Court of Queen's Bench of Alberta

Citation: Tsuu T'ina Nation v. Alberta (Environment), 2008 ABQB 547

Date: 20080904
Docket: 0701 02170, 0701 02169
Registry: Calgary

Between: Action No. 0701 02170

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

Applicants

- 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

And Between: Action No. 0701 02169

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

Applicants

- 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

Reasons for Judgment
of the
Honourable Mr. Justice Sal J. LoVecchio

Introduction

[1] The need to access a viable water source is common to all humans. When that source becomes restricted or scarce, it only stands to reason that those relying on that water source will make every effort to ensure its continued viability and availability.

[2] The Alberta portion of the South Saskatchewan River Basin (the "SSRB") encompasses one quarter of the surface area of Alberta. At the time of the 1996 census, this area had an estimated population of 1,300,000.

[3] The population of the SSRB is expected to grow to between 1,890,000 and 2,120,000 by 2021 and to between 2,370,000 and 3,180,000 by 2046. The livestock population in this area was over 4 million in 1996 and it appears to be growing.[1]

[4] Water use in Alberta is currently governed by the *Water Act*[2]. The *Water Act* continues the long established practice in Alberta of a licencing priority system. The concept of first in time, first in right, has been in place for over 100 years.

[5] The Government of Alberta has issued licences for water use since 1894 and irrigation licences currently account for 75% of the total volume of the allocations. Demand for non-irrigation water use, which includes municipal, industrial, non-irrigation agricultural, stockwatering and water management is forecasted to increase significantly over the next 40 years. There are approximately 20,000 water licence holders in the SSRB today.

[6] By 2021, demand for water withdrawals is estimated to increase between 29% and 66% over 1996 levels and demand for consumptive use is estimated to increase between 35% and 67%. By 2046, demand for water withdrawals is estimated to increase between 52% and 136% over 1996 levels and demand for consumptive use is estimated to increase between 63% and 132%.

[7] In light of the increase in forecasted demand for water usage in the SSRB, an ameliorative water management plan for southern Alberta was long overdue. The challenge of the Government of Alberta was to balance the demand for water consumption spurred by growth and prosperity, with the need to conserve and protect the aquatic environment. Compounding the problem, these competing demands had to be addressed in a manner which respected the existing water licences.

---

[1] Statistics Canada Census of Agriculture, Return Volume 1 page 288.

[2] R.S.A. 1996, c. W-35.

[8] As the utilization of existing water allocations increases, so does the impact to the aquatic environment. Water allocation limits have been reached or exceeded in the Bow, Oldman and South Saskatchewan River basins. It is estimated that the Red River basin will reach its allocation limit in 30 to 40 years. There is a belief in many quarters that we are in the midst of a water crisis in southern Alberta.

[9] With this potential crisis in mind, the Government of Alberta conducted a review of water management in the SSRB. As part of this review, Alberta Environment established Basin Advisory Committees in 2000 and 2001 and through these committees conducted a public consultation process.

[10] In the first phase of the review, water licence transfers were considered. In preparation for the second phase of the process, Alberta Environment commissioned several studies concerning critical water management planning issues. The Terms of Reference for this phase were developed in June 2003. This phase focussed on the need to balance water consumption and environmental protection.

[11] In August 2004, the BACs provided a report and recommendations to Alberta Environment. A Water Management Plan for the South Saskatchewan River Basin emerged from this effort.

[12] The SSRB Plan is a collection of recommendations to decision-makers, namely the Director under the *Water Act*. The principal recommendations of the SSRB Plan are:

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.

[13] The Minister (Alberta Environment) took the SSRB Plan to Cabinet and it was approved by the Cabinet and affirmed by Order in Council 409/2006 dated August 30, 2006. The approval of this plan fulfils a statutory condition precedent to the Director in considering transfer applications. Without such a plan in place, transfers would require Cabinet approval.

These Proceedings

[14] On February 28, 2007, the Applicant Samson filed an Originating Notice (Action No. 0701-02169) for judicial review of the following decisions:

1. The Decision of the Minister (Alberta Environment) to recommend the *South Saskatchewan River Basin Water Management Plan* (the "SSRB Plan") to the Lieutenant Governor in Council for approval under the *Water Act*, R.S.A. 2000, c. W-2 on August 29, 2006.

2. The Decision of the Crown approving the SSRB Plan pursuant to section 11 of the *Water Act* as affirmed by Order in Council 409/2006, dated August 30, 2006.

[15] The Originating Notice originally said the approval was under section 11(1) of the *Environmental Protection and Enhancement Act*, R. S. A. 2000, c. W-3 but that was simply an innocent mistake.

[16] In addition, the Applicants sought the following declarations and orders:

3. A declaration that Her Majesty the Queen in Right of Alberta has a legally enforceable constitutional duty to consult with and accommodate the Samson Cree Nation and the Tsuu T'ina Nation (the "Nations") where the Nations' existing and claimed Treaty No. 6 and Treaty No. 7 rights and Aboriginal rights are or may be affected by the SSRB Plan, including the use and enjoyment of the Nations' Reserves, lands claimed as Reserve lands, Treaty hunting and fishing rights and other Aboriginal rights, and the Nations' Treaty and Aboriginal water rights.

4. A declaration that the Crown Reservation recommended by the SSRB Plan did not discharge the constitutional duty of Her Majesty the Queen in Right of Alberta to accommodate Tsuu T'ina's right to use and develop its Reserve, Tsuu T'ina's Treaty hunting and fishing rights and other Aboriginal rights, and Tsuu T'ina's Treaty and Aboriginal water rights.

5. A declaration that the Crown failed to discharge its constitutional duty to consult:

> with the Samson Cree Nation regarding the Water Conservation Objective ("WCO") (implemented on January 16, 2007), and the allocation volume/limit for the Red Deer River Basin recommended by the SSRB Plan and that these recommendations and actions fail to discharge the Crown's constitutional duty to accommodate the Nations' Treaty hunting and fishing rights and other

Aboriginal rights, Treaty water rights and right to use and develop Samson's Reserve; and

with the Tsuu T'ina Nation regarding the Water Conservation Objective ("WCO") (implemented on January 16, 2007) for the Bow River Basin recommended by the SSRB Plan and that this recommendation and action fail to discharge the Crown's constitutional duty to accommodate Tsuu T'ina's Treaty hunting and fishing rights and other Aboriginal rights, Treaty water rights and right to use and develop Tsuu T'ina's Reserve.

6. An order to set aside Order in Council 409/2006, dated August 30, 2006, approving the *Approved Water Management Plan for the South Saskatchewan River Basin* (*2006*).

7. An order enjoining Her Majesty the Queen in Right of Alberta from implementing the recommendations of the *Approved Water Management Plan for the South Saskatchewan River Basin* (*2006*) by alternative means and actions until it has satisfied its duty to consult with and accommodate the Samson Cree Nation and Tsuu T'ina Nation.

8. Such further and other relief as this Honourable Court deems just.

[17] The Tsuu T'ina Nation filed a similar Application (Action No. 0701-02170).

