In the Court of Appeal of Alberta

Citation: Tsuu T'ina Nation v. Alberta (Environment), 2010 ABCA 137

Date: 20100428
Docket: 0801-0272-AC
Registry: Calgary

2010 ABCA 137 (CanLII)

Between:

The Tsuu T'ina Nation and Chief Sandford Big Plume on behalf of himself and all other members of the Tsuu T'ina Nation

Appellant
(Applicant)

\- and -

Her Majesty the Queen In Right of Alberta, as Represented by the Minister of Environment, the Lieutenant Governor In Council and the Attorney General of Alberta

Respondents
(Respondents)

And Between:

The Samson Cree Nation and Chief Victor Buffalo, on behalf of himself and all other members of the Samson Cree Nation

Appellant
(Applicant)

\- and -

Her Majesty the Queen In Right of Alberta, as Represented by the Minister of Environment, the Lieutenant Governor In Council and the Attorney General of Alberta

Respondents
(Respondents)

Corrected judgment: A corrigendum was issued on May 3, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Ellen Picard
The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of The Honourable Mr. Justice O'Brien

Concurred in by The Honourable Madam Justice Picard
Concurred in by The Honourable Madam Justice Rowbotham

Appeal from the Judgment by
The Honourable Mr. Justice S. J. LoVecchio
Dated the 4th day of September, 2008
(2008 ABQB 547, Docket: 0701-02169; 0701-02170)

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Reasons for Judgment Reserved of
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I. INTRODUCTION

[1] The legal duty of government to consult with First Nations and, if appropriate, to accommodate their concerns with respect to actions affecting them, is now well established. The law in this regard, however, is of relative recent evolution and is not yet fully developed in all aspects of its application.

[2] The appellants, the Tsuu T'ina Nation, and Chief Sandford Big Plume on behalf of himself and all other members of the Tsuu T'ina Nation (sometimes collectively referred to as the Tsuu T'ina), and the Samson Cree Nation and Chief Victor Buffalo on behalf of himself and all other members of the Samson Cree Nation (sometimes collectively referred to as the Samson Cree), submit they were not consulted and accommodated by the Province of Alberta with respect to the development of the Water Management Plan for the South Saskatchewan River Basin, approved by the Lieutenant Governor in Council on August 30, 2006.

[3] This appeal raises issues of whether the duty to consult and accommodate arose in the circumstances, and, if so, what the scope of the duty was and whether it was satisfied. For the reasons that follow, I have concluded that the appeal must be dismissed. The Tsuu T'ina and Samson Cree have each demonstrated the Crown's knowledge of the existence of proven rights and potential rights possessed and claimed by them that could be adversely affected by the government plan. However, the scope and level of the duty was towards the low end of the scale, having regard to the nature of the claims and the potential adverse impacts of the government action. The consultation that was carried out was adequate to discharge the duty in the circumstances of this case.

II. FACTS AND LEGISLATIVE FRAMEWORK

[4] The background facts are set out at length in the Reasons for Judgment of the chambers judge, 2008 ABQB 547, and are summarized for purposes herein.

[5] Rapid growth in population and economic development in southern Alberta have resulted in increased water consumption. While there has been exponential growth in demand, the water supply is relatively fixed. Planning is essential both to meet projected needs and to preserve the aquatic environment.

[6] For more than a century, Alberta has regulated water usage by means of a system of licencing. Priority is based on the principle of first in time, first in right. The greatest volume of usage has been granted under licences for irrigation. Significant volumes are also required for municipal, industrial, and other agricultural purposes.

[7] The South Saskatchewan River Basin (SSRB) comprises the Red Deer, Bow, Oldman and South Saskatchewan River Sub-basins within southern Alberta. In area, the SSRB covers about 25

per cent of Alberta's total area. The cities of Calgary, Red Deer, Lethbridge and Medicine Hat are within the SSRB. Pursuant to an interprovincial Master Agreement on Apportionment, at least 50 per cent of the total natural discharge of the SSRB must be available to Saskatchewan.

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[8] The *Water Act*, R.S.A. 2000, c-3 (the *Act*) governs the conservation, use and allocation of water in Alberta. Section 7 of the *Act* states that the Minister of the Environment must establish a framework for water management planning by December 31, 2001. The Minister complied with this requirement. The Framework for Water Management Planning contemplates that public consultation should be an essential element of future planning.

[9] Section 9 of the *Act* allows the Minister of Environment to require that a water management plan be developed by a Director or another person. The Minister asked a Director to develop such a plan for the SSRB. The Director was required to engage in such public consultation as the Minister considered to be appropriate, in accordance with subsection 9(2)(f) of the *Act*.

[10] The water management plan for the SSRB was developed in two phases. The first phase, which dealt, amongst other things, with the transfers of water allocations, was approved in June 2002, and constituted an approved Water Management Plan. The second phase, dealing largely with water conservation objectives, effectively amended the earlier approved plan and was approved in August 2006, and thereupon constituted the approved Water Management Plan for the SSRB (the Plan).

[11] Water conservation objectives (WCO) are defined by the *Act* to mean the amount and quality of water established by the Director to be necessary, amongst other things, for the protection of a natural water body or its aquatic environment, and for the management of fish and wildlife. A WCO may include water necessary for the rate of flow of water, or water level requirements (s. l (hhh)).

[12] The contacts and dealings between Alberta Environment – the Department of government responsible for the Plan – and the appellant First Nations relative to the Plan are outlined in the body of this judgment.

III. PROCEEDINGS

[13] The appellant First Nations each brought applications for judicial review, by separate originating notices issued on February 27, 2007. The applications were heard and dealt with concurrently by a chambers judge. The applications sought Declarations that Alberta had a constitutional duty to consult with and accommodate the First Nations' existing and claimed Treaty and Aboriginal rights; that Alberta had failed to discharge such duty; and for an order setting aside the Order in Council approving the Plan.

[14] The Tsuu T'ina Nation signed Treaty No. 7 in 1877, and its reserve lands are located within the SSRB. The Tsuu T'ina exercise and claim Treaty and Aboriginal rights on its reserve and throughout their traditional territory, which is largely located within the SSRB.

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[15] The proceedings giving rise to this appeal are not vehicles for determining the appellants' water rights. The nature and extent of the Treaty and Aboriginal rights of the Tsuu T'ina, at least as they pertain to water rights and water management, are the subject of separate proceedings commenced by Statement of Claim issued on September 7, 2007. In those proceedings, the Tsuu T'ina, as plaintiffs, claim against Alberta the following, amongst other things:

> 1. A declaration that the Plaintiffs have a Treaty water right to appropriate water from the Elbow River, Fish Creek and all other water courses and all sources of ground water, within, adjacent to, and in the vicinity of the Reserve in quantities that are sufficient to meet the Plaintiffs' reasonable economic, residential, governmental, recreational and cultural needs, both now and in the future.
>
> 2. A determination ... of the amount of water the Tsuu T'ina Nation is entitled pursuant to its Treaty water rights.
>
> 3. A declaration that the Plaintiffs have a Treaty water right to sufficient quantities and quality of water in the water courses and water bodies of the Treaty No. 7 region to sustain their Treaty rights to hunt, fish and trap.
>
> 4. A declaration that the Plaintiffs have a property interest in all water resources and the beds and foreshores of the water courses and water bodies within and adjacent to the boundaries of the Reserve.
>
> 5. A declaration that the Treaty is an "agreement or undertaking" within the meaning of ss. 5 and 6 of the *North-west Irrigation Act, 1894*, and all subsequent amendments thereto.
>
> 6. A declaration that the Plaintiffs' Treaty water rights have priority over all statutory grants, permits and licences granted under the *North-west Irrigation Act*, the *Water Act* and all predecessor legislation.
>
> 7. A declaration that the Plaintiff's [sic] Treaty water rights and property rights and interests in the beds and foreshores of the water courses and all water resources within and adjacent to the Reserve were not affected by the transfer of Crown lands in 1930 as these rights and interests constitute an "interest other than of the Crown" as contemplated in s. 1 of Schedule (2) of the *Constitution Act, 1930*.
>
> 8. A declaration that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 do not apply to all water resources within and adjacent to the boundaries of the Plaintiff's Reserve in accordance with the doctrine of interjurisdictional immunity.

