Update: Aboriginal Water Rights – Clarified or Muddied

(The Duty to Consult With Aboriginal Peoples)

The Alberta government has been licensing water usage since 1894. In the early 2000s, it realized that the number of licenses it was issuing was reaching the capacity of the southern rivers. The government developed a plan to equitably distribute water in the future. In *Tsuu T'ina Nation v. Alberta (Environment)*, both the Tsuu T'ina and Samson Cree Nations sued the Alberta government, claiming that they had not been properly consulted in the process of developing the plan, as is required by the Canadian constitution.[1] The government replied that it had met that duty by issuing:

invitations to participate in the process by the government to the [Aboriginal peoples]. Meetings were held with the [Aboriginal peoples] to discuss water needs. The government hired a consultant to assist the [Aboriginal peoples] in their review of the proposed plan.[2]

The government also replied that the process of developing a plan or relevant governing legislation is not reviewable by the courts in any event. Both nations also asked the court for a clear declaration that they had a constitutional right to be consulted.

The Supreme Court has noted that the case law indicates four situations that could come into play:

- The right is proven and the government action is completed (as in *Sparrow*);[3]
- The right is proven and the government action is anticipated (as in *Mikisew*);[4]
- The right is claimed and the government action is anticipated (as in*Haida*);[5] and
- The right is claimed and the government action is completed (as in these Applications).

The Court ruled that *Sparrow* did not apply. There, Mr. Sparrow, a treaty Indian, challenged a *Fisheries Regulation* after being charged with using an illegal fishing net. Mr. Sparrow argued that the regulations impinged on his established right to fish for sustenance. The Court held that Sparrow's right to fish could be limited, as that right was shared by other Aboriginal groups and fishers. Both nations argued that they had a right to an unlimited water resource under their hunting rights described by treaties. No water rights were mentioned under the treaties.

While not wholly rejecting that argument in *Tsuu T'ina Nation*, the Alberta Court of Queen's

Bench treated it as one that should be settled at a trial, not under a motion to stop the government from proceeding with a plan for the future.[6] The court did comment that if a government had an ability to limit a fishing right, it should have a right to limit water distribution. *Mikisew* did not apply here as there was no anticipated government action. The disputed water plan was already in place and had been for some time.

The *Haida* case did not apply in *Tsuu T'ina Nation* either. In *Haida*, a government had awarded a timber harvesting license on property that the Haida were claiming under the land claims process in British Columbia. In *Tsuu T'ina Nation*, there might be an existing treaty right to a claim of water, but in *Haida* the treaty has been under negotiation.[7] The court advised both nations they would have to establish that right at trial.[8]

This case was unique in that both nations had not yet proven a claim to a water right in court. As noted above, the government had invited both nations to participate in the process and had provided them with an independent consult to help them assess their position. However, it is unclear if either nation partook in the process. Both nations argued that the province was obliged to approach them on a government-to-government constitutional basis, rather than as a senior government consulting a junior government on an advisory basis. The court ruled that the province had no duty to engage in constitutional consultations with either First Nation. Further the court declined to express an opinion if such a right existed in the constitution.[9]

Also, and noting that there was a water crisis brewing in Southern Alberta, the court let the government's decisions in regard to water distribution stand, as the decisions could be modified later if the First Nations involved successfully litigated their points in the trial process.[10]

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[1] *Tsuu T'ina Nation v. Alberta (Environment)http://www.canlii.org/en/ab/abqb/doc/2008/2008abqb547/2008abqb547.html.*, 2008 ABQB 547 (CanLII) .

[2] *Ibid*. at para. 102.

[3] *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075.

[4] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (CanLII), [2005] 3 S.C.R. 388, 2005 SCC 69.

[5] *Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, 2004 SCC 73.

[6] *Tsuu T'ina Nation v. Alberta (Environment)*, 2008 ABQB 547 (CanLII), http://www.canlii.org/en/ab/abqb/doc/2008/2008abqb547/2008abqb547.html at para. 81.

[7] *Ibid*. at paras 111-18.

[8] *Ibid*. at para. 129.

[9] *Ibid*. at para. 144.

[10] *Ibid*. paras 152-55.