[18] The physical location of the Samson and the Tsuu T'ina are different. The Samson are not located within the geographic boundary of the SSRB. They are located in the Battle River Basin. As such, the potential impact of the SSRP Plan for them might be seen as quite different.

[19] By Amended Consent Order dated March 17, 2008, the two matters were to be heard at the same time. While adverse impact is an important consideration in these Applications, the potential difference in impact was not a factor in how this matter was decided.

The Issues

[20] The primary issue which underlays these Applications is the duty to consult and accommodate, which the Applicants submit is a "constitutional" duty to consult and accommodate, and the further submission that this "constitutional" duty to consult and accommodate was not met. The word constitutional has been placed in quotation marks as the nomenclature attaching to the duty is a declaration sought in these Applications and as such is a collateral issue.

[21] While these are the main issues, they on occasion raise additional issues which will be discussed as they arise. The Application to Strike is such an issue.

Application to Strike

[22] Before addressing the primary issue and the collateral issue, a preliminary matter must be addressed.

[23] The Government of Alberta applied to the Court to strike portions of some of the affidavits and exhibits filed by the T'suu Tina and Samson in these proceedings as the Respondent submits that the evidence before the Court should be restricted to the Return. The Applicants submit that the additional affidavits and exhibits filed with the Court are necessary in order to prove that the Crown breached its' "constitutional" duty to consult and accommodate.

[24] The Respondent conceded that a large proportion of the evidence found in the affidavits and the exhibits which the Respondent sought to strike is already in the Return and, as a result, its admissibility is not in issue. The Respondent has provided the Court with a chart indicating portions of the additional evidence to which the Respondent has agreed. In addition, and, to meet the possibility that the additional evidence would be admitted in its entirety, the Respondent replied to the Applicants' additional evidence by filing, under reserve, an additional affidavit.

[25] These Applications for Judicial Review were brought under the Rules as Originating Notices. There is little doubt the Return forms the primary evidentiary base for the Applications. So the question becomes whether that is all that may be considered.

[26] In a duty to consult analysis, the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*[3] has stated that a preliminary assessment of the merits of the claim must be made by the Court. To make this preliminary assessment, the Court would be required to review something. Unless the particular government action put in issue the claim made, it is difficult to envision a set of circumstances where the information the Court might be required to review would all be found in the Return.

[27] It is clear from the language used by the Supreme Court of Canada in *Haida* that the Justice who heard the case in the reviewing Court considered evidence that the Justice described as "voluminous" with respect to the history of the Haida people, their culture and traditions. Although it is not stated how this evidence was led, there is no suggestion in the decision that it was part of a return. It was most likely led through affidavit evidence.

[28] The decision in *Haida* must be seen as a tacit approval of evidence, which would go beyond that contained in a return, being considered by the Court in a judicial review when the Crown's duty to consult is an issue.

---

[3] [2004] 3 S.C.R. 511, 2004 SCC 73.

[29] Perhaps more fundamentally, the duty to consult is grounded in the honour of the Crown. It would not be in keeping with the honour of the Crown to strike evidence which is available and might assist the Court in making a preliminary assessment of the merits of the right claimed and the other issues before the Court.

[30] For these reasons, I would dismiss the Respondent's Application to Strike. In so doing, I would note that nothing I have done below really turned on the evidence which would be seen as outside of the Return and the agreed additions.

Evidentiary Basis

[31] With the above ruling in mind, the evidence available to this Court in reaching its decision was as follows:

1. Court Return, Volumes 1 to 11
2. Affidavit of Wanda Baptiste
3. Affidavit of Lawrence Saddleback
4. Affidavit of Patricia McCormack
5. Supplementary Affidavit of Patricia McCormack
6. Affidavit of Alexander Crowchild
7. Affidavit of Lee Crowchild
8. Affidavit of Vincent Crowchild
9. Affidavit of Peter Manywounds
10. Affidavit of Darryl Whitney
11. Affidavit of Bryce Starlight
12. Affidavit of David McGee.

Discussion and Analysis

The Statutory Framework - The *Water Act*

[32] In 1996, the Legislature passed the *Water Act* in an attempt to modernize water law in the province. The purpose of the *Water Act* (as set out in Section 2), is as follows:

> "The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing
>
> > (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
> >
> > (b) the need for Alberta's economic growth and prosperity;

> © the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
>
> (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
>
> (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management; and
>
> (f) the important role of comprehension and responsive action in administering this Act".

[33] The *Water Act* gives the Lieutenant Governor in Council the power to approve a water management plan. The Lieutenant Governor in Council may also amend or cancel an existing plan. As already noted, the existence of a water management plan is a condition precedent to the Director considering applications for the transfer of a licence.

[34] Absent specific authorization by the Lieutenant Governor in Council, the Minister may not approve a water management plan or part of a water management plan.

[35] One of the key aspects of the *Water Act* is the ability to set a priority for certain licences over others. This has been an integral part of water management in the province for over 100 years. Under this regime, senior licence holders have priority over more junior licence holders in times of shortage. Seniority is derived from when the licences were issued. In other words, first in time is first in right.

[36] There is currently no statutory authority in Alberta for any statutory decision maker to rearrange the priority system, or to alter the statutory priority system.

The Duty to Consult

[37] This part of the Discussion and Analysis engages three lines of authority from the Supreme Court of Canada: *R. v. Sparrow*[4], *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[5] and *Haida*.

[38] These three cases are indicative of the evolution of the law with respect to the duty to consult. They are also representative of an interplay between the status of the particular

---

[4] [1990] 1 S.C.R. 1075.

[5] [2005] 3 S.C.R. 388, 2005 SCC 69.

Aboriginal right in issue (is it a proven or claimed right) and the timing of the government action (is it a completed or anticipated action) in consultation cases. Perhaps more germane, they are also indicative of the fact the law in this area is still evolving.

[39] When exploring this interplay, four distinct possibilities emerge:

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

[40] When discussing the particular government action taken, it will be important to note how that particular action was taken. By that I mean, was it legislative or administrative in nature, as it will be the position of the Respondent that how the particular action is taken is fundamental to how the analysis should be undertaken. This is likely the reason why the approach in the submissions was so fundamentally different.

[41] For the Applicants this case is about a duty to consult and the Applicants say this duty is an independent stand alone obligation and arises as soon as the Crown knows or ought to know of a potential adverse impact on an existing or claimed right. For the Respondent, this is an administrative law case and, based on that law, the process leading to the passage of legislation is not subject to judicial review.