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> 9. A declaration that the *Water Act*, and all subsequent regulations, orders and policies enacted pursuant to the *Water Act*, do not apply to the Plaintiffs and the Plaintiffs' Reserve because the Crown in Right of Alberta failed to satisfy its constitutional duty to consult with and accommodate the Plaintiffs' Treaty rights, including but not limited to the Plaintiff's Treaty water rights, prior to enacting the *Water Act* and all subsequent regulations, orders and policies enacted pursuant to the *Water Act*.
>
> 10. A declaration that the Plaintiffs possesses [sic] a Treaty, Aboriginal and inherent right of self-government in relation to the use, allocation and management of all water resources, water courses and water bodies within and adjacent to the boundaries of the Reserve, including, at least, the authority to permit or prohibit the use of water for commercial, industrial, agricultural, recreational, cultural, governmental and domestic purposes on the Reserve.
>
> 11. A declaration that the Defendant's assertion that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 constitutes an unjustified infringement of the Plaintiff's Treaty water rights and Treaty, Aboriginal and inherent right of self-government in relation to the use, allocation and management of all water resources, water courses and water bodies within and adjacent to the boundaries of the Reserve.
>
> 12. A declaration that the Plaintiffs possess Aboriginal rights to water.
> ...

[16] The Samson Cree Nation signed Treaty No. 6 in 1876, and its reserve lands lie approximately 50 kilometres north of the SSRB. The Samson Cree, likewise, claim and exercise Treaty and Aboriginal rights on its reserve and throughout its traditional territory. It alleges that its traditional territory includes the Red Deer River Sub-basin.

[17] The Samson Cree have also advanced a separate action against Alberta, with respect to water rights and water management. Its Statement of Claim was issued on June 13, 2007 and, for the most part, mirrors the claims advanced by the Tsuu T'ina. However, it is relevant to quote the first claim made by the Samson Cree in their action:

> 1. A declaration that the Plaintiffs have a Treaty water right to appropriate water from the Battle River, Samson Lake, Pigeon Lake and all other water courses and water bodies within, adjacent to and in the vicinity of the Reserves in quantities that are sufficient to meet the Plaintiff's reasonable economic, residential, governmental, recreational, domestic and cultural needs, both now and in the future.

The specifically named water bodies are not within the SSRB.

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[18] The actions commenced by the appellant First Nations, by way of Statements of Claim, are in their early stages.

IV. JUDGMENT ON THE JUDICIAL REVIEW APPLICATIONS

[19] The applications were heard in April 2008. The chambers judge noted that the first phase of the SSRB Plan had considered water licence transfers, and that the second phase "focussed on the need to balance water consumption and environmental protection" (para 10).

[20] He summarized the Plan, encompassing both Phases I and II, as being "a collection of recommendations to the Director under the *Water Act*." He summarized the principal recommendations, as follows, at para 12:

> 1. Close the Bow, Oldman and South Saskatchewan River basins to further allocations, except for the purposes specified in a Crown Reservation;
>
> 2. Create a Crown Reservation of unallocated water in the above basins. Permit water allocated from the Crown Reservation only for Treaty 7 First Nations Reserves, water conservation objectives, storage, and pending licence applications as of the date of the Crown Reservation;
>
> 3. Set water conservation objectives to improve the flow in the rivers for the Bow, Oldman and South Saskatchewan basins;
>
> 4. Set a water conservation objective for the Red Deer River; and,
>
> 5. Authorize the Director to consider applications to transfer all or a portion of the water allocation under existing licences in the SSRB.

[21] The chambers judge considered that there was a difference in the tests for determining the existence of a duty to consult depending upon the circumstances before the court (paras. 43-44). He observed that the test in *Haida* "dealt with an anticipated government action which threatened to infringe upon an unproven Aboriginal right": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511. In contrast, the test articulated in *Sparrow* involved "a completed government action and a proven right": *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385. He found that the circumstances in this case were different than those either in *Haida* or *Sparrow*. On the one hand, the Plan had been approved by Order in Council, at the time the applications were brought, and was, therefore, "a completed action", engaging the *Sparrow* test. On the other hand, the claims of the First Nations involved "unproven substantive rights", involving the *Haida* test. He therefore made separate analyses invoking each of the *Sparrow* and *Haida* tests.

[22] The chambers judge concluded that under the *Sparrow* test any infringement was justified, as the Plan had a valid legislative objective, namely, conservation and protection of the aquatic

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health within Southern Alberta, and that sufficient consultation had taken place, such that the honour of the Crown was maintained in the circumstances (paras. 101-104).

[23] Employing the *Haida* test, the chambers judge found that the Plan did not adversely affect the applicants' water use, and that the merits of the claims for water rights were far from being established. He determined that the absence of adverse impact, along with his determination of the potential merits of the claims, placed the duty to consult "at the very low end of the scale". He found that, in the circumstances of the case therefore, the Government had met that duty (para. 131).

[24] The chambers judge also discussed the contention of Alberta that the Order in Council approving the Plan was legislative in nature and, thereby, immune from judicial review. However, he did not conclude on that issue, as he considered that his two-pronged analysis (using both the *Sparrow* and *Haida* tests) made it unnecessary to do so (paras. 66-68).

V. GROUNDS OF APPEAL

[25] The appellant First Nations essentially challenge both the findings that the duty to consult in the circumstances of that case was at the low end of the scale, and that it was met. They submit that the chambers judge erred in his interpretation and application of the duty to consult and accommodate, and further argue that, in making his findings, he ignored or failed to consider relevant matters and evidence.

[26] It is significant to note that the appellants on the appeal have withdrawn their request to set aside the Order in Council approving the Plan. Rather, they only seek from this Court a Declaration that:

> 1. The SSRB Plan gave rise to the Crown's constitutional duty to consult with and accommodate the Appellants; and
>
> 2. The Crown failed to satisfy its constitutional duty to consult with and accommodate the Appellants regarding the SSRB Plan and the measures set out therein.

VI. STANDARD OF REVIEW

[27] Whether there is a duty to consult and, if appropriate, to accommodate, is essentially a question of legal duty, and consequently governed by a standard of correctness. However, deference is owed to the fact findings upon which such a duty might be premised. To the extent that the duty is inextricably intertwined with findings of fact, then the standard is reasonableness: *Haida* at para. 61.

[28] Correctness will also govern the assessment of the seriousness of the claims advanced for aboriginal and treaty rights, as well as the degree of adversity the government action will have on

those rights: *Haida* at para. 63. Once again, deference will be owed to any underlying findings of fact.

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[29] The process of consultation and accommodation is examined on a standard of reasonableness. Perfect satisfaction is not required. Rather, the reasonableness of the steps taken by the government as a whole, and in all of the circumstances, must be examined: *Haida* at para. 62. Put another way, if a duty arose, it is a question of mixed law and fact whether Alberta's actions satisfied such duty, with the result that the appropriate standard of review is reasonableness.

VII. ANALYSIS

A. General Nature of the Duty to Consult

[30] The duty to consult and, if appropriate, accommodate, has evolved through case law over the past two decades, and continues to evolve through consideration of its application in differing contexts and circumstances.

[31] A duty to consult was first specifically referenced by the Supreme Court of Canada in *Sparrow*, as an aspect of possible justification for the breach or infringement of a proven aboriginal right. In that case, the aboriginal appellant resisted the application of federal fishing regulations, on the basis that they infringed upon his aboriginal right to fish. He argued that the "recognition and affirmation" of aboriginal rights in section 35(1) of the *Constitution Act, 1982*, gave those rights a constitutional status, such that any legal act affecting them was of no force and effect.

[32] The Court acknowledged that the recognition and affirmation of aboriginal rights under section 35(1) did limit the exercise of legislative power, but only to the extent that the Crown was obliged to justify its actions when a legislative action abrogated an aboriginal right. Thus, it held at paras. 61-62:

> In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).
>
> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must,

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> however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.

[33] The Court prescribed a two-part test in situations where it is alleged there is legislative infringement of an aboriginal right. The initial obligation falls on the applicant to demonstrate a *prima facie* infringement. If this test is met, the onus then shifts to the Crown to justify the infringement (*Sparrow* test). In describing the process of justification, the Court held it was important to consider whether there was a reasonable legislative objective, along with a number of other factors, including the one that is most relevant to the present appeal – "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented": para. 82. The Court continued in that regard to state:

> The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

[34] In cases that followed, the Court further developed the concept of consultation, discussing, among other things, its scope and timing. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, Lamer C.J. discussed the duty to consult in the context of legislative decisions infringing upon proven claims of aboriginal title. He found that the duty was imperative, but subject to wide variations in scope, depending on the extent of the infringement. He stated at para. 168:

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an

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> aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[35] The duty to consult moved beyond the post-legislative justification process in *Haida*. In that case, the Supreme Court held that the Crown owed a duty to consult, even at the stage where an aboriginal right had not yet been properly defined and proven. Speaking for the Court, McLachlin C.J. traced the duty to consult back through *Sparrow* and *Delgamuukw*, and then stated at para. 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that **the duty 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**: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J. [emphasis added]

[36] In the remainder of the judgment, the Chief Justice expanded on the nature of this duty. She held, *inter alia*, and here I summarize her findings:

> 1. The duty to consult has a constitutional dimension in that the Crown's duty to act honourably in defining the rights and guarantees found in section 35(1) of the *Constitution Act, 1982*, implies a "duty to consult and, if appropriate, accommodate" (para. 20). Despite the fact that the duty to consult is derived from section 35(1), however, it does not give aboriginal groups a right of veto pending final resolution of a claim. "What is required is a process of balancing interests, of give and take" (para. 48).
>
> 2. The duty to consult and accommodate is not based on the common law duty of fairness. It is a duty based on "a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution"; para. 31. Thus, aboriginal groups can challenge "government conduct" on the basis of a failure to consult and accommodate pending claims resolution. The basis of the challenge is independent of the usual procedures for challenging administrative action, although principles of administrative law may be helpful in determining the proper standard of review (paras. 60-61).
>
> 3. Based on the passage from *Delgamuukw*, cited above, the scope of the duty will depend on the facts of each case. The initial threshold invoking the duty, however, is low. McLachlin C.J. stated at para. 37:
>
> > There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but

> unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

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[37] The Chief Justice did not discuss the issue of remedy when there is a breach of the duty to consult, but some guidance on this subject can be gleaned from the eventual result in the case. The court did not quash the tree farm licence issued by the government to the forest company, Weyerhauser. However, it upheld the declaratory relief granted by the lower court.

