

Courts shine light on the “duty to consult” Aboriginal people

It's been fascinating, this past six months, to watch as the case law on the “duty to consult” continues to evolve. Several landmark cases have finally worked their way up to the Supreme Court of Canada, while, at the same time, federal and territorial courts have been making their own contributions. It's becoming increasingly apparent that a duty to consult in a meaningful manner applies across the country from Labrador to British Columbia and from the Far North to the hinterlands. The recent court cases shine some light on the extent and depth of that consultation.

Beckman v. Little Salmon/Carmacks First Nation has shown that the fundamental duty exists beyond the strictures of more recent treaties. A seemingly comprehensive treaty – nearly 500 pages of detailed property provisions and procedures dealing with governance rights and obligations – had been in place since 1997. Yet a simple agricultural land grant on traditional hunting and fishing lands fell through the legal cracks. The Court ruled that although the modern treaty might be largely mute on the

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The Aboriginal practice at Willms & Shier has never been busier. More governments, municipalities and resource developers are committing to meaningful consultation to address Aboriginal concerns. Many First Nations are developing consultation protocols to help guide those discussions. At the same time, the federal, provincial and territorial courts continue to lay down the ground rules to ensure the legal and constitutional prerequisites are met. This special report summarizes four recent precedent-setting cases that further delineate the duty to consult Aboriginal people. If you need help to better understand and implement your responsibilities in this rapidly evolving field, please contact our team of legal specialists.

Best regards, Juli

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Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53

Little Salmon/Carmacks First Nation argued that in approving an agricultural land grant on traditional territories to which they held right of access for hunting and fishing, the Yukon government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. The government argued that there was no treaty right to consultation on a land grant application, but that it had consulted as a “courtesy”. Although the Little Salmon/Carmacks First Nation Final Agreement, ratified in 1997, does not set forth the process by which Crown lands can be surrendered, the Agreement does not exist in isolation. The SCC ruled that the duty to consult forms part of the legal framework that informs treaties, both recent and historic. “Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted the objective of reconciliation,” the Court ruled. However, the SCC also determined that consultation “at the lower end of the spectrum” had indeed taken place, that regard was given to First Nations' concerns, and that there was no substantive right of accommodation.

www.canlii.org/en/ca/scc/doc/2010/2010scc53/2010scc53.html

Issued: November 19, 2010



subject, consultation – even at the lower end of the scale – is still a fundamental duty, not a “courtesy.”

“[A]s the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.”

– Justice Binnie in *Beckman v. Little Salmon/Carmacks First Nation*

On the other hand, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* shows that the duty to consult cannot be used as a venue to right historic wrongs and debate general policy issues that lie outside the scope or impact of the project at hand. “The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights,” the Court ruled. “Past wrongs, speculative impacts, and adverse effects on a First Nation’s future negotiating position will not suffice.”

“Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.”

— Justice J.C. McLachlin in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*

In *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*, the Nunavut Court of Justice reiterated that consultation must be meaningful. A series of information meetings on proposed seismic testing around Baffin Island were held when many Inuit were engaged in hunting and fishing expeditions. Those who could attend said their concerns were simply noted down and had limited effect on the testing program. Given that

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

Under a 2007 Energy Purchase Agreement (EPA), Rio Tinto Alcan would sell to BC Hydro excess electricity generated by the Kenney Dam project in the Nechako River in northwestern British Columbia. The EPA would run until the year 2034. On December 17, 2007 the British Columbia Utilities Commission accepted the EPA as being “in the public interest”. The dam affects water flows and impacts fisheries on lands now claimed by the Carrier Sekani Tribal Council. The Council was not consulted about the water diversion when the dam was built in the 1950s and asserted a constitutional right of consultation with respect to the 2007 EPA. The Commission found that the consultation issue could not arise because the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and, hence, would not change the current management of its fishery nor adversely affect any Aboriginal interest. After a series of challenges and appeals, the SCC ruled that the Commission did not act unreasonably in approving the 2007 EPA. While the Commission did have the power to consider whether adequate consultation with affected Aboriginal peoples had taken place, it was not empowered to itself engage in consultation with Aboriginal groups. The Court reaffirmed that the duty to consult is a constitutional duty that must be met. However, if the tribunal 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.”

www.canlii.org/en/ca/scc/doc/2010/2010scc43/2010scc43.html
Issued October 28, 2010



seismic testing could potentially drive marine mammals from the area, disrupting Inuit hunting, diet and even their way of life – the Court ruled a significant level of meaningful consultation and accommodation was warranted. In determining whether to grant an injunction, the Court also weighed equally the traditional wisdom of the Inuit against the scientific evidence present by the government.

