accorded the BCUC the power to decide questions of law but then expressly denied it the authority to decide questions of constitutional law). But the legislation defined the term “constitutional question” in narrow terms and that allowed the presumption to re-emerge to govern those matters that were not covered by the statutory exclusion. The *Carrier Sekani* Court put it like this (at paras 69 and 71):

The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal’s power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39).

Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that “[t]he tribunal does not have jurisdiction over constitutional questions.” However, “constitutional question” is defined narrowly in s. 1 of the *Administrative Tribunals Act* as “any question that requires notice to be given under section 8 of the *Constitutional Question Act*”. Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for [*sic*, SCC version] a constitutional remedy.

In addition to the general observation based on the power to decide questions of law, the Court also asked if the BCUC’s statute allowed it to consider questions of Crown consultation with Aboriginal peoples. Here the Court noted (at para. 70) that while the factors that the Board must consider in exercising its statutory authority “focused mainly on economic issues” the relevant section also required the Commission to consider “any other factor that the Commission considers relevant to the public interest.” In my view the Court then articulates a very broad proposition in which it instructs that the term “public interest” when used in a statute must be informed by the constitution (at para. 70):

The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*.

It is important to note that it is the “constitutional dimension of the duty” that gives rise to “the special public interest”; there is no suggestion here that the “special public interest” is created by the fact that the applicant for the statutory approval in *Carrier Sekani* was an agent of the Crown.

The Court then went on to conclude that the Commission *did* have the power to determine if the consultation had been adequate. In sum there are three crucial steps in the reasoning: step one draws on the general power to decide questions of law; step two infers from the reference to public interest in the tribunal’s statute enough subject-matter nexus to allow the tribunal to deal with the subject of aboriginal consultation; and in step three the Court confirms that the legislature has not taken any measures to otherwise limit the tribunal’s jurisdiction.

How then does the ERCB in this letter decision avoid the application of *Carrier Sekani* and essentially confine the judgment in that case to its special facts which involved, as we have seen, an application by a Crown agent? Is there anything in the judgment which suggests that the Supreme Court of Canada wanted to confine its decision to cases involving applications by the Crown or a Crown agent? I do not believe that there is. So far as I can see, the only references to the special status of the applicant take the form of a repeated quotation (at paras 21 and 70) from one of the judgements in the British Columbia Court of Appeal wherein Justice Donald asks, rhetorically: “How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest.” There is nothing in this text to suggest that the Court quoted this language in order to qualify and limit the more general proposition that underlies the earlier sentence in the same paragraph (para 70) quoted above.

If the Board’s efforts to limit the ambit of *Carrier Sekani* fails then we are left with the following: (1) a Board (the ERCB) that has a general power to decide questions of law; (2) a Board (the ERCB) that has the specific authority to decide a question of constitutional law (as defined in the *APJA* to deal with questions of the applicability or validity of an enactment”), and (3) a Board (the ERCB) that has the general duty in making decisions with respect to an energy project to “consider whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.” Therefore the Board should have held that it had the power to determine the adequacy of the Crown’s consultation in this case unless there is some other basis for distinguishing *Carrier Sekani*.

More generally, the principal difficulty with the Board’s conclusion is that it proves too much. What the Board is effectively concluding is that respect for aboriginal and treaty rights is not a relevant consideration for the Board in assessing whether or not a project should be allowed to proceed. As such it is an example of a completely de-contextualized approach to statutory interpretation. It harkens back to the pre-1982 (and pre-section 3 of the *ERCA*) Alsands decision of the Supreme Court of Canada, *Athabasca Tribal Council v Amoco Canada Petroleum Co. Ltd. et al.*, [1981] 1 SCR 699 in which the Court concluded that (and here I quote from the SCR headnote) that:

The Energy Resources Conservation Board did not have jurisdiction to prescribe the implementation of an affirmative action program as a condition of approval of a tar sands plant pursuant to *The Oil and Gas Conservation Act*. The Board’s jurisdiction was governed by statute and was limited by the purposes of those

statutes to the regulation and control of energy resources and energy in Alberta. To extend the Board's powers to include the responsibility for the social welfare of the inhabitants in natural resource areas, and therefore the affirmative action program, would require express language. The references to "the public interest" in *The Energy Resources Conservation Act* and *The Oil and Gas Conservation Act* were not a sufficient indication of the legislature's intention to endow the Board with authority to recommend the affirmative action program.