[38] The duty to consult was again considered and further developed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. In that case, the Supreme Court held that the duty to consult also arose when the Crown exercised a right to take up land, and thereby adversely affected a treaty right to hunt, fish and trap. In *Mikisew*, the federal Minister of Heritage had given formal approval, by ministerial order, to the building of a winter road in Wood Buffalo National Park. The road, as planned, was designed to skirt the Mikisew's reserve lands, but the Mikisew argued it would interfere with the exercise of their right to hunt, fish and trap upon their ceded traditional lands – a right guaranteed under Treaty 8.

[39] The Court was required to determine the duties which flowed from the honour of the Crown in the context of Treaty 8, including the history of the negotiations leading to Treaty 8 (para. 56). Binnie J., for the Court, noted that both the historical context and the inevitable tensions underlying the implementation of the treaty, whereby lands were transferred from a category to which the aboriginals had rights to hunt, fish and trap to lands of another category in which they had no such rights, demanded a *process* (para. 33). The procedural duty to consult was an obligation separate and apart from the Crown's substantive right to take up the lands.

[40] Binnie J., in *Mikisew Cree*, elaborated upon both the nature of the right to consultation and the consequences of its breach, at paras. 57 and 59:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.
>
> ...

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> Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that *process* is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. [emphasis in the original]

B. Did the Duty to Consult Arise in this Case?

[41] The appellant First Nations submit that the duty to consult in this case arose in circumstances akin to those in *Haida*. I accept that the circumstances here more closely resemble those in *Haida* than the circumstances in *Sparrow* and *Mikisew Cree*. There are certain elements of this case, however, that resemble the facts in these other cases. More particularly, certain treaty rights to hunt and fish are undisputed and, in that sense, are proven. The Plan has been approved by Order in Council and, in that limited sense, is complete. The appellant First Nations are suing Alberta in an attempt to establish claims, as yet unproven, to water and water management, which claims are founded on treaty and aboriginal rights. Finally, the implementation of the Plan may affect both proven and disputed treaty claims. In short, there is a mixture of circumstances, with some being analogous to circumstances in each of *Sparrow*, *Haida*, and *Mikisew Cree*.

[42] This mixture of circumstances presents difficulties in applying any one of these cases directly here. The *Sparrow* analysis does not fit well. In that test, an applicant has a preliminary burden of showing a *prima facie* infringement. The originating motions brought here by the appellant First Nations do not rely upon infringement, nor do they attempt to establish a *prima facie* breach. The Tsuu T'ina Nation asserts that its treaty and aboriginal rights "are or may be affected by the SSRB Plan". The Samson Cree Nation merely asserts that its treaty and aboriginal rights "may" be affected.

[43] Although the chambers judge conducted a *Sparrow* analysis here as part of his decision, to do so he had to assume that the claimed water rights would be proven (para. 76), and further that the appellant First Nations would have proven a *prima facie* infringement (para. 92). His purpose in making the analysis was to demonstrate that even if such assumptions were made, the SSRB Plan was justified and the honour of the Crown maintained, in the circumstances of this case (para. 104).

[44] The *Mikisew Cree* analysis is similarly difficult to apply. This is not a case of the Crown taking up land pursuant to a treaty right, thereby clearly, demonstrably, and adversely affecting treaty rights. While I do not suggest that the principles underlying *Mikisew Cree* are necessarily confined to cases where land is taken up, the particular facts and historical context which gave rise to the duty in that case are very different from the situation here. Thus, broad statements, properly applicable to the circumstances in that case, are not easily transported and applied here.

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[45] There are also difficulties with the *Haida* analysis. The duty in *Haida* arises when the Crown has knowledge, real or constructive, of the potential existence of a claimed aboriginal right or title, and contemplates conduct that might adversely affect it: *Haida* at para. 71. The threshold for triggering the duty is low, and the purpose of the consultation is to preserve the aboriginal right or interest pending resolution of the claim. Here, although the appellants are in litigation with Alberta attempting to establish water and water management rights, the case also deals with rights and claims of a proven nature.

[46] In my view, there should not be three separate tests to determine whether a duty to consult exists, and it is inappropriate to try to define the test by simply referring to the circumstances of a particular case in which the duty was found to exist. The underlying theme of the cases in which a duty to consult has been found is that the honour of the Crown is always at stake when it deals with aboriginal peoples. In other words, the question is always whether the honour of the Crown requires that consultation and appropriate accommodation take place when a proposed government action threatens to adversely affect aboriginal peoples. The test is broad and sensitive to differing factual circumstances. The particular circumstances in the earlier cases are but examples of instances where the duty exists. These circumstances, of course, may usefully be examined to provide analogies to the circumstances of the case before the court. However, the existence of the duty does not depend upon the exact correspondence to the circumstances in other cases.

[47] Alberta argues that no duty to consult arose in this case, as the appellant First Nations had not established that the government action had potential adverse impacts. Further, it was submitted that Alberta did not recognize the potential existence of any credible claim for aboriginal water rights, and, therefore, had neither real nor constructive notice of such right. In addition, the Crown argued that the duty to consult was not engaged in this instance, as the Order in Council approving the Plan was legislative in nature and, therefore, not affected by any duty to consult. I will first discuss this latter contention and then move on to consider whether the honour of the Crown required consultation in the circumstances of this case.

1. Was the Crown's action Legislative and therefore not reviewable?

[48] The chambers judge discussed this issue at some length, but concluded he did not need to resolve it (para. 68). I agree, especially since the appellant First Nations have withdrawn their original request that the Order in Council be set aside. At this stage, they seek only declaratory relief. As the point was strenuously argued on the appeal, however, I will elaborate on the reasons why the issue need not be determined.

[49] The gist of the Crown's argument is that legislation cannot be invalidated because of a failure to consult. It relies upon a passage from the judgment of Slatter J.A. in *R. v. Lefthand*, 2007 ABCA 206, [2007] 10 W.W.R. 1, leave to appeal to the Supreme Court of Canada denied, 2008 CarswellAlta 196. Slatter J.A. stated at para. 38:

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> The duty to consult is of course a duty to consult collectively; there is no duty to consult with any individual. There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected: *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40. It cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*. It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a *prima facie* breach of an aboriginal right is sought to be justified: *Mikisew Cree* at para. 59.

[50] In *Authorson*, cited by Slatter J.A., the Supreme Court of Canada held that the right of due process found in the *Canadian Bill of Rights*, S.C. 1960, c. 44, did not require that Parliament give notice, and opportunity to speak, to veterans whose right to monetary interest had been taken away by legislation. Major J., for the Court, stated at para. 37:

> The respondent claimed a right to notice and hearing to contest the passage of s. 5.1(4) of the *Department of Veterans Affairs Act*. However, in 1960, and today, no such right exists. Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.

[51] Binnie J., in *Mikisew Cree*, characterized the duty to consult as being procedural. It is an interesting question as to whether a free-standing duty to consult is a constitutional imperative under section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, such as to invalidate legislation made in breach thereof. However, as earlier pointed out, the appellants no longer seek to quash the Order in Council. This also removes the need to answer whether the Order in Council, approving the plan, is legislative.

[52] In my view, the argument raised by the Crown does not go beyond consideration of whether or not the quashing of the Order in Council is a proper remedy. An inability to quash legislation, if that be the case, does not mean that consultation is not required when drafting plans for development of natural resources, nor does it preclude the availability of declaratory relief in appropriate circumstances.