“If the testing proceeds as planned and marine mammals are impacted as Inuit say they will be, the harm to Inuit in the affected communities will be significant and irreversible. The loss extends not just to the loss of a food source, but to a loss of culture.”

“The court is cognizant that the government's duty to consult and accommodate does not mean there is a duty to reach agreement. There may be times when the parties, despite extensive consultation, cannot agree on a final resolution. There is no aboriginal veto on government decisions ...The court must ensure that allegations of a failure to consult are not used to simply derail government projects that the Aboriginal group opposes. I am satisfied that this is not such a case.”

— Justice S. Cooper in *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)*

Finally, *Yellowknives Dene First Nation v. Canada (Attorney General)* may rewrite the process for pursuing mining projects on Aboriginal lands. It confirms that if the Crown delegates procedural aspects of consultation to third parties, the underlying duty remains with the Crown to satisfy itself that meaningful consultation has taken place. Representatives of a small mining company, North Arrow Minerals Inc., when faced with Band demands that they enter into an exploration agreement – that would ensure ongoing consultation and confer certain benefits on the Band – simply walked away from the negotiations. Without even talking to the Aboriginal participants, Indian and Northern Affairs Canada assumed that adequate “consultation” had taken place and the Mackenzie Valley Land and Water Board issued

Qikiqtani Inuit Association v. Canada (Minister of Natural Resources), 2010 NUCJ 12

Natural Resources Canada (NRCan) concluded an agreement with the German Federal Institute of Geoscience to carry out geological seismic testing in Lancaster Sound, Jones Sound and North Baffin Bay, beginning on August 9, 2010 and continuing for some 65 days. However, the Qikiqtani Inuit Association (QIA) had concerns about the lack of consultation and impact of seismic testing on marine mammals, including disrupting migration patterns and driving mammals away from the area for a significant period of time. Although NRCan had held five public meetings to consult with the local community, those meetings were scheduled when most Inuit were on the land and community members at the meetings felt that decisions had already been made. Despite considerable controversy over the project, the required research license was issued to NRCan on July 22, 2010. The QIA then applied to the Nunavut Court of Justice for an injunction to stop the seismic testing or, alternatively, to quash the research license issued by the Commissioner of Nunavut. The Court held that the Government's duty to consult with the Inuit regarding the project arose when the Crown had knowledge of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect it. The Court determined that the significance of the Inuit right being impacted (i.e., the right to harvest marine mammals, to participate in the hunt, to share healthy “country food”, and to make traditional clothing) warranted a significant level of meaningful consultation and accommodation. On the other hand, there was no compelling reason why the testing must proceed this year. Accordingly, the Court found that the Inuit of North Baffin would suffer the greater harm if injunctive relief were not granted.

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doc/2010/2010nucj12/2010nucj12.html](http://www.canlii.org/en/nu/nucj/doc/2010/2010nucj12/2010nucj12.html)

Issued: August 8, 2010



the requested land use permit to conduct mineral explorations. Not surprisingly, the Federal Court disagreed.

“[T]he Crown can rely on the actions of others in assessing whether the duty to consult had been discharged. It can delegate responsibility to take certain consultative steps to third parties ... but the underlying duty remains that of the Crown.,” the Court ruled. “The problem is not that the Crown and Board looked to the “consultation” undertaken by North Arrow; the problem is that they wrongly considered it to be adequate.”

“In negotiations, the parties may engage in hard bargaining. First Nations run the risk of demands being rejected and third parties walking away from the table. But so long as a third party is still seeking to conduct activities on First Nations’ land or in a way that impacts their interests, the Crown remains obligated to at least consult and accommodate.”

– Justice Phelan in *Yellowknives Dene First Nation v. Canada (Attorney General)*

Yellowknives Dene First Nation v. Canada (Attorney General), 2010 FC 1139

The applicants sought judicial review of a July 16, 2009 decision of the Mackenzie Valley Land and Water Board to issue North Arrow Minerals Inc. a land use permit to conduct mineral explorations 340 km northeast of Yellowknife, NWT. The Federal Court ruled the Board and INAC (the Crown) failed to properly consult the bands and to ensure that their concerns were taken into account before approving the diamond and lithium drilling project and issuing the permits to North Arrow. Both the Board and INAC accepted North Arrow’s assertion that consultation was complete and (wrongly) considered it to be adequate, although North Arrow had cut off negotiations at the first offer and failed to follow the Board’s guidelines on consultation. “This North Arrow may do with legal impunity,” the Court ruled. “However, the Crown cannot shelter behind North Arrow or absolve itself of its obligations by having a third party undertake negotiations. The Crown and thus the Board are impacted on North Arrow’s petard.”

www.canlii.org/en/ca/fct/doc/2010/2010fc1139/2010fc1139.html

Issued: November 11, 2010

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