[42] As this case raises the fourth permutation noted and that permutation has not been specifically addressed, I intend to commence my analysis with a decision of the Alberta Court of Appeal in *R v. Lefthand* [6]. In this decision, Justice Conrad highlighted the significance of the distinction between completed and anticipated government action. She observed at paras. 162 to 169:

> Where the Crown has failed to consult but has not yet completed its course of action, the court may attempt to remedy a breach of process rights by ordering that meaningful consultation occurs *prior* to implementation of the government proposal. In contrast, such a remedy is often not available when a court is considering a completed course of action as, in many instances, harm will already have been done. Thus, in the case of *Mikisew Cree*, the court was able to quash approval for the proposed road and direct that meaningful consultation with the effected aboriginal peoples occur prior to the project proceeding. Such a remedy would not have been possible if the road were already in place by the time the consultation issue was raised in court.
>
> My conclusion that this point of difference is significant is supported by the reasons in *Mikisew Cree*. There, the Supreme Court of Canada emphasized throughout the judgment

[6] 2007 ABCA 206, 222 C.C.C. (3d) 129.

that "[a]t this stage the winter road is no more than a *contemplated* change of use" *(Mikisew Cree* at para. 44) [emphasis added]. Significantly, the court referenced the importance of this temporal element immediately prior to suggesting that modification to the *Sparrow* framework was appropriate "[w]here, 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" (*Mikisew Cree* at para. 59).

The importance of considering procedural rights in advance of substantive rights in cases where meaningful consultation can be effectively ordered was also demonstrated in *Haida Nation*. In that case, the Haida people claimed that they ought to have been consulted about logging plans on land which, though legally held by the government, was the subject of an outstanding land claim. The challenge for the Haida was that they were unable to show a *prima facie* breach of any right because the right they were seeking to protect had not yet been legally proven. In this context, the court held that limiting consultation to the "post-proof sphere" risked "unfortunate consequences". It noted that "[w]hen the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable" (*Haida Nation* at para. 33). In recognition of this concern, the court held that the duty to consult "arises when the Crown has knowledge, real or constructive, of the *potential* existence of the Aboriginal right or title and *contemplates* conduct that *might* adversely affect it" (*Haida Nation* at para. 35).

The threshold described in *Haida Nation* for showing that the duty to consult has been triggered is clearly lower than the threshold required to show that a *prima facie* breach of a substantive right has occurred. This modified threshold is appropriate in situations where:

> (a) meaningful consultation can still be ordered; *and*
>
> (b) either the government has not yet acted or the substantive right has not yet been established.

The lowered threshold is necessary in these circumstances because, although the actual impact of the government action on the substantive right is purely speculative, an effective remedy to the consultation breach is readily available. The Supreme Court has recognized the potential injustice which could result from requiring proof of a *prima facie* breach in such situations and found, in both *Mikisew Cree* and *Haida Nation*, that it is inappropriate for a court not to remedy a failure to consult simply because it is too premature to show how the government's ultimate action will impact on the right being asserted. Rather, the consultation issue warrants independent examination and, if necessary, immediate remedy.

> These same concerns do not exist in cases like *Sparrow* and *Badger*, where the government has already completed its course of action and the right allegedly infringed is an established treaty or aboriginal right. In these situations, the court needs to be satisfied that a *prima facie* breach has occurred before proceeding to consider other issues, including the presence or absence of consultation. It would be a waste of judicial resources to consider issues relating to consultation if the ultimate action did not result in even a *prima facie* breach of a substantive right. At this stage, the speculation is gone and the court is able to assess the actual outcome of the government's actions before determining whether consultation was required in the circumstances.
>
> In my view, it is also significant that both *Mikisew Cree* and *Haida Nation* were cases involving the irreversible use of land. This element explains further the necessity, in each of those circumstances, of examining the alleged breach of process rights outside of the two-part infringement analysis. Failure to do so in those cases could have led to permanent consequences with no suitable remedy.
>
> In sum, where a claimant is alleging that a completed government action is interfering with an established aboriginal or treaty right, he or she must show that a *prima facie* infringement has occurred before the court will examine any other factors. In such circumstances, consultation is considered in the justification portion of the analysis. Where, however, a lack of consultation is alleged *before* a *prima facie* infringement can be conclusively shown - either because the government has not yet acted or because the right in question has not yet been established - the court may nonetheless consider the breach of process rights alone. This modified approach is particularly appropriate where the irreversible use of land is being proposed, as it allows the court to remedy a lack of consultation before the land in question becomes permanently altered.
>
> As neither of the cases on appeal involve the irreversible use of land, and both deal with a regulation which has already been passed and a treaty right which has been admitted to apply, I find that they are analogous to *Sparrow* and *Badger* rather than to *Mikisew Cree* or *Haida Nation*. As a result, the issue of consultation is appropriately addressed at the justification stage of the two-part infringement analysis. [Emphasis in the original]

[43] There was considerable debate between the parties as to whether the test in *Sparrow* or the test in *Haida* should be applied when determining whether the Province of Alberta breached its duty to consult and accommodate. Although both cases addressed the Crown’s duty of consultation, they are nonetheless divergent in that *Haida* dealt with an anticipated government action which threatened to infringe upon an unproven Aboriginal right while *Sparrow* dealt with a completed government action and a proven right.

[44] The difficulty is not the divergence. The difficulty is first our different set of circumstances. In this case, we have a completed action and an unproven substantive right. Completed actions takes you down the *Sparrow* fork in the road. Unproven claims of substantive rights takes you down the *Haida* fork in the road. Below the surface lies the administrative

versus legislative distinction raised above. And, standing alone beside the whole equation is the question of adverse impact.

Was the Government Action Administrative or Legislative in Nature?

[45] The Respondent submits that the Court cannot set aside an Order in Council on procedural grounds. As prior consultation must be seen as a part of the process leading to the passage of the Order in Council, that is the end of the matter.

[46] To respond to this submission, two additional issues must be addressed: (1) whether the particular actions placed in issue were administrative or legislative in nature; and (2) did *Haida* change the rules by introducing a process requirement prior to anticipated Government action regardless of its nature when that action adversely affects what may still be a claimed as opposed to a proven substantive right.

[47] This is an important question to consider for the simple reason it would not be in keeping with the honour of the Crown to permit the government to simple forge ahead in breach of an antecedent process requirement and then say sorry we are now dealing with a completed act.

[48] The genesis for this submission of the Respondent is also found in *Lefthand*. In *Lefthand*, Justice Slatter stated (at para. 38):

> 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.

[49] In these Applications, two distinct actions of the Government have been questioned: the decision of the Minister (Alberta Environment) to recommend the SSRB Plan to the Lieutenant Governor in Council for approval under the *Water Act*; and the decision of the Crown approving the SSRB Plan pursuant to section 11 of the *Water Act* which decision was affirmed by Order in Council 409/2006, dated August 30, 2006.

[50] These two government actions are quite different. The first is simply the decision of a Minister (along with a recommendation for approval) to place a matter (in this case the SSRB Plan) before the Cabinet for approval.

[51] I find it difficult to understand on what basis this decision should be subject to review.

[52] As already noted the *Water Act* gives the Lieutenant Governor in Council and, absent a specific authorization given to the Minister by the Lieutenant Governor in Council, only the Lieutenant Governor in Council the power to approve a water management plan. Logically, someone would have to bring such a plan regardless of its nature to the Cabinet table.