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[53] In *Haida*, the decision to issue a Tree Farm Licence (T.F.L.) gave rise to a duty to consult. The licence did not itself authorize timber harvesting, but required an additional cutting permit. The Chief Justice stated at para. 76:

> The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

[54] Likewise, Slatter J.A. in *Lefthand* recognized the desirability of consultation at the planning stage, before any legislative action on the part of government. Immediately following the passage relied upon by the Crown and quoted above, he continued and qualified his remarks to state, at para. 39:

> Beyond the passage of legislation and regulations, the matter becomes less well defined. Administrative tribunals often do have a duty to consult when their orders will have an impact on aboriginal rights. There may also be a duty on study groups that are formed by governments to report on matters that may affect aboriginal rights. For example, in this case the Eastern Slopes Regulation Review Committee was established in 1997 to make regulations respecting the fisheries covered by Treaty No. 7. When it is anticipated that such a study group might recommend amendments to a regulatory regime, consultation is generally appropriate.

[55] Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions. Here, the Director and the Department of the Environment were directed to develop a water management plan for the purpose of making recommendations to the Lieutenant Governor in Council for his approval. The *Water Act* requires consultation with stakeholders in developing a plan. The situation appears similar to that spoken of by Slatter J.A. above, where he recognized that consultation may be appropriate in the case of a study group established to make regulations respecting the fisheries covered in Treaty 7.

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[56] Further, the adoption of a plan is at the outset of government action, and is intended to guide such action. This is to be contrasted with situations where the Crown has already completed its substantive action, as discussed by Conrad J.A. in *Lefthand* at paras. 161-163. Her consideration in this regard related to appropriate remedy. As already adverted to, the appellant First Nations no longer seek to quash the Order in Council in question. Rather, the situation is comparable to that in *Haida*, where the court gave declaratory relief, but did not quash the Tree Farm Licence.

[57] In short, I am of the view that the fact that the plan was adopted by an order in council does not immunize the persons developing the plan from a duty to consult, if such a duty otherwise arises in the circumstances of the case.

2. The Crown's knowledge of the potential existence of aboriginal right or title

[58] The chambers judge did not distinguish between the claims of the Tsuu T'ina and the Samson Cree in relation to the Plan. In my view, the circumstances of each First Nation are very different and need to be examined separately.

(a) *The Tsuu T'ina*

[59] The reserve lands of the Tsuu T'ina's were set aside pursuant to Treaty 7. The Elbow River and the Fish Creek flow through the reserve lands, which are located in the SSRB. The Tsuu T'ina exercise treaty rights within the area. They have treaty rights, some of which are undisputed and others of which are in issue. They also claim aboriginal rights.

[60] The Tsuu T'ina assert fishing and hunting rights, pursuant to Treaty 7, albeit that treaty does not mention fishing rights, which omission will be discussed later in this judgment. They also claim treaty water rights, although any such rights are not expressly dealt with in the treaty. They rely upon an implied water right to meet the needs of the reserve, a right which has been implied and acknowledged in certain American jurisprudence: *Winters v. United States*, 207 U.S. 564 (1908).

[61] The aboriginal rights claimed by the Tsuu T'ina are of ownership and title to the beds of the Elbow River, Fish Creek, and all other water courses and water bodies within the reserve lands. They claim the right to usage, allocation, and management of all water resources within or adjacent to the boundaries of the reserve, including the authority to permit or prohibit the use of water for commercial, industrial, agricultural, recreational, cultural, governmental, and domestic purposes within or adjacent to the reserve lands.

[62] The chambers judge found that Alberta had knowledge of these claimed rights (para. 112). The record supports that finding. With respect to the claimed treaty rights, the Crown, of course, always has notice of the contents of the treaty: *Mikisew Cree* at para. 34. While Alberta seeks to limit the rights to those expressly granted by the treaty, and disputes the implied rights here asserted by the Tsuu T'ina, the record clearly shows that Alberta had knowledge of the claimed rights for many years prior to the development of the Plan.

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[63] While the claims may be of varying degrees of merit (as I will discuss later in Part C.1), it cannot be reasonably asserted that none of the claims are credible so as to make consultation unnecessary. Indeed, the record shows that at all material times the government recognized, correctly in my view, that the Tsuu T'ina had interests requiring consultation. Even if Alberta did not have knowledge of all of the claimed rights, its knowledge of the express treaty rights is sufficient to show knowledge of rights and claims that may be adversely affected by its intended action.

(b) *The Samson Cree*

[64] The situation with respect to the Samson Cree is quite different. While Treaty No. 6 does expressly grant hunting and fishing rights, the reserve lands are not within the SSRB. None of the rivers within the basin flow through, or are adjacent to, the reserve lands. Rather, the Samson Cree's reserve is located in the Battle River Basin, which is the subject of a separate and distinct water management plan for that basin.

[65] The Samson Cree claim that they will require water from the Red Deer River in the future to meet their needs, and that their right to hunt and fish may be affected by the SSRB Plan insofar as it impacts upon the Red Deer River Sub-basin. The Red Deer River is within the SSRB, and, as will be more fully discussed herein, the Plan does contain certain water conservation objectives relative to that river. While the Crown had prior knowledge of the water claims of the Samson Cree, similar in nature of the claims of the Tsuu T'ina, and further, the Crown had knowledge of Treaty No. 6 rights, the record falls short of demonstrating knowledge of the rights and claims of the Samson Cree relative to the SSRB, at least until such time as the Plan was in the course of its development.

[66] In these circumstances, I am dubious that Alberta at the time it undertook the study had the requisite knowledge of the potential claims of the Samson Cree in relation to the SSRB. However, some concerns of the Samson Cree, albeit not fleshed out at the time, did come to the attention of the Crown during development of the Plan. I will, therefore, proceed on the basis that the Crown had knowledge of the claims of the Samson Cree relative to the SSRB. As will be seen, the ultimate result is not affected by the acceptance of the Samson Crees' assertion that the Crown possessed knowledge of its potential claim in relation to the subject Plan.

3. Potential adverse impacts

[67] The threshold for this prerequisite to consultation is very low. Binnie J., in *Mikisew Cree*, stated at para 34: "The flexibility lies not in the trigger ('might adversely affect it') but in the variable content of the duty once triggered."

[68] Alberta submits that since the chambers judge found that the Plan did not, in fact, have an adverse impact on either treaty or aboriginal rights (paras. 122 and 136), that finding is dispositive in negating any duty to consult. I do not accept this proposition.

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[69] The operative word is "might". It seems obvious that a Plan intended to manage water resources, including the protection of the aquatic environment, has the potential for adversely affecting the express treaty rights of the appellant First Nations, as well as water rights claimed by them within the subject area. It was reasonable for the chambers judge to infer from the government's desire to consult the Tsuu T'ina from the outset of Phase II of the Plan, that the government knew that the Plan had potential to adversely affect them. With respect to the Samson Cree, the concerns which they voiced during the development of the Plan relative to its impact on the Red Deer River Sub-basin, indicated potential adverse impacts in relation to their claims. The fact that the Plan ultimately might not have had adverse impacts, as found by the chambers judge, does not eliminate the need to consult in the development of the Plan. Further, it is at least arguable that some of the elements of the Plan, as ultimately adopted, arose from the consultation, and played a part in the finding of the chambers judge that there was thereby no adverse effect.

4. Conclusion as to whether the duty to consult arose

[70] My analysis leads to the same result as that reached by the chambers judge. I am satisfied both that the Crown had knowledge of express treaty rights and the existence of the aboriginal and treaty claims of the Tsuu T'ina, and that the SSRB Plan might in its development adversely affect them. For reasons already stated, I am less sure on this record that any duty to consult arose with respect to the Samson Cree. For purposes of further analysis, however, I will proceed on the basis that the duty was owed to all the appellants.

C. What was the Scope and Level of the Duty to Consult?

[71] The Chief Justice in *Haida* commented in regard to the level of consultation required to maintain the honour of the Crown that: "every case must be approached individually" and that "each must also be approached flexibly ... as the process goes on and new information comes to light" (para. 45).

[72] Here, the chambers judge placed the duty to consult "at the very low end of the scale", having regard to his assessment both of the merits of the claims of the appellant First Nations and the potential for adverse impact. The appellants urge that the chambers judge was wrong in his assessment both of merits and impact. I will address their arguments.

1. Seriousness of the claims

(a) *The Tsuu T'ina*

[73] The Tsuu T'ina have an express treaty right to hunt. The subject Plan does not deal with hunting rights. It is conceivable, however, that the exercise of such rights may be affected by water management, as a deterioration in the aquatic environment may be expected to reduce the population of the hunted animals. Accordingly, the claim is serious, as the right is recognized. However, its impact upon the scope and level of the duty to consult is best measured when considering the potential adverse effects of the intended government action.

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[74] As explained in *Lefthand*, it is open to question whether Treaty 7 is the source of any aboriginal right to fish (paras. 52-68). Once again, a serious claim is disclosed. However that may be, the effect of any right to fish upon the scope and level of the duty to consult is again better assessed, in the circumstances of this case, when considering potential adverse impacts.

