RIO TINTO ALCAN V CARRIER SEKANI TRIBAL COUNCIL

Supreme Court of Canada (McLachlin CJ, Binnie, LeBel, Deschmaps, Fish, Abella, Charron, Rothstein and Cromwell JJ)
28 October 2010
[2010] SCC 43, [2010] 2 SCR 650

Administrative law – Jurisdiction – Jurisdiction of Commissions and Tribunals to consider the duty to consult – Jurisdiction of Commissions and Tribunals to undertake consultation on behalf of the Crown – Interaction between s 71 of the *Utilities Commission Act* RSBC 1996, s 44 of the *Administrative Tribunals Act* SBS 2004 and s 8 of the *Constitutional Questions Act* RSBC 1996

Facts:

In the 1950s, the government of British Columbia approved the damming of the Nechako River by Alcan (now Rio Tinto Alcan) for the purposes of generating power for aluminium production. The Nechako Valley is subject to a Carrier Sekani Tribal Council ('CSTC') First Nations claim as their ancestral homeland. The claim extends to a right to fish the Nechako River. The CSTC was not consulted at the time of the damming. The damming of the river and reservoir altered the water flows of the Nechako River. The effect is that water is diverted from the Nechako River to the Nechako Reservoir where it passes through the turbines of a powerhouse and flows into the Kemano River and onto the Pacific Ocean.

Since 1961 Alcan has sold excess power to BC Hydro, a Crown Corporation. In 2007, Alcan and BC Hydro entered into an Energy Purchase Agreement ('EPA') which committed Alcan to supply and BC Hydro to purchase excess power until 2034. The EPA also establishes a Joint Operating Committee to advise Alcan and BC Hydro on the administration of the EPA.

The EPA was subject to review by the British Columbia Utilities Commission ('Commission') as to whether the agreement was in the public interest. In determining the scope of its hearing the Commission did not address the issue of First Nations consultation required under s 35 of the *Constitution Act* 1982. The CSTC requested late intervener status as the failure of the hearing to address the First Nations consultation issue might negatively impact Aboriginal rights and title which were subject to ongoing land claims. The Commission dismissed the CSTC's application for reconsideration of the scoping order on the grounds that the EPA would not adversely affect the interests of First Nations. CSTC appealed to the British Columbia Court of Appeal which reversed the Commission's order and remitted the case back to the Commission for evidence and argument on the duty to consult. Alcan and BC Hydro appealed this decision to the Supreme Court of Canada.

Held, allowing the appeal and confirming the decision of the British Columbia Utilities Commission on the issue of a Duty to Consult:

1. The duty to consult 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'. This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right: [31]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, cited.

2. The duty to consult is grounded in the honour of the Crown. The potential rights embedded in First Nation claims are protected by s 35 of the *Constitution Act,* 1982. The honour of the Crown requires that these rights be determined, recognised and respected. While the process of negotiation continues the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests:

[32]; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, cited.

3. The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: [36]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, cited.

4. The threshold to prove knowledge by the Crown is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While existence of a potential claim is essential, proof that the claim will succeed is not: [40]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388, para 34), cited.

5. Government action is not confined to the exercise of statutory power or to decisions or conduct which have an immediate impact on land and resources. The duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights: [43]–[44]; *Huu-ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697 [2005] 3 CNLR 74, paras 94, 104; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 CNLR 315, paras 11-15, cited.

6. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impact on pending Aboriginal claims or rights. Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have not 'immediate impact on the lands and resources': [45], [47]; Jack Woodward, *Native Law*, vol 1 (Carswell, 4th release, 1994), quoted.

7. An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult: [48].

8. A broad approach to the duty to consult must be rejected following *Haida Nation*. The duty to consult is confined to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part: [53].

9. Tribunals are confined to the powers conferred on them by their constituent legislation. The factors the Commission is required to consider under s 71 of the *Utilities Commission Act* are broad enough to include the issue of Crown consultation with Aboriginal groups. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over constitutional matters. 'Constitutional question' is narrowly defined as a challenge to the constitutional validity or constitutional applicability of any law, or where there is an application for a constitutional remedy in s 1 of the *Administrative Tribunals Act* and s 8 of the *Constitutional Questions Act*: [55], [70], [71].