This might have been a correct statement of the law in 1981, but surely it has not survived section 35 of the *Constitution Act, 1982* and the adoption of section 3 of the *ERCA*.

**Is the Board correct to claim that any declaration as to the adequacy of consultation would necessarily be premature in any case in which the Government of Alberta has further decisions which it needs to take before a project can proceed?**

As noted above, one of the reasons that the Board provides for supporting its conclusion that it could not grant a declaration that the Crown has not met its constitutional duty is that (LD at 8) the "Crown's process is not complete so that such a declaration would be premature." As an aside I observe that this is hardly a jurisdictional assessment since it entails a contingent determination as to whether or not the Crown (and is that the Crown or is it the Government of Alberta?) has completed its process. This must turn on an appreciation of the relevant evidence. But the more fundamental point is the question of whether the duty to consult applies to a *project* (as the Board seemingly suggests) or whether it applies to the exercise of a particular statutory *power*.

I think that there are several reasons for thinking that the duty to consult and accommodate applies to the exercise of each statutory power rather than the project as a whole. First, the language in the leading case on the trigger to the duty (*Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511) focuses on the exercise of a power (in that case the power to approve the transfer of a tree farm licence (T.F.L.) from one corporate entity to another) rather than approval of a project. In that case the Court said that:

... the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (at para 35)

....

... the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. .... If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences. (at para 76)

Second, there is a long line of cases (including *Haida* and *Carrier Sekani* at paras 43 – 44 and the decisions cited there) which emphasise that the duty is associated with high level planning activities just as much as with the approval of physical activities. This confirms that the duty is not project-based. Third, this same line of cases clearly contemplates that the duty to consult may be triggered sequentially by each of a series of decisions in relation to the same physical activity.

Since none of the judicial cases take the position that the Court is unable to rule on the Crown's fulfillment of its duty to consult and accommodate until the Crown has made all of its decisions in relation to a particular physical activity, it seems unlikely that a tribunal should be permitted to avoid its constitutional responsibilities for its own decisions by saying that the government of which it is a part (even if an independent quasi-judicial body) has yet to complete all of its decision making.

And finally the general dictates of administrative law suggest that it is important for rule of law purposes to locate additional implied duties (whether constitutional duties to consult and accommodate or procedural duties of fairness) close to a specific statutory power rather than suggesting that the Crown as a whole must fulfill the duty. In the abstract such a broad-brush approach sounds fine and even admirable, but in both law and practice it will be more difficult to implement. An approach that locates the assessment of the duty to consult close to the exercise of the power is also consistent with the Court injunction in *R v Conway* 2010 SCC 22 (at para 6) to the effect that "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": and see also *Carrier Sekani* at para 69.

But part of the difficulty here may simply be that the Board is responding to the way in which the First Nation framed the issue in this matter. As noted in the introduction, the question posed by CLFN framed the issue in terms of the Crown's duties with respect to the *project* rather than the statutory powers of the Board under the *ERCA* and the *OSCA* with respect to that project. But if that really is the basis for the Board's decision its approach seems overly technical and inconsistent with the overarching objective of reconciliation which animates the jurisprudence on the duty to consult and accommodate.

In sum, I do not think that the case law allows an administrative body that otherwise has the power and the jurisdiction to determine constitutional questions to avoid that responsibility by pointing to the fact that other decisions may still have to be made with respect to that project. Those subsequent decision-makers may also have to satisfy themselves that the Crown has fulfilled its duty (if any) in relation to their particular statutory powers -- but that conclusion does not relieve others of their constitutional responsibilities.

I understand that CLFN has filed an application with the Alberta Court for leave to appeal.