[75] As observed by the chambers judge, the *Winters* doctrine, which implies the right of reserve lands to water rights, has not been applied in Canada. It is doubtful that the doctrine is applicable in Canada, as its application in the United States has been limited to states that regulate water through a system of prior appropriation – a system which has never existed in Canada: see Scott Hopley and Susan Ross, "*Aboriginal Claims to Water Rights Grounded in the Principle Ad Medium Filum Aquae, Riparian Rights and the Winters Doctrine*" (2009), 19 Journal of Environmental Law and Practice, at 21-23. The *ad medium filum aquae* presumption, which is rebuttable, is a common law rule by which ownership of the bed of a non-tidal river or stream belongs in equal halves to the owners of riparian lands.

[76] The claim for ownership and title to the river beds, based either upon aboriginal or treaty rights, is likewise unproven and faces many obstacles, some of which are alluded to in the majority judgment of Cory J. in *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658. See also the discussion of Iacobucci J. relative to the *ad medium filum aquae* presumption with respect to reserve lands in *R. v. Lewis*, [1996] 1 S.C.R. 921, 133 D.L.R. (4th) 700 at paras. 55-62.

(b) *The Samson Cree*

[77] Treaty No. 6 expressly grants the Samson Cree the right both to hunt and fish in the tract of lands surrendered thereunder. However, the record does not demonstrate what portion of the surrendered territory, if any, lies within the SSRB. In any event, in measuring the scope and level of the duty to consult, the impact of such treaty rights as do exist in this regard is once again better assessed when considering potential adverse impacts of the SSRB Plan.

[78] The Samson Cree claim water and water management rights of the same nature as those claimed by the Tsuu T'ina. It is not readily apparent, however, that the reach of those claimed rights extends to the SSRB; i.e., the rivers and water bodies, of which neither flow through nor are adjacent to the reserve lands. In any event, even if such claimed water rights reach into the SSRB, the Samson Cree face the same difficulties in establishing those rights as do the Tsuu T'ina.

(c) *Conclusion on seriousness of the claims*

[79] The claims range from proven, and thereby serious, to unproven and very much challenged ones. In my view, the chambers judge's assessment of the merits of the claims to water and management rights, whether based on aboriginal or treaty rights, was correct. These claims will "not be an easy case to win" (para. 129). In any event, there is a significant contrast with the circumstances in *Haida*, where the evidence grounded "a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar" (para. 71).

2. Potential adverse impacts of the SSRB Plan

[80] It is necessary to first identify the proposed government action that could potentially adversely impact the treaty and aboriginal rights claimed by the appellant First Nations. In this instance, the proposed action was Phase II of the Water Management Plan. Phase I, dealt with the transfer of water under existing licences, and it was developed in 2001-2. Phase I was approved by O.C. 321/2002 and constituted the then approved water management plan under section 11 of the *Water Act*.

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[81] Phase II consisted of developing a plan to balance water consumption and environmental protection within the SSRB. It does not identify water needs of a specific user or sector. The principal recommendations contained in the Plan are set out in its Executive Summary at p. V:

- Alberta Environment (AENV) no longer accept applications for new water allocations in the Bow, Oldman and South Saskatchewan River Sub-basins until the Minister of Environment specifies, through a Crown Reservation, how water not currently allocated is to be used.

- Water be allocated from the Crown Reservation only for:

  - Water conservation objectives;

  - Storage of peak flows to mitigate impacts on the aquatic environment and to support existing licences. (Alberta Environment will assist the Watershed Planning and Advisory Councils in evaluations of the potential for on-stream and off-stream storage.);

  - Licences and registrations that may be issued for applications and registrations pending at the date of the Crown Reservation. (This does not necessarily imply approval; but the pending applications and registration will be reviewed.);

  - First Nations Reserves.

- When allocations in the Red Deer River Sub-basin reach 550,000 cubic decametres, a thorough review be conducted to identify the maximum allocation limit.

[82] For the greater part, the concerns of the appellant First Nations related to the existing water priority system and the water market that may develop from the transfer of water licences. These were “not on the table” for discussion in Phase II. This led the chambers judge to conclude at para. 122:

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> The SSRB Plan is aimed at improving the overall health of the basin and does not deal with the right to hunt and fish. If there is presently any adverse impact on the water use of the Application, (either directly or as an adjunct their other rights) it is a result of the priority system as set out in the *Water Act* and the licences already granted. These are historical facts and not the result of the decisions under review or the SSRB Plan.

[83] The appellants intimate that the chambers judge, in assessing potential adverse impacts (at para. 138) overlooked his observation that, as a result of transfers by existing licence holders of under-utilized allocations, it is likely "that more water will be consumed, exacerbating the water shortage". The appellants point to the expected reduced flows as seriously impacting on the fish population, and thereby adversely affecting their right to fish.

[84] As already noted, the provisions for transferring licences were part of the existing Water Plan approved in 2002 (prior to the Phase II planning), and consequently were not part of the proposed government action during the relevant time frame. In any event, the transfers are subject to holdbacks by the Director, which the chambers judge commented may "partially offset" any negative impact of transfers that are approved (para. 138). In that event, the holdbacks may provide a future source of water to the First Nations.

[85] Finally, with respect to the transfer of water licences, the Plan, incorporating both Phases I and II, contemplates public review and requires an applicant for a transfer to give public notice. A further requirement was added to the Plan – that the concerns of the First Nations must be considered as part of the review. It should not be supposed that every transfer of a water licence is adverse to the interests of the First Nations. However, with respect to transfers which the First Nations may consider adverse, they will have opportunity to have their concerns considered. In my view, the chambers judge was correct in refusing to "speculate" as to "the scope of any duty to consult which may or may not arise in those transfer approval applications" (para. 140). Such will depend upon the particular circumstances surrounding an application.

[86] The appellant First Nations submit that the Plan further adversely affected their rights, by recommending that the 1991 Crown reservation be repealed and replaced. It is argued that the 1991 Crown reservation was an instrument used to address First Nation water needs that would provide them with a 1991 priority. In result, it is said that the First Nations will thereby be lower in priority than thousands of other licences for approximately 4 to 4.5 million acre feet granted between 1991 and 1999.

[87] This submission with respect to the repeal of the *SSRB Water Allocation Regulation*, A.R. 307/91, was not commented upon by the chambers judge and, in any event, appears to be misconceived. The *1991 Regulation* reserved all water in the SSRB to the Crown under section 12

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of the *Water Resources Act*, R.S.A. 1980, c. W-5. All licences issued thereafter come out of the water reserved under that *Regulation*.

[88] Priorities under the *Water Resources Act* were assigned according to the date of the completed application for a licence. Accordingly, any priorities obtained under the *Regulation* were based upon application date, and not the date of the *1991 Regulation*. The new *Water Act* made no change affecting priorities under the *1991 Regulation*.

[89] In short, the overall effect of Phase II that constituted the proposed government action is to enhance conservation and to improve aquatic environment. The adverse impacts alleged by the appellants are not attributable to the Plan. The focus of their concerns originates with the regime, as existing at the time that Phase II was put forward by Alberta Environment. At worst, the Plan did not change the *status quo* relative to those concerns, although these concerns were beyond the scope of the mandate of Phase II. In any event, it is difficult to construe the maintenance of the *status quo* with respect to the concerns of the appellants as constituting an adverse impact arising from the proposed government action.

[90] Finally, with respect to adverse impact, it is useful to consider the object of the consultation. In *Haida*, the duty to consult was aimed at finding an "interim" solution (para. 44) in order "to preserve" the Haida interest pending resolution of the claim to aboriginal rights, including title (para. 77). It was clear, in that case, that if the forests were logged out pending determination of their claim, they would "find themselves deprived of forests that are vital to their economy and their culture", which could never be replaced (para. 7).

[91] The situation in this case is very different. The rivers and water bodies are not likely to disappear pending the resolution of the claims of the appellant First Nations, even if the time frame for determination is many years. In fact, if the Plan is successful, the environment and aquatic health will be improved, and the exercise of the treaty hunting rights will be enhanced rather than impaired. This is to be contrasted with the situation in *Mikisew Cree*, where the court found that the impacts of the road in that case "were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question", (para. 55). Even then, it was held that the Crown's duty to consult lay "at the lower end of the spectrum" (para. 64).

[92] At the heart of the concern of the appellant First Nations is that other water users will gain priorities to water and thereby deprive the appellants of the control of the management of the waters, which they claim to own, and to have priority for their uses. However, if the appellants should succeed in their litigation presently before the courts and they are found to possess aboriginal rights to water, and it is further found that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 constitutes an unjustified infringement of their treaty and aboriginal rights, then the priorities under the existing regime will be in issue and required to be re-addressed. In other words, the government and third parties may bear the risks. In any event, the appellants are not facing a peril similar to that faced in *Haida*. The degree of irreparable harm, if any, to the First

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Nations, pending resolution of their claims, is an appropriate consideration in determining the scope and level of consultation that should take place for the purpose of preserving rights in the interim.