[53] That decision (along with a recommendation for approval) to bring a matter to the Cabinet table does not commit the Cabinet to any particular course of action. It is simply a decision by one Minster to have his or her colleagues consider a matter. To use the language of Justice Slatter, to suggest there is a duty to consult with respect to the decision to have the Cabinet consider a matter would be an unwarranted interference with the proper functioning of the Alberta Cabinet. It should not be the role of the Court to be telling a Minister what matters he or she may bring to the Cabinet table for consideration.

[54] In addition, as noted in the Brief of the Respondent (and the authorities mentioned), the court will only quash something that is a determination or decision. It will not quash a recommendation.

[55] The second decision under review is the approval of Cabinet. Again, to use the language of Justice Slatter, to suggest there is a duty to consult in these circumstances would be an unwarranted interference with the proper functioning of the Cabinet. The Respondent argues that this decision is binding on me, thus ending the matter.

[56] To the extent any after the fact review is appropriate, the Respondent then submits the *Sparrow* test should be applied to this legislative action. Unfortunately, it may not be that straight forward.

[57] All three Justice's wrote in *Lefthand*. For Justice Conrad, the issue of consultation was driven by the distinction between completed action versus anticipated action, as detailed above. The third member of the panel was Justice Watson. Justice Watson says he concurs in the "compendious reasons" of Justice Slatter subject to a few reservations. One is found in para. 194 where he said:

> In this regard, I would endorse the comments of Slatter J.A. at paras. 40 and 41 of his reasons. Courts should be chary of declaring justiciable (and thus subject to judicial review) a *legislative* process of Parliament, when (a) the product of the legislation, *viz.* the legislation, is already sufficiently vulnerable to Constitutional evaluation and response and (b) the consequences of the legislation are capable of remedy under law if need be. It is not necessary here to pronounce on what sort of regulatory activity by government would be a legislative process in that sense, nor to discuss what the reach of justiciability might be in any event. [Emphasis in the original]

[58] Justice Watson did not specifically endorse paragraph 38 and in paragraph 41 Justice Slatter is talking about administrative orders. Justice Watson talks about *Haida* in paragraph 192 and says that "the duty to consult however it should evolve should be feasible, proportional to the interest affected, and necessary". That might suggest legislative acts may also be subject to review but the words "interest affected" suggest adverse impact must always be present. The duty to consult is an evolving doctrine.

[59] It has not been questioned that administrative acts are subject to review. To the extent *Lefthand* has said there is no duty to consult for legislative acts, that decision is binding on me.

Is this Action Legislative?

[60] In the present case, the Applicants challenge Order in Council 409/2006. In most cases, an Order in Council would be legislative. There are, however, exceptions.

[61] In determining whether something is of a legislative nature, one must look to the substance of what was done, rather than the form. The Court must consider the nature of the body enacting the order, the subject matter of the order, the application of the order, and the rights and responsibilities altered by the order.[7]

[62] In *Judicial Review of Administrative Action in Canada*[8], the authors discuss the definition of a legislative power. They note that two characteristics are important in defining a legislative power. The first is the element of generality, that is, that the power is of general application and when exercised will not be directed at a particular person. The second indicium of a legislative power is that its exercise is based essentially on broad considerations of public policy, rather than on facts pertaining to individuals or their conduct.

[63] Decisions of a legislative nature, it is said, create norms or policy, whereas those of an administrative nature merely apply such norms to particular situations.

[64] The SSRB Plan provides general considerations that must be taken into account by decision-makers exercising the authority given to them pursuant to the *Water Act*.

[65] It sets out the factors to be considered in whether to (I) issue an approval or licence or (ii) approve a transfer of an allocation of water in the area over which the water management plan applies [s. 11(3)(a) of the *Water Act*]. The *Water Act* specifically requires the Director to have regard to any plan in place when considering an application for a licence [s. 51(4)], when determining that licence applications should not be accepted in a water management area [s. 53(3)] and when considering an application for the transfer of a water allocation [s. 82(5)].

[66] When the subject matter of the SSRB Plan is considered, the action taken by the government is more legislative than administrative. As this legislative government action is completed, I agree with the Respondent, the Court is initially taken down the *Sparrow* fork in the road.

---

[7] See *Rose v. R.* (1960), 22 D.L.R. (2d) 633 (Ont. C.A.) at para. 31.

[8] Donald Brown & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 2 (Toronto: Canvasback Publishing, 2007)

[67] That being said, *Haida* may also have a role to play in the analysis of this case as that case extended the duty to consult to unproven substantive rights and it may have changed the rules by inserting a procedural consideration into the equation.

[68] So, at this juncture, my plan is to first apply the test from *Sparrow* and then to apply the test from *Haida* to ascertain whether that would lead to a different result. If it does not, the question of whether *Haida* changed the rules for legislative acts might perhaps better be left to another day.

The Sparrow Test

[69] This case is being brought after approval by the Lieutenant Governor in Council of the SSRB Plan, therefore we must consider the validity of this action in the context of a completed government action and its effect on a substantive right, which right in this case is an unproven substantive right. The framework for such an analysis is set out in *Sparrow*.

[70] In *Sparrow*, the accused was charged under the *Fisheries Act* with fishing with a drift net longer than was permitted by his food fishing license. Mr. Sparrow defended the charge on the basis that he was exercising his Aboriginal right to fish and that the net length restriction was invalid in that it violated s. 35(1) of the *Constitution Act, 1982*. In essence, the accused sought to use a constitutional challenge to the *Fisheries Act* as a defence to a violation of that Act.

[71] The first step in the *Sparrow* analysis is to determine whether or not there is an existing right protected by the Constitution.

[72] The rights claimed by the Applicants in the present case are for the most part water rights, or water rights as an extension of their right to reserve land and their right to hunt and fish. As will be noted below, the Applicants have each filed a Statement of Claim the principal purpose of which is to have the claimed rights noted in these Applications recognized by the Court.

The Other Proceedings

[73] More specifically, on June 13, 2007, the Samson Cree Nation filed a Statement of Claim, Action No. 0701-06089. I intend to quote from the Statement of Claim as what is sought has far reaching implications. The Samson seek the following:

> 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 Plaintiffs' reasonable economic, residential, governmental, recreational, domestic and cultural needs, both now and in the future.

2. A determination by this Honourable Court of the amount of water the Samson Cree is entitled to 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. 6 region to sustain their Treaty rights to hunt, fish and trap.

4. A declaration that the Plaintiffs have a property interest in the water resources within the boundaries of and adjacent to the Reserves and the beds and shores of the water courses and water bodies within and adjacent to the boundaries of the Reserves.

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*.

6. A declaration that the Plaintiffs' Treaty water rights have priority over all statutory grants, permits, licenses and registrations granted under the *North-west Irrigation Act*, the *Water Act* and all predecessor legislation.

7. A declaration that the Plaintiff's Treaty water rights and property rights and interests in the beds and foreshores of the water courses and water bodies within and adjacent to the Reserves and water resources within, adjacent to, and in the vicinity of the Reserves were not affected by the transfer of the Crown lands in 1930 as these rights and interests constitute an "interest other than that of the Crown" as contemplated in s. 1 of Schedule (2) to 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 water resources within and adjacent to the boundaries of the Plaintiff's Reserves in accordance with the doctrine of interjurisdictional immunity.

