

Bill 2 the Responsible Energy Development Act and the Duty to Consult

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Proposals commented on:

[Bill 2, the Responsible Energy Development Act](#), Alberta and the [First Nations Consultation Policy, Discussion Paper](#), (Fall 2012).

There has been a lively debate in the courts, tribunal decisions and the literature over the last few years as to the role of administrative tribunals in discharging or examining the Crown's duty to consult aboriginal peoples when contemplating making decisions and developing policies which may adversely affect aboriginal or treaty rights. There are two guiding rules. First, a tribunal that has the authority to decide questions of law is presumed to have the jurisdiction to decide questions of constitutional law including the question of whether or not the Crown has satisfied its constitutional duty to consult and accommodate – provided that the constitutional question is rationally connected to a power or jurisdiction that the tribunal is exercising. The legislature may rebut that presumption by removing all or part of that jurisdiction from a tribunal. Second, a tribunal does not have the authority to discharge the Crown's duty to consult and accommodate unless that authority is expressly delegated to the tribunal. The principal authority for all of this is *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 which I blogged at [here](#).

Section 21 of Bill 2 proposes that the new Regulator shall have neither responsibility:

The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

This post examines: (1) the status quo on this issue in relation to the Energy Resources Conservation Board (ERCB), (2) whether the proposed provision is lawful, and (3) the implications of section 21.

What is the status quo in relation to energy projects?

The status quo is as follows. First, the ERCB clearly has the authority to decide questions of general law as part of discharging its specialized responsibilities. See for example *Nexxtep Resources Ltd v Talisman Energy Inc*, 2012 ABQB 62, which I commented on in a previous ABlawg post [here](#). Second, under the terms of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 and Designation of Constitutional Decision Makers Regulation (Alta Reg 69/2006), the Alberta Energy and Utilities Board (AEUB) and the ERCB as the successor to the AEUB have the jurisdiction to determine all questions of constitutional law. Thus, the ERCB has the authority to determine, in a relevant case, whether the Crown has fulfilled its duty to consult and accommodate when making decisions about a project that may affect aboriginal or

treaty rights. The ERCB seemed to accept the inevitability of this conclusion in a letter decision issued in late 2011: ERCB decision re MEG Energy, Christina Lake Phase 3, November 25, 2011 & December 7, 2011. More recently however, in two decisions, the Osum Decision and a decision issued as part of the Joint Review Panel for Shell's Jackpine Project the Board has given a variety of reasons for concluding that it cannot or should not decide on the question of the fulfillment of the Crown's duty to consult and accommodate: ERCB, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, Osum Oil Sands Corp., Taiga Project, August 24, 2012 (leave to appeal denied, [2012 ABCA 304](#), Joint Review Panel decision, Jackpine Mine Expansion Project, October 26, 2012. I have offered a critique of the ERCB's Osum decision a previous ABlawg post [here](#).

In sum the key point is this: while the Board appears to have the jurisdiction and the duty to decide consultation issues, in practice, the Board has found a variety of opportunities to side-step this responsibility.

Is section 21 lawful?

In several aboriginal and non-aboriginal cases the court has expressed some preferences for having constitutional issues resolved (at least in the first instance) at the administrative level closest to the action. See for example *R v Conway*, 2010 SCC 22 at para. 6 “[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” (quoted with approval in *Carrier Sekani* at para 69). But that said, I think that it would be very difficult for anybody to attack the validity of section 21. First the Supreme Court of Canada has also indicated in both *Haida Nation v British Columbia (Ministry of Forests)*, 2004 SCC 73 and *Carrier Sekani* (above) that provincial governments have a broad discretion in the manner in which they structure administrative arrangements for consultation. Consequently, so long as the administrative scheme provides access to the Courts it will not run afoul of section 96 of the Constitution (*Crevier v AG Quebec*, [1981] 2 SCR 220). I think that there may be a division of powers problem with a provision in a provincial statute that picks out aboriginal rights for special treatment but that depends upon the characterization of the legislation. Is the section a law in relation to “Indians and lands reserved for Indians” (see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010) or is it a law in relation to the administration of justice or some other head of provincial power?

What are the implications of section 21?

The case law is clear in stipulating that while provinces may have discretion in structuring different administrative approaches to the duty of consultation they cannot exclude the supervision of the Courts. The point was put particularly forcefully in *Carrier Sekani* as follows (at paras 62 and 63):

[62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application ... raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation

arising from particular government actions, the government might ... be able to avoid its duty to consult.

[63] ... the duty to consult ... is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

But what are the practical implications of this? If the Regulator cannot assess the adequacy of consultation, then it must follow that a First Nation that believes that the Crown has not fulfilled its DCA can and must commence an action in the Court of Queen's Bench. The privative clauses of Bill 2 will be inapplicable as will the doctrine of collateral attack. Plaintiffs will presumably be best advised to wait until the Regulator has rendered its decision (to deal with the issue of prematurity highlighted in *Osum* and *Jackpine*) before commencing the action and can be expected routinely to ask for interim injunctive relief pending the trial of the action which, if successful, will effectively suspend any approval that the Regulator has provided. Will this lead to certainty and expedited approval or more delays and uncertainty? I suspect that different readers will have different responses but I have a hard time seeing how this is going to lead to improved and integrated decision making. In fact it looks like a single window for everything except decisions which engage the duty to consult. It may be that we have yet to see the full provincial proposal for dealing with consultation issues. The province is hinting that it plans to establish a centralized "Consultation Office" (ACO). The ACO will act as an "oversight body" for the existing constitutional units in line departments, and, inter alia "Determine adequacy of consultation for industry and government led consultation." But at this stage it is not clear if this will be implemented by policy or by statute and it is unclear how the ACO will relate to the Regulator.