[93] While the above analysis of potential adverse impacts of the SSRB Plan applies to both the Tsuu T'ina and the Samson Cree, it applies to the rights and claims of the Samson Cree with even greater force. The Red Deer River was identified as being hydrologically the healthiest of the SSRB Rivers. The Plan recommends that a cap be placed when allocations reach a certain level, and for further review at that time. In the meantime, the Plan recommends a water conservation objective that will leave more water in the river than the in-stream objective that existed before the Plan.

[94] The Samson Cree seek to protect a claimed right to take and transport water from the Red Deer River, to meet their future needs where they reside. To the extent that the Samson Cree have hunting and fishing rights in the Red Deer River Sub-basin (and may ultimately be able to establish water and water management rights relative to the river), the Plan is more likely to enhance and preserve such rights than if no Plan at all were undertaken. Thus, it is unlikely that there are any future adverse impacts to the Samson Cree arising from the Plan which constitutes the government action in question.

3. Conclusion on the scope and level of the duty to consult

[95] I am satisfied that the chambers judge did not err in holding that the duty to consult in this case was at the very low end of the scale, having regard to the nature of proposed government action, the seriousness of the appellants' rights and claims, and the potential adverse impacts upon those rights and claims.

D. Was the Duty to Consult Satisfied?

[96] Having found that the duty to consult was at the very low end of the consultation spectrum, the chambers judge held that, in the circumstances of the case, the duty was satisfied (para. 131). He adverted to certain meetings and other steps taken in the consultation process. However, he did not consider it necessary to provide details of the consultation, which were sufficient, in his view, to discharge the obligation (paras. 101-103).

[97] The appellants challenge the finding that the duty was met as being unreasonable and contrary to the evidence, which, in this case, consisted of many thousands of pages of a return record as supplemented by affidavits and exhibits. While the discussion of the evidence relative to the consultation is brief, to the point of being cryptic, it is not dismissive. In my view, the record contains evidence to support the finding, and the appellants have not shown that it was wrong or unreasonable such as to overcome the deference owed to the chambers judge with respect to his finding that the duty was discharged. I will now explain my reasons for reaching this conclusion. Once again, I will make separate analysis of the consultation with each of the appellant First Nations.

1. The Tsuu T'ina

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[98] The *Water Act* provides that the responsible Minister may require a water management plan to be developed, and stipulates that the Director or other person developing such plans must engage in public consultation that the Minister considers appropriate (section 9). In this instance, consultation was contemplated to be obtained through four Basin Advisory Committees (BACs). In late 2000 and early 2001, a BAC was formed for each of the Red Deer, Bow, Oldman and Saskatchewan Rivers.

[99] The BACs were created from representatives of Municipalities, major water-user industries, recreational groups with an interest in water, fish and game, environmental organizations, irrigation districts, and agricultural organizations in the SSRB who sent representatives in response to invitations from Alberta Environment. A Tsuu T'ina member participated in the Bow River BAC for Phase I, but not in any "official" capacity.

[100] It should be noted that even before the formation of the BACs, and in preparation for water management planning, Alberta Environment had sought information from the Tsuu T'ina in 2000, and again in 2002, by means of surveys. No response was made to the questionnaires. The explanation for the lack of response, provided years later in the course of this litigation, was that the Tsuu T'ina did not have the internal capacity to provide the data sought by the surveys.

[101] During the final months of Phase I, and for a period thereafter, preparatory studies were undertaken by Alberta Environment, which were thereafter provided to the BACs. In October 2002, Alberta Environment requested the Tsuu T'ina participate as full members in the Bow River BAC for Phase II. The letter was addressed to Chief Sandford Big Plume, one of the appellants herein. It stated, in part:

> Work on Phase Two of the plan is now underway. We believe that this phase will be of importance to you because it sets the stage for long-term planning in the South Saskatchewan River Basin. The main purpose of the second phase is to recommend water conservation objectives. These objective will determine the quantity and quality of water that should [sic] in rivers in the basin to protect the aquatic environment. Phase Two will also update the South Saskatchewan River Basin 1990 Water Management Policy. For your information, draft terms of reference of Phase Two are attached.
>
> We are formally inviting you to participate as full members of Bow River Basin Advisory Committee. For more information and to confirm the committee representative(s), please contact the Bow River Basin Advisory Committee Coordinator Rob Wolfe at (403) 297-5383.

As indicated, draft Terms of Reference were also provided with this letter. The evidence discloses no response to the invitation.

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[102] The preparatory studies undertaken by Alberta Environment were completed in June 2003 and provided to the BACs. Once again, a Tsuu T'ina member participated to some extent in the Bow River BAC process, but not in any official capacity. In July 2004, the BACs submitted a report of their recommendations to the Steering Committee for the planning project, which were used to draft a water management plan.

[103] The Tsuu T'ina dismiss these early attempts to obtain their participation, on the basis that from the outset they were entitled to a separate and discrete consultation. They rely upon a passage from *Mikisew Cree*, which states that, in the circumstances of that case, the Crown "was required to provide notice to the Mikisew and to engage directly with them and not ... as an afterthought to a general public consultation with Park users", (para. 64).

[104] The duty to engage separately is not absolute. In my view, Barnes J. accurately states the law in this regard in *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, [2009] 3 C.N.L.R. 36 at para. 25:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

[105] In this case, the Tsuu T'ina were not prepared to participate through the public consultation process, so that it cannot be known as to whether that process may have accommodated, at least to some degree, their concerns. I do not suggest that consultation through the public process necessarily would have been sufficient in the circumstances of this case. However, these early attempts at involving the appellant Tsuu T'ina do demonstrate a sensitivity to First Nation concerns, and a genuine desire by Alberta Environment for their participation in the process.

[106] It should also be borne in mind that the judgment of the Supreme Court of Canada in *Haida* was only released in the latter part of 2004, and Alberta, in a sense, was feeling its way in the new environment. A consultation policy was being developed, which ultimately was issued on May 15, 2005, entitled: *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development*. The policy statement adopted by the government was that "Alberta will consult with First Nations where Land Management and Resource Development on provincial land may infringe First Nations *Rights and Traditional Uses*".

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[107] In this case, Alberta also sought to meet the concerns of the Tsuu T'ina through a separate process. In the latter part of 2004, Alberta Environment contacted members of the Tsuu T'ina to inquire of the appropriate means to engage discussion. By letter dated April 5, 2005, addressed to the Tsuu T'ina Nation, Alberta Environment stated, in part:

> [P]lease accept this letter as a formal request from Alberta Environment to meet with Chief and Council.
>
> Alberta Environment would like to request an audience with Chief and Council to discuss the South Saskatchewan River Basin Water Management Plan. The session requested will require an hour to provide the presentation and time for discussion.
> ...
>
> The purpose of the meeting is to discuss the issues related to water management in the SSRB and how that might impact the Nation. If at all possible, we would like to meet in April 2005 to provide the time necessary for discussion. Attached please find additional information about the Plan.

[108] By this point in time, the government was becoming anxious to get on with the plan, in an effort to have the conservation measures recommended by the BACs put into effect. Alberta Environment targeted completing consultation with the First Nations by the summer of 2005.

[109] A meeting was held on June 3, 2005, with Chief Sandford Big Plume of the Tsuu T'ina Nation, as well as with Chiefs of other Treaty 7 Nations. At the outset, the Chiefs remonstrated that things were getting off on the wrong foot, because a Deputy Minister led on behalf of Alberta Environment, rather than the Minister himself being in attendance. At that meeting, the Chiefs advised that a lack of capacity and resources was preventing Treaty 7 First Nations from engaging in meaningful dialogue about the proposed plan.

[110] The Tsuu T'ina Chief was invited to meet directly with the Minister on July 12, 2005. He did not attend. The record does not disclose the reason.

[111] In this time frame, Alberta Environment proposed that a technical expert be hired to assist the Treaty 7 Nations in their understanding of the Plan, identify the concerns of the First Nations, and to permit dialogue.

[112] In September and October 2005, Alberta Environment met a number of times with representatives of the Tsuu T'ina about selecting a consultant. Ultimately, the consulting firm of Gartner Lee was hired, at the expense of the government, in the fall of 2005, to assist the Treaty 7 First Nations. Alberta Environment also undertook the expense of a Tsuu T'ina technician to assist Gartner Lee.