9. A declaration that the Plaintiffs possess a Treaty, Aboriginal and inherent right of self-government in relation to the use, allocation and management of water resources and water courses and water bodies within and adjacent to the boundaries of the Reserves, including, at least, the authority to permit or prohibit the use of water for commercial, industrial, agricultural, recreational, and domestic purposes on the Reserves.

10. A declaration that the Defendant's assertion that the *Water Act* and all predecessor legislation enacted by the Province of Alberta since 1930 apply to the Plaintiffs and the Plaintiffs' Reserves 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 water

resources and water courses and water bodies within and adjacent to the boundaries of the Reserves.

11. Costs of the within action on a solicitor and his own client basis; and,

12. Such further and other relief as counsel may advise and this Honourable Court may allow.

[74] On September 13, 2007, the Tsuu T'ina Nation filed a Statement of Claim, Action No. 0701-09372. What the Tsuu T'ina seek is in part even broader in scope. The Tsuu T'ina seek the following:

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, domestic and cultural needs, both now and in the future.

2. A determination by this Honourable Court of the amount of water the Tsuu T'ina Nation is entitled to 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, licenses granted under the *North-west Irrigation Act*, the *Water Act* and all predecessor legislation.

7. A declaration that the Plaintiff's 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 the Crown lands in 1930 as these rights and interests constitute an "interest other than that of the Crown" as contemplated in s. 1 of Schedule (2) to 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.

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 possess a Treaty, Aboriginal and inherent right of self-government in relation to the use, allocation and management of 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, 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.

13. Costs of the within action on a solicitor and his own client basis; and,

14. Such further and other relief as counsel may advise and this Honourable Court may allow.

[75] Accordingly, the question of whether the Applicants have a constitutionally protected "Aboriginal" or "Treaty" right to water either specifically or as an adjunct to other rights should not and will not be decided in these Applications.

[76] For the purpose of these Applications, to take the first step in the *Sparrow* test, I will assume that the question of the Applicants' claimed rights to water will be answered in the affirmative or there is really no need to proceed further.

[77] Once a right is established, the next step in the *Sparrow* test is to answer a question. The question - whether the government action constitutes a *prima facie* infringement of that right.

[78] The onus of proving a *prima facie* infringement is on the party claiming the right, in this case the Tsuu T'ina and the Samson. Amongst other things, the right to water has been asserted as an extension or adjunct to the right to hunt, fish and traditional practices or as a restriction to their rights in reserve land.

[79] So, the question becomes whether the SSRB Plan unduly restricts the Applicants' exercise of their right to hunt, fish and traditional practices or restricts their rights in reserve land.

[80] In *R v. Morris*[9], the Supreme Court of Canada considered the difference between insignificant interference with the exercise of a treaty right and *prima facie* infringement of the right. The Court observed (at paras. 48 to 50):

> Regarding insignificant interference, this Court considered in *Coté* whether a provincial regulation requiring the payment of a small access fee for entry into a controlled harvest zone infringed a treaty right to fish. The fee was not revenue generating, but was intended to pay for the ongoing maintenance of roads and facilities within the controlled zone. Lamer C.J. held that this provincial regulation "impose[d] a modest financial burden on the exercise of th[e] alleged treaty right" (para. 88), thereby representing an insignificant interference with a treaty right, and consequently did not infringe that right.
>
> In contrast in *Badger* this Court considered that a licensing scheme that imposed conditions as to the "hunting method, the kind and numbers of game, the season and the permissible hunting area" (para. 92) infringed the appellants' treaty right to hunt. Cory J., writing for the majority, held that this licensing scheme constituted a *prima facie* infringement of the appellants' treaty right to hunt, since it "denie[d] to holders of treaty rights ... the very means of exercising those rights" and was found to be "in direct conflict with the treaty right" (para. 94).
>
> Insignificant interference with a treaty right will not engage the protection afforded by s. 88 of the Indian Act. This approach is supported both by *Coté* and by *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. rejected the idea that "anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement" (para. 91 (emphasis added)). Therefore, provincial laws or regulations that place a modest burden on a person exercising a treaty right or that interfere in an insignificant way with the exercise of that right do not infringe the right.

[81] The Applicants in the present case may face a difficult hurdle in proving a *prima facie* infringement of their rights. Access to water is arguably connected to the exercise of the claimed

[9] [2006] 2 S.C.R. 915, 2006 SCC 59.

rights, but not to the extent of a licensing scheme limiting those rights (*Sparrow*) or the approval of a road set to run through reserve land (*Mikisew*).

[82] The Applicants evidence is mostly directed towards the government's intention to consult with them and, as part of that consultation, consider the impact, if any, of the SSRB Plan on their treaty rights. This is not proof of a *prima facie* infringement of treaty rights. It is simply a recognition of the fact there might be a problem.

[83] It has been the Applicants' contention that *Sparrow* does not apply in this case, which perhaps explains why the evidence of the Applicants was not directed to a *prima facie* infringement.

[84] But that is not the only consideration at work in this case. There is a much more subtle issue in play.

[85] The Respondent submits both Treaty 6 and Treaty 7 contain language indicating that the rights bestowed upon the First Nations are subject to "such regulations as may, from time to time, be made by the Government".
[86] The potential importance of the "subject to" language was highlighted in *R. v. Badger*[10] where the Supreme Court of Canada said (at para. 11):

> "[A]t the time the treaties were signed and, even more so, at the time that the NRTA was agreed to by the provinces and the federal government, it would have been clearly understood that the rights of Indians pursuant to either document would be subject to governmental regulation for conservation purposes. The rights protected by the NRTA thus cannot be viewed as being constitutional rights of an absolute nature for which governmental regulation is prohibited".
>
> [The reference in the quote to the NRTA is a reference to the Natural Resources Transfer Agreement]

[87] Now the more subtle issue.

[88] In *Lefthand*, Justice Slatter said something with a potentially far more dramatic impact on our situation. He noted (in paragraph 80) that the right in question in *Sparrow* was not expressly subject to any limitations so the challenged regulations were treated as a *prima facie* infringement of the right. This meant the validity of the regulations was reviewed at the justification stage, not at the stage of defining the rights or their scope. That difference is critical. Why it is critical emerges from what he then said, at para. 80:

---

[10] [1996] 1 S.C.R. 771

> In Sparrow, at pp. 1109-10 the Court held that "The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)". As a matter of logic, where the right is expressly subject to regulation, the enactment of regulations does not have a "negative effect", because that is an inherent limitation on the right: *Badger*, at para. 37. Accordingly, a greater amount of interference is tolerable than where the right is not subject to any limitations. An inherent limitation of a right, and a justification of a breach of a right are fundamentally different things: *Mikisew Cree*, at para. 31. Whether an interference with a right amounts to an infringement of that right depends in large measure on the scope of the right.

