

Case Law Update: Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council

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By Scott McGrath

Aboriginal Law Duty to Consult

The Kenney Dam was built in Northwest British Columbia in the 1950s. The dam and reservoir altered the water flow to the Nechako River, to which the Carrier Sekani Tribal Council First Nations ("CSTC") have a land claim. The CSTC was not consulted on the building of the dam. In 2007 B.C. Hydro, a Crown corporation, entered into an agreement with Alcan, the owner of the dam, to purchase the excess power created by the dam. This agreement required approval by the British Columbia Utilities Commission (the "Commission"). The CSTC made submissions to the Commission that the B.C. government should be obligated to consult the CSTC on the agreement as it would adversely affect its claims and rights.

The Court held that the duty to consult arises where: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) there is contemplated Crown conduct; and (3) the contemplated conduct may adversely affect an Aboriginal claim or right. While the first two branches of the test were easily met here, the third branch was more difficult. The claimant must show a causal relationship between the proposed conduct and the potential for adverse impacts on Aboriginal claims or rights. Past wrongs, including past breaches of the duty to consult, do not suffice. Neither will mere speculative impacts satisfy this requirement.

The fact that the B.C. government had breached its duty to consult in the 1950s did not satisfy this requirement. The duty will only be triggered where a contemplated Crown action puts current claims and rights in jeopardy. The Court rejected the argument that a failure to consult on the initial project means that any further development requires consultation. Because the water levels would not be affected by the agreement, and because Alcan would sell its excess power to another party if not to B.C. Hydro, no duty to consult arose.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035