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[113] On October 20, 2005, Alberta Environment announced that a draft of the proposed plan would be released for public consideration and input. This announcement elicited a letter from the Treaty 7 Chiefs, including the Tsuu T'ina Chief, to the Minister of Environment, dated October 12, 2005. The letter states, in part:

> Since time immemorial we have exercised our inherent right to use the rivers and lakes of our traditional territories to satisfy the water needs of our people. The right to sufficient supplies of water is integrally tied to the use and enjoyment of the reserve. It is promised to our Nations under Treaty 7. This statement is made without prejudice to any First Nation's claims within or over water within their respective reserve lands. The Government of Alberta is obliged to meaningfully consult with Treaty 7 First Nations on this issue and to accommodate our Treaty water rights within the SSRB Plan and any related amendments to the *Water Act* or other relevant legislation. If Alberta fails to comply with its constitutional duty to consult and accommodate, the SSRB Plan will constitute an unjustifiable infringement of our Treaty and Aboriginal rights.

[114] The Minister responded by letter dated November 29, 2005, stating, in part:

> I am pleased to advise that Alberta Environment contracted a qualified consultant to provide technical support and expertise to Treaty 7 First Nations in your review of the Draft SSRB Water Management Plan. I understand that my Ministry staff and a First Nations Steering Committee, consisting of representatives from Treaty 7 First Nations, conducted meetings to review the several applications submitted for the project. After a thorough review, the committee chose Gartner Lee Limited to be the successful consultant. It is in the spirit of positive relations with First Nations that my Ministry has arranged for this assistance in ensuring that the plan is understood and that First Nations can provide informed input.
>
> The release of the SSRB Water Management Plan is in draft form to ensure that all stakeholders have the opportunity to review and provide comments prior to finalizing the plan. In addition, the consultant will be arranging for a series of individual meetings with each First Nation in Treaty 7 to ensure they learn more about the plan and provide comments. I encourage you to designate representatives to attend those meetings. The Draft SSRB Water Management Plan is not meant to address specific stakeholder concerns; however, my Ministry is prepared to discuss any First Nation concerns within the South Saskatchewan River Basin at your convenience.

[115] On November 30, 2005, the Tsuu T'ina, through an e-mail from legal counsel to Alberta Environment, requested:

- An expansion of the consultation process to include talks about water allocation for the T7 Nations with a view to meeting their future needs.
- An extension of the time for consultation to occur.
- Funding for legal opinion for the Nations on consultation and their water rights so they can act from a fully informed position.
- A meeting of the Chiefs and Minister of Environment to start this process.

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[116] Gartner Lee conducted community meetings with the Treaty 7 First Nations, from January to March 2006. The Steering Committee formed by Alberta Environment for the planning project extended the time for receipt of the Gartner Lee report until the end of March 2006.

[117] Alberta Environment consequently extended the target date for completion and approval of the Plan. Applications for new water allocations were piling up, and Alberta Environment was concerned that it would have to temporarily close the Bow and Oldman Sub-basins to protect the aquatic environment pending completion of the Plan.

[118] Gartner Lee provided its final draft to the Tsuu T'ina, by letter dated March 31, 2006. Neither the draft report nor concerns arising therefrom were provided at or about that time to Alberta Environment. Rather, the Treaty 7 First Nations advised that they would set out their concerns only in a meeting with the Minister.

[119] On April 11, 2006, Treaty 7 representatives met with Alberta Environment, which suggested a bifurcated process to allow the Plan to go forward, while subsequently addressing particular concerns raised by the First Nations concerning their water needs, which matters were not within the terms of reference of the Plan.

[120] By letter dated April 21, 2006, the Chief of the Tsuu T'ina Nation, on its behalf, rejected any process that would see the Plan approved before consultation had been completed with respect to all concerns of the First Nations. The letter stated that the Plan "cannot be implemented without the Nation's consent", and continued by asserting that the *Water Act* itself was passed without proper consultation with the Treaty 7 First Nations. It concluded, as follows:

> Notwithstanding Alberta's failure to consult and accommodate and our rejection of the Proposal, Tsuu T'ina is prepared to engage in a process of meaningful consultation and accommodation with Environment regarding the matters addressed by the SSRB Plan, and generally regarding the management and allocation of water as it impacts Tsuu T'ina. We wish to be clear, however, that such consultations cannot be constrained by the provisions and recommendations of the SSRB Plan, or indeed, by the provisions of the *Water Act* in its present form. Further, Tsuu T'ina

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> is not prepared to waive its objection to the lack of adequate consultation and accommodation noted above pending the conclusion of such consultations. If Alberta is not prepared to consult on that basis, and to accommodate the Nation's concerns, Tsuu T'ina shall have no choice but to consider other options in responding to the SSRB Plan. [emphasis added]

[121] On May 1, 2006, the Steering Committee considered the above letter and rejected its conditions. However, it did not directly confront the Treaty 7 First Nations. Rather, by letter dated May 16, 2006, the Minister advised Chief Sandford Big Plume as follows:

> Alberta Environment is committed to consultation with First Nations who may be affected by the draft South Saskatchewan River Basin Water Management Plan. To that end, my Ministry is will [sic] awaiting your response to the draft plan, outlining how the plan will affect the Tsuu T'ina First Nation. This will begin the process of addressing your Nation's concerns with the plan, and identifying how Alberta Environment and the Tsuu T'ina First Nation can move forward together.
>
> I would like to meet with you and the other Treaty 7 Chiefs at your earliest convenience to further discuss your concerns. I have asked my Ministry staff to contact your office to make the appropriate arrangements.

[122] A meeting with Treaty 7 Chiefs was subsequently held on July 6, 2006. A representative attended on behalf of the Tsuu T'ina and, apparently, hand delivered a letter of that date from Chief Big Plume. The letter provided the Gartner Lee Report to Alberta Environment. However, the Chief stated that the Tsuu T'ina did not endorse the Report, on the basis that it was "an inadequate and incomplete piece of work", because of unrealistic guidelines imposed by Alberta Environment. In his letter, the Chief reiterated that the Tsuu T'ina were prepared to engage in consultations, but that they could not be constrained by the SSRB or the *Water Act*, "and must respect Tsuu T'ina's Treaty and Aboriginal water rights." The letter concluded, as follows:

> If Alberta is not prepared to consult on this basis, and to accommodate Tsuu T'ina, we shall have no choice but to take whatever steps are necessary, including legal action, against the Government of Alberta, in response to the SSRB Plan.

[123] In the meantime, the draft SSRB Plan had been endorsed by the legislative Standing Policy Committee and was scheduled to go before the Cabinet on July 11, 2006, for potential approval. It appears that shortly before the meeting with the Chiefs on July 6, the referral of the draft plan to the Cabinet for approval had been delayed. Ultimately, the Plan was approved by Cabinet on August 29, and by the Lieutenant Governor in Council on August 30, 2006.

[124] Alberta Environment's dealings with the Tsuu T'ina between July 6, 2006 and the Cabinet approval of the plan several weeks later led to an unfortunate misunderstanding, and created an

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expectation on the part of the appellant First Nations that there would be further direct consultation before the Plan was approved.

[125] At the meeting with the Chiefs on July 6, 2006, Alberta Environment explained what it perceived to be an emergent situation requiring the immediate closure of the Bow and South Saskatchewan Sub-basins, excepting allocations to First Nations. There appears to have been agreement on this part. The Minutes of the meeting indicate that the Plan would be delayed until further discussion took place with the Treaty 7 First Nations.

[126] By letter to Chief Big Plume, dated August 4, 2008, the Minister pointed out that the SSRB plan was not designed "to identify and resolve all water management components in the basin", and then proceeded to state:

> Given your concerns regarding the draft SSRB plan, I propose the following:
>
> 1. The Government of Alberta and Treaty #7 work together to develop a plan to resolve SSRB plan concerns on the topics other than allocations.
>
> 2. Regarding allocations, Alberta Environment will commit to jointly arriving at a Terms of Reference for the continuing discussions on this topic. This will include an assessment of reasonable water needs.
>
> 3. Alberta Environment commits to meeting with each of the Treaty #7 First Nations to discuss if it is possible to arrive at an acceptable water allocation under the *Water Act*.
>
> The SSRB plan is delayed at the present time; however, there is a need to take steps to provide protection to the river. As we discussed, a means of not accepting new applications for licences is also being considered.

[127] It does not appear that any further discussions were held with the First Nations prior to approval of the Plan. The Minister's Recommendations to Cabinet to approve the Plan were made on August 17, 2006. By letter dated August 30, 2006, the Minister advised Chief Big Plume that the Plan had been approved.