[89] The issue became even more critical when Justice Slatter went on to analyze the role of the NRTA in the equation.

[90] For Justice Conrad, this discussion was unnecessary to decide the appeals. As a result, she thought it undesirable for the Court to reach findings on either the applicability of the NRTA to fishing regulations or the scope of the fishing rights under Treaty No. 7.

[91] In this case, the existence of a substantive right and, by implication, its scope (should a right be recognized) is the subject matter of the Other Proceedings. As such, the determination of those matters is beyond the scope of these Applications.

[92] For the purposes of this part of the analysis, I will assume the Applicants would have proven a *prima facie* infringement (it not being necessary because of this assumption to pursue the implications of *Lefthand* in defining the scope of the right) and move on to the justification stage of the analysis. I would simply note that justification will likely be a less onerous exercise if the scope of the right was properly constrained by the act in question.

[93] Under *Sparrow*, legislation that constitutes a *prima facie* infringement of an Aboriginal or treaty right will nonetheless be affirmed if it meets the test justifying an interference with a right recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The onus is on the Crown to justify interference with the right.

[94] Justification is established in the first part of a two part test where there is a valid legislative objective established which is compelling and substantial. In this case, conservation and protection of the resource are submitted as valid objectives which are compelling and substantial.

[95] It is well established that the pursuit of conservation of a scarce and valued resource is a valid legislative objective.[11]

---

[11] See *Jack v. the Queen*, [1980] 1 S.C.R. 294.

[96] The evidence presented by the Respondent painted a bleak picture capable of alarming anyone relying on the SSRB for their water needs. Conservation measures were not only necessary, but likely overdue. Instituting a moratorium on new allocations where water conservation objectives are not being met is a reasonable limitation of water use for all users, including First Nations. The need to put such measures in place is both compelling and substantial.

[97] In the second part of the test, the Court must be satisfied that the action taken is consistent with the special trust relationship between the government and Aboriginal peoples. More generically, has the honour of the Crown been maintained. At this stage, such things as how the resources are allocated, is the impairment the minimum required, has there been consultation, and, where appropriate, has there been compensation are considered. This list is not exhaustive.

[98] The Crown Reservation recommended by the SSRB Plan gives First Nations priority over other new allocation seekers after conservation targets are met.

[99] This priority system would be in line with the Aboriginal priority established in *Jack*.

[100] The Applicants have not been treated differently than any other person. If anything, through the Crown Reservation recommended in the SSRB Plan they are treated better than others in new allocations.

[101] Although the consultation methods employed by the government would likely be considered on the low end of the spectrum proposed by Chief Justice McLachlin in *Haida*, consultation did take place. It is not my intention to review in any great detail each and every meeting or letter exchanged.

[102] When the Return is reviewed, it is clear there were invitations to participate in the process by the government to the Applicants. Meetings were held with the Applicants to discuss water needs. The government hired a consultant to assist the Applicants in their review of the proposed plan.

[103] Each side has a very different perspective on what transpired. It is not my intention to dissect their divergent views as this decision is not really driven by a need for an extensive process.

[104] The Applicants' claim fails under the *Sparrow* test as any infringement (to the extent there actually was one) may be justified. There is a valid legislative objective which is compelling and substantial, that being the conservation and protection of the aquatic health in southern Alberta, and the honour of the Crown was maintained in the circumstances.

The Haida Test

[105] In *Haida*, the First Nations challenged a transfer by the Minister of a tree farm licence to cut trees on the lands of the Haida Gwaii. The government held legal title to the land. The Haida claimed title to the land and objected to the harvesting of the forests in the designated area.

[106] As it was the first case of its kind to reach the Supreme Court of Canada, Chief Justice McLachlin took on the task of establishing a general framework for the duty to consult and accommodate where Aboriginal claims have yet to be decided. This is an antecedent process requirement to government action.

[107] She said (at para. 16):

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

[108] Under the claimed rights framework, the first question to be determined is whether the Crown had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. The threshold to trigger the duty to consult is low.

[109] The next portion of the analysis requires a determination of the scope of the duty. It is at this point that the inquiry is more flexible. The scope of the duty is proportionate to the strength of the case supporting the claimed right and the seriousness of the potentially adverse effect upon the claimed right. As the merit of the claim increases and the impact of the action is more adverse, the duty to consult becomes more extensive. Conversely, claims which seem to lack merit and actions which have little or no impact will not attract a very extensive duty to consult.
[110] Let me begin with the threshold to trigger the duty.

Knowledge of the Claim

[111] It is the position of the Applicants that the Respondent has long since been aware of their asserted right to water. In 1994, Tsuu T’ina provided the Province of Alberta with Band Council Resolution 1674 which asserts that the Nation possesses Treaty water rights pursuant to Treaty 7, owns the beds of all water courses within Tsuu T’ina’s reserve, has jurisdiction over water resources within its reserve, and has water rights off-reserve in relation to Tsuu T’ina’s other Treaty and Aboriginal rights, particularly hunting and fishing rights.

[112] Counsel for the Respondent put on record that the Respondent conceded that the Respondent had knowledge of the claimed rights as early as July 16, 2003. Although the timing of said knowledge is ambiguous, on the evidence before the Court it is clear that the Crown had knowledge of the Applicants’ claimed water rights.

[113] *Haida* uses the word "might" when considering adverse impact at the threshold to trigger the duty stage. The threshold to trigger the duty is low. The mere fact a consultation process was initiated by the Crown should be sufficient to establish there was some concern that there "might" be some adverse impact. This part of the test is satisfied, so a duty to consult would be triggered. That takes us to the second stage where the extent or scope of the duty to consult is determined. As noted, two factors are balanced - the relative merit of the claim and the potential for adverse impact.

Adverse Impact

[114] Although the Court in *Haida* addresses the question of the relative merit of the claim first, I will deal with the second portion of the question, adverse impact, as the outcome of this analysis may make the question of the relative merit of the claim less important.

[115] In *Labrador Metis Nation v. Canada (Attorney General)*[12], the Labrador Metis Nation appealed the dismissal of its application for judicial review of the Attorney General's decision to stay a private prosecution. The Metis Nation brought the private prosecution against the Province of Newfoundland and Labrador alleging that the construction of bridges and a causeway by the Province was contravening their right to fish. The Federal Court of Appeal held that there was only a remote causal connection between the decision in dispute and damages to lands subject to Aboriginal rights. The Court said:

> Any adverse effects on the aboriginal rights or title claimed over the fishery result principally from the decision of the agents of the Crown who constructed the highway contrary to the approved plans, and not from the issue of the stay by the Attorney General.[13]
>
> . . . the very tenuous nature of the connection between the issue of the stay and damage to aboriginal rights is insufficient to support a duty to consult.[14]

[116] In *Ahousaht Indian Band v. Canada*[15] the Federal Court stated, at para. 36:

> **"**In this case, we are not dealing with a claim to a specific piece of land where the government might be contemplating some development project, or even the issuance of a licence to exploit resources on said land which might substantially

---

[12] 2006 FCA 393, 277 D.L.R. (4th) 60.