[128] The Minister's letter of August 30 advised that a Crown Reservation had been established "to reserve any remaining unallocated surface water in the Bow, Oldman, and SSRB Sub-basins for specific purposes, including water allocations for First Nations". The Minister stated that the Province had to take definite and immediate action to safeguard the watersheds and to protect aquatic environment. The letter continues, as follows:

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> I assure you that Alberta Environment is committed to working with the Treaty #7 First Nations to address your concerns with the plan, including your water allocation concerns.
> ...
>
> Regarding your concerns with the plan, I assure you the Government of Alberta recognizes the plan is dynamic and may be amended to better protect and manage the basin. Alberta is committed to working with Treaty #7 First Nations to define their water needs and take steps towards addressing them. In my letter of August 4, 2006, I proposed three approaches to addressing your water concerns. I have instructed Ministry staff to proceed on these three approaches immediately. As I stated at our recent meeting, Alberta is willing to consider the insertion of a non-derogation clause in the SSRB Plan regarding Treaty and Aboriginal rights. Alberta Environment awaits the proposed language for such a clause.

[129] It is difficult to resist the inference that during the summer of 2006 the Tsuu T'ina were led along with the idea that there would be further consultation before the Plan was approved, which happened at the end of August 2006. Rather than being straightforward by disclosing that the Plan was in the final stages of preparation and approval, the Minister, under threat of litigation, allowed the Treaty 7 First Nations to think that further meaningful consultation with respect to the Plan could occur before it was approved. In fact, it would seem that Alberta Environment was thinking of consultation after approval, which would deal with matters not within the terms of reference, but by no means made this clear to the Tsuu T'ina.

[130] The actions of Alberta Environment during the summer of 2006, however, do not define either the scope of the legal duty to consult, nor do they determine whether, as a matter of law, such duty has been satisfied. The chambers judge, on the record before him, was entitled to conclude that the duty to consult, which he had identified as being at the low end of the scale, had been satisfied, having regard to the following circumstances:

1. The time frame for completion and approval of the Plan was extended for many months in order to allow for consultation.

2. The government, at the request of the Treaty 7 First Nations, funded the provision of expert assistance to enable them to better understand and respond to the Plan.

3. Some consultation occurred. Certainly, the concerns of the Treaty 7 First Nations were listened to. However, their principal concerns related to aboriginal and treaty water rights which were not recognized by the Province and not within the scope of the proposed government action; i.e., Phase II of the Plan.

4. The consultation was inhibited by the dictates of the First Nations who proscribed the manner of consultation in some instances to meetings between the Minister and the Chiefs, and, more importantly, who proscribed terms which were far beyond the scope of the proposed government action. While it is understandable that the First Nations would desire consultation and negotiation on all issues raised in their litigation regarding their claims to treaty and aboriginal water rights, they misconceived the limited purpose of the consultation with respect to the claims they were pursuing by way of litigation; i.e., consultation to preserve those claims on an interim basis pending resolution of the litigation, which may take many years to conclude. In short, the terms of the consultation, insisted upon by the First Nations in this case, could not reasonably have been accepted by the government, and would have delayed and prolonged the process indefinitely.

   I would add that consultation and negotiation with respect to all of the claims of the appellant First Nations is highly desirable and should be encouraged. Consultation with respect to these issues outside the scope of the intended government action in question, however, cannot halt all action relating to water and water management in southern Alberta. Further, it is inherent in the concept of meaningful consultation that the parties facilitate it through cooperation and good faith efforts.

5. Alberta Environment was facing an emergent situation that required action. The record supports the finding of the chambers judge in this regard (para. 132-133). Moreover, the Tsuu T'ina were aware of the need for urgent action.

6. Alberta Environment did make some accommodation of the First Nations by providing for water allocation to the First Nations through the Crown Reservation.

7. Alberta Environment committed to further consultation to meet the water needs of the First Nations. In other words, the adoption of the Plan did not end the consultation process with respect to the concerns expressed by the First Nations, which, I reiterate, were largely outside of the scope of the proposed government action in this instance.

[131] I have not overlooked the submission of the appellant First Nations that the above noted accommodation, by means of the Crown Reservation, was worthless – something said to have been admitted by David McGee, the Senior Water Policy and Implementation Manager in the Department of Environment. However, the chambers judge had before him the affidavit of Mr. McGee, which explained his comments to representatives of the Tsuu T'ina, and which clearly supports the proposition that there is some value to any new licences which may be issued to the First Nations, notwithstanding existing over-allocation of water on some of the rivers within the SSRB. While the chambers judge did not expressly comment on this evidence, he was entitled to have regard to it in reaching his conclusion that the duty had been satisfied.

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2. The Samson Cree

[132] The chambers judge, in concluding that there had been adequate consultation, did not deal separately with the Samson Cree. They submit that Alberta Environment engaged in no consultation whatsoever with them, and, thereby, breached the duty to consult. In my view, the record does not support this contention.

[133] I have already pointed out the very different circumstances of the Samson Cree to those of the Tsuu T'ina First Nation. The Samson Cree reserve is not within the South Saskatchewan River Basin, but lies some distance north, in the Battle River Basin. This basin is the subject of a separate water management plan, with respect to which Alberta Environment has more recently been in discussion with the Samson Cree. As remarked upon earlier in this judgment, the action commenced by the Samson Cree, claiming water and water management rights, does not name the Red Deer River as part of the claim.

[134] In March 2004, at a meeting between Alberta Environment and representatives of Treaty 6 First Nations about water issues relative to Battle River and Pigeon Lake, the Samson Cree expressed an interest in the SSRB, in which the Red Deer River was located.

[135] In December 2005, Alberta Environment sent the draft Plan and a related information package to the Samson Cree, and invited input. The Samson Cree did not attend a subsequent meeting in February 2006 with Alberta Environment and other Treaty 6 First Nations, at which time they would have had opportunity to raise concerns or express the need for assistance, as did the Treaty 7 First Nations.

[136] In *Haida* at para. 43, the Chief Justice discussed the concept of a spectrum, and indicated that in certain instances that the duty of the Crown to consult may be satisfied by providing notice, information and thorough discussion of any issues raised in response to the notice. Here, the Samson Cree were provided with information and opportunity to express their concerns.

[137] It is also relevant to note that to the extent that the Samson Cree had interests in the SSRB, its interest was not of a different nature than the interests of the Treaty 7 First Nations, whose interests were more immediate and substantial. The record discloses that there were communications over the relevant time frame between representatives of the Treaty 6 and Treaty 7 First Nations, relative to advancing their claims for water rights and management.

[138] In particular, a unanimous resolution was passed at an Assembly of Treaty Chiefs of Treaty Nos. 6, 7 and 8 First Nations, held at Lake Louise on May 15-16, 2006, in "support for Treaty 7 First Nations on the issue of the South Saskatchewan River Basin Water Management Plan". The preamble of the resolution states, amongst other things, that the Government of Alberta had "failed to discharge its constitutional duty to consult with and accommodate the concerns of affected Treaty 7 First Nations" in relation to the SSRB Plan. The resolution called upon Alberta to consult and

develop a process with respect to the "concerns of Treaty 7 First Nations"; and the Assembly further resolved that the Treaty Chiefs would support all such further actions considered necessary by the Treaty 7 chiefs to maintain reserve lands, traditional territories, and other treaty and aboriginal rights "in the Treaty 7 Region". The appellant, Chief Victor Buffalo, attended that assembly on behalf of the Samson Cree. No reference was made in the resolution to any concerns of Treaty 6 First Nations. It is reasonable to infer that the Samson Cree were content to rely upon the activities undertaken by the Treaty 7 First Nations in regard to the Plan.

[139] While the chambers judge did not deal separately with the manner in which the duty to consult was discharged in relation to the Samson Cree, I am satisfied that his finding that there was sufficient consultation was reasonable and justified in the circumstances before the court.

E. Declaratory Relief

[140] The appellants seek declarations concerning the nature of the duty to consult which arose in this case, and a declaration that the Crown failed to satisfy such duty. For the reasons set out above, I would not disturb the finding of the chambers judge that the duty had arisen and was met in the circumstances of this case.

[141] The chambers judge declined to grant a declaration as to the nature of the duty to consult, and, in particular, that it was a *constitutional* duty. He pointed out that the duty to consult was evolving, and found it unnecessary to make any declaration, albeit he did find that a duty existed in the particular facts before him. Declaratory relief is discretionary, and I see no good reason to grant a declaration in circumstances where the chambers judge, exercising his judicial discretion, declined to do so. Moreover, it is relevant to the exercise of discretion to note that these same issues and claims for relief are presently before the Court of Queen's Bench in the existing litigation commenced by the appellant First Nations. It seems reasonable that these issues, including the determination of appropriate relief, should be left to be dealt with in the context of the broader litigation.

VIII. CONCLUSION

[142] The appeal is dismissed.

Appeal heard on November 3, 2009

Reasons filed at Calgary, Alberta
this 28th day of April, 2010

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O'Brien J.A.

I concur: As authorized by: Picard J.A.

I concur: Rowbotham J.A.

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Corrigendum of the Reasons for Judgment Reserved

In paragraph 4 of the judgment the citation has been corrected to: 2008 ABQB 547.

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