[13] *Labrador Metis Nation* at para. 27.

[14] *Labrador Metis Nation* at para. 29.

[15] 2007 FC 567, 4 C.N.L.R. 1.

> deplete the resource in question. Rather, we are dealing with a claim of an aboriginal right to fish commercially, in the context of a proposal by the government to implement a program of quotas with a view, first and foremost, to encourage conservation, as well as to meet a number of other objectives, such as achieving greater accountability and improving economic viability. As such, the respondent argues that, rather than infringing the applicant's alleged rights, the Pilot Plan will help protect the groundfish fisheries, for the benefit of all Canadians, including the applicants. Since there is thus no or very little adverse effect, then the scope of the Crown's duty to consult is limited".

[117] The Court in *Ahousaht* continued at para. 46:

> I am satisfied that any infringements or adverse effects on the rights of the applicants to fish commercially resulting from the Pilot Plan would be limited, particularly in light of the fact that the respondent was pursuing a compelling and substantial objective of conservation of the resource in question for the benefit of all Canadians, including the applicants. As such, it is my conclusion that the duty to consult and accommodate the interests of the applicants would have been located on the lower end of the spectrum.

[118] The Respondent submits that the SSRB Plan is ameliorative and has no adverse impact. During oral submissions, the Respondent set out the state of water management prior to the SSRB Plan and after the SSRB Plan.

[119] Prior to the SSRB Plan, there were no limits on new allocations in place. The SSRB Plan recommended a moratorium on new allocations for the Bow River, and established an allocation limit of 550,000 cubic decametres for the Red Deer River, at which point new allocations would cease until further study. Another recommendation of the SSRB Plan aimed at conservation of the aquatic environment is the establishment of water conservation objectives (WCO) for the Bow, Oldman and South Saskatchewan River basins. New licences will be subject to a set WCO, being 45% of the natural rate of flow, or the existing instream objectives plus 10%, whichever is greater.[16]

[120] When the *Water Act*, was enacted, the notion of transferable rights was a controversial issue. The government has already made the political decision. Transfers are permitted. However, the legislation permits a portion of the allocation to be withheld for environmental purposes when a transfer is approved.

[121] The SSRB Plan authorizes the use of conservation holdbacks in transfer approvals within that region. The use of such holdbacks can only be an improvement on where we were.

---

[16] Approved Water Management Plan for the South Saskatchewan River Basin (Alberta), August 2006, Alberta Environment.

[122] 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 Applicants, (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 licenses already granted. These are historical facts and not the result of the decisions under review or the SSRB Plan.

Relative Merit of the Claimed Right

[123] Although my finding with respect to adverse impact makes an analysis of the relative merits of the claim less meaningful, this point must be addressed.

[124] Tsuu T'ina is a signatory to Treaty 7 and Samson is a signatory to Treaty 6. Both treaties were modified by the NRTA.

[125] The relevant portions of Treaty 7 read as follows:

> And Her Majesty the Queen hereby agrees with her said Indians, that they shall have right to pursue their vocations of hunting throughout the Tract surrendered as heretofore described, subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty and saving and excepting such Tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by Her Government of Canada; or by any of Her Majesty's subjects duly authorized therefor by the said Government.
>
> It is also agreed between Her Majesty and Her said Indians that Reserves shall be assigned them of sufficient area to allow one square mile for each family of five persons, or in that proportion for larger and smaller families, and that said Reserves shall be located as follows, that is to say:
>
> [I]f any Band desire to cultivate the soil as well as raise stock, each family of such Band shall receive one cow less than the above mentioned number, and in lieu thereof, when settled on their Reserves and prepared to break up the soil, two hoes, one spade, one scythe, and two hay forks, and for every three families, one plough and one harrow, and for each Band, enough potatoes, barley, oats, and wheat (if such seeds be suited for the locality of their Reserves) to plant the land actually broken up. All the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

[126] The relevant portions of Treaty 6 read as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered

> and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.
>
> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their vocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.
>
> It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; …. therefor. All the aforesaid articles to be given once and for all for the encouragement of the practice of agriculture among the Indians.

[127] The Applicants also rely on the American jurisprudence in *Winters v. United Stated*[17], which expands the right to reserve land to include water rights. This issue remains undecided in Canada.

[128] The Applicants also put forward an argument based on riparian rights, an issue which also remains undecided.

[129] There are no words in either treaty which speak to specific water rights. In my view, to be successful the claimed right will have to be found as an ancillary to the treaty rights to hunt, fish and reserve land. The implications of *Lefthand* are also a factor the Court will be required to consider. I would not go so far as to classify this as "a dubious or peripheral claim"[18] but the Applicants are moving into unchartered waters and this will not be an easy case to win.

[130] The establishment of an "Aboriginal" as opposed to a treaty right would be even more problematic.

---

[17] 207 U.S. 564 (1908).

[18] To borrow the words of Chief Justice McLachlin in *Haida* at para. 37.

[131] When the potential merits of the claim is considered along with the level of adverse impact that I have found, I would place the duty to consult as being at the very low end of the scale. In the circumstances of this case, the Government has met that duty by the actions already noted above.

Other Considerations

[132] Regardless of whether I consider the government action in the context of the *Sparrow* test or the *Haida* test, there is another factor that must be considered in this situation, as the Supreme Court of Canada in *Haida* encouraged the Court to look at all the circumstances and be flexible. In that context, the urgency of the need for a plan is perhaps an additional relevant factor. Sometimes in a crisis a Government must act.

[133] The need to fast-track the approval of the SSRB Plan is perhaps best expressed in an email from Graham Statt, Director of Resource Consultation for Aboriginal Affairs which was sent on May 4, 2006, wherein he stated:

> The reality is that the province has to consider the needs and interests of all Albertans, including Aboriginal Albertans, and at this point we are in a crisis situation with respect to water and the allocation of water in the province. Alberta must make efforts to ensure that conservation and environmental concerns are addressed. The SSRB Plan is a critical and necessary first step to ensure the basin is closed to further allocations of water, which would only serve to exacerbate the issue.
>
> . . .
>
> In the end, we are government and we need to govern – but with respect to the rights and interests of the FNs. It may be that some of these issues cannot be resolved in or outside of the SSRB through negotiation and litigation may very well be the appropriate venue for those issues. In the meantime, proceeding with the Plan reinforces our view that we are in a crisis situation, and that time of the essence. I believe that our good faith efforts and clear communication in this regard goes a long way to meet the duties and honour of the Crown in light of the circumstances we are facing.

[134] The Supreme Court of Canada said in *Haida* (at para. 48):

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means is every case. Rather what is required is a process of balancing interests, of give and take.

[135] In upholding the honour of the Crown, the government is not required to abandon all other interests and duties. The duty for Government to consult with First Nations is not absolute, but rather must be accorded appropriate, albeit substantial, weight when proceeding with government action which adversely affects Aboriginal rights.

What Happens Now?

[136] Although the approval of the SSRB Plan itself did not have an adverse impact on the Applicants' Aboriginal or treaty rights, asserted or claimed, for the Government of Alberta, the water rights discussion *vis-à-vis* the Applicants is likely far from over.

[137] The statutory scheme for transfers of licences is set out in ss. 81 to 83 of the *Water Act*. The *Water Act* imposes a series of conditions precedent before the Director may approve transfers. One of the most important - that there must be an approved water management plan in place. The SSRB Plan is the first such plan.

[138] To the extent this has moved a market in water one step closer to reality, the potential for adverse impact in the future may have increased. As existing licence holders move to transfer under-utilized allocations, it would logically stand to reason that more water will be consumed, exacerbating the water shortage. That negative impact may only be partially offset by any holdbacks imposed. The Government by its own words suggests a crisis already exists.

[139] Under the SSRB Plan, the Director has the authority to allow or deny transfers, and attach conditions to those transfers which do proceed. The factors which the Director must consider are set forth in the SSRB Plan. This approval process is a potential minefield. Only time will tell whether a mine will explode.

[140] While that process is not before me, the approval of any applications for transfers appears to be administrative in nature and may very well fall within the four corners of *Haida*. To the extent it might, I should not speculate as to the scope of any duty to consult which may or may not arise in those transfer approval applications.

[141] In addition, I should note that the Respondent has in place a First Nations Consultation Policy. It is part of the record. Should the Government be allowed to disregard its own policies in transfer applications? If the Policy were not enough, the Supreme Court of Canada has said consultation when required must be real. The Brief of the Applicants suggests what happened here was not. I leave it to the Respondent to reflect whether what they actually did would meet a real test.

[142] Water shortage in southern Alberta will continue to be a concern to the Applicants, along with over a million other citizens relying on the source. Although Tsuu T'ina and Samson's concerns are valid, the SSRB Plan, which is the only issue before me, is not the cause of their problem, and having it set aside is not the solution.

[143] The Government of Alberta's latest addition to water regulation in the province is neither the villain nor the hero in this story. In the end, that is the rationale for this decision.

Should the "Duty to Consult", be declared a "Constitutional Duty to Consult"?

[144] The Applicants have sought a declaration that "Her Majesty the Queen in Right of Alberta has a legally enforceable **constitutional** duty to consult with and accommodate the Samson Cree Nation and the Tsuu T'ina Nation (the "Nations") where the Nations' existing and claimed Treaty No. 6 and Treaty No. 7 rights and Aboriginal rights are or may be affected by the SSRB Plan, including the use and enjoyment of the Nations' Reserves, lands claimed as Reserve lands, Treaty hunting and fishing rights and other Aboriginal rights, and the Nations' Treaty and Aboriginal water rights".

[Emphasis added]

[145] This declaration raises two issues. The Applicants want that declaration in respect of not only the claimed rights which are the subject matter of the Other Proceedings but also their existing Treaty No. 6 and Treaty No. 7 rights. The Applicants also want an additional word to be added to how this duty to consult is described.

[146] In *Sparrow*, the Supreme Court of Canada said (at 1105):

> It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.

[147] The Supreme Court of Canada continued (at 1109):

> 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, 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 justification of any government regulation that infringes upon or denies aboriginal rights.

[148] This is an after the fact review and as already noted prior consultation is an aspect of the justification process.

[149] In *Mikisew*, the Supreme Court of Canada stated that prior consultation is required when existing rights are affected. *Haida* extended this duty to claimed rights.

[150] It is not necessary for me to restate in a declaration what the Supreme Court of Canada has already done.

[151] In the same vein, the duty to consult is part of the evolution of our constitutional common law. Saying it is part of that evolution is quite different than saying it is in the Constitution and I decline to so declare.

Conclusion

[152] For the reasons stated above, I decline to set aside:

> 1. The Decision of the Minister (Alberta Environment) to recommend the *South Saskatchewan River Basin Water Management Plan* (the "SSRB Plan") to the Lieutenant Governor in Council for approval under the *Water Act*, R.S.A. 2000, c. W-2 on August 29, 2006; and
>
> 2. The Decision of the Crown approving the SSRB Plan pursuant to section 11 of the *Water Act* as affirmed by Order in Council 409/2006, dated August 30, 2006.

[153] With respect to the declarations sought, I decline to declare:

> 3. That Her Majesty the Queen in Right of Alberta has a legally enforceable constitutional duty to consult with and accommodate the Samson Cree Nation and the Tsuu T'ina Nation (the "Nations") where the Nations' existing and claimed Treaty No. 6 and Treaty No. 7 rights and Aboriginal rights are or may be affected by the SSRB Plan, including the use and enjoyment of the Nations' Reserves, lands claimed as Reserve lands, Treaty hunting and fishing rights and other Aboriginal rights, and the Nations' Treaty and Aboriginal water rights;
>
> 4. That the Crown Reservation recommended by the SSRB Plan did not discharge the constitutional duty of Her Majesty the Queen in Right of Alberta to accommodate Tsuu T'ina's right to use and develop its Reserve, Tsuu T'ina's Treaty hunting and fishing rights and other Aboriginal rights, and Tsuu T'ina's Treaty and Aboriginal water rights; and
>
> 5. That the Crown failed to discharge its constitutional duty to consult:
>
> > with the Samson Cree Nation regarding the Water Conservation Objective ("WCO") (implemented on January 16, 2007), and the allocation volume/limit for the Red Deer River Basin recommended by the SSRB Plan and that these recommendations and actions fail to discharge the Crown's constitutional duty to accommodate the Nations' Treaty hunting and fishing rights and other Aboriginal rights, Treaty water rights and right to use and develop Samson's Reserve; and

> with the Tsuu T'ina Nation regarding the Water Conservation Objective ("WCO") (implemented on January 16, 2007) for the Bow River Basin recommended by the SSRB Plan and that this recommendation and action fail to discharge the Crown's constitutional duty to accommodate Tsuu T'ina's Treaty hunting and fishing rights and other Aboriginal rights, Treaty water rights and right to use and develop Tsuu T'ina's Reserve.

[154] It follows from the above that there will be no order to set aside Order in Council 409/2006, dated August 30, 2006, approving the *Approved Water Management Plan for the South Saskatchewan River Basin* (*2006*).

[155] The request for an order enjoining Her Majesty the Queen in Right of Alberta from implementing the recommendations of the *Approved Water Management Plan for the South Saskatchewan River Basin* (*2006*) by alternative means and actions until it has satisfied its duty to consult with and accommodate the Samson Cree Nation and Tsuu T'ina Nation was not pursued.

Costs

[156] The matter of costs was not addressed. The parties may address this matter in the next 30 days if they wish.

Heard April 22-23, 2008.
Dated at the City of Calgary, Alberta this 4th day of September, 2008.

Sal J. LoVecchio
J.C.Q.B.A.

Appearances:

Leonard Andrychuk, Q.C. and Clayton D. Leonard
MacPherson Leslie & Tyerman LLP
for the Applicants

Sandra Folkins, Angela Edgington and Witold Gierulski
Alberta Justice
for the Respondent