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RENEWING GOVERNMENT AUTHORIZATIONS AFTER *CARRIER SEKANI*: A "NOVEL" PROBLEM

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The duty to consult and, if necessary, accommodate, is triggered by a contemplated provincial or federal government decision or act which has the potential to adversely impact established or claimed Aboriginal Title or Rights ("Aboriginal interests"). In ***Carrier Sekani,***[1] the Supreme Court of Canada recently emphasized that to trigger the duty to consult and accommodate, the possible adverse impacts must be causally related to the pending government conduct.[2] In that case, it was found that the government decision under review would have no impact whatsoever on water allocation in the Nechako River and was therefore not causally connected to the ongoing adverse impacts of a hydro-electric project which had been operating for 50 years.[3]

The Court rejected the argument of the Carrier Sekani Tribal Council that each time the government contemplates a decision or an act having anything to do with an existing undertaking, it must consult with Aboriginal groups on ongoing adverse impacts associated with the entire project.[4] Had this argument succeeded, Aboriginal groups would have been handed significant leverage in resolving outstanding claims for infringement of Aboriginal interests related to existing industrial developments. Governments would have had to consider accommodation for past infringement of Aboriginal interests in the process of making any new decisions or taking any new action in respect of existing projects.

Instead, the Court chose to use the duty to consult as a prospective tool to prevent *future* infringement of Aboriginal interests flowing from the government decision being made rather than as a means to provide a remedy for past infringements.[5] Remedies for past and ongoing infringements, including a past breach of the duty to consult and accommodate, are still available and include injunctive relief and damages.[6] However, the government need not resolve all past infringements of Aboriginal interests relating to a project before deciding or acting further in respect of that project. Only those potentially adverse impacts which are causally related the impending decision or act trigger consultation.[7]

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[1] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43.
[2] *Ibid* at para. 53.
[3] *Supra* note 1.
[4] *Supra* note 1 at paras. 47 & 48.
[5] *Ibid.*
[6] *Supra* note 1 at para. 37.
[7] *Supra* note 1.

The Problem

The decision, while unwelcome news for Aboriginal groups, might have been acceptable as being at least a rational application of the principles of consultation developed in earlier decisions. However, the Court went on to require Aboriginal groups to show that the current government decision will cause "novel" adverse impacts where "underlying" or "continuing" adverse impacts exist already.[8]

Governments have been quick to latch onto these words to limit consultation. The author was recently involved in a consultation process in Nova Scotia triggered by an application by a pulp mill for a ministerial approval under the provincial ***Environment Act*** and associated regulations. The approval would have had the effect of authorizing the discharge of contaminants from a wastewater treatment facility located on Crown land adjacent to a Reserve, where it had been operating for 40 years. The most recent approval had been issued 10 years earlier without consultation and was about to expire. Citing ***Carrier Sekani***, the Province of Nova Scotia narrowed the scope of consultation to "novel" impacts that might result under a new ministerial approval. It argued that so long as the adverse impacts under the new approval were the same as those which occurred under the old approval, there were no "novel" impacts and no duty to consult in respect of the ongoing impacts.

As discussed below, under the causal relationship test, it is clear that the decision of the Province of Nova Scotia to issue a new approval to discharge contaminants would have triggered consultation. In the absence of the new approval, the discharge of contaminants would have been prohibited under the ***Environment Act***. Relying on the presumption that persons will follow the law, for the purpose of determining whether consultation ought to take place, it could be presumed that the pulp company would have ceased discharging contaminants from the treatment facility had the new approval been denied. Clearly there would have been a causal relationship between the new approval and any future discharge of contaminants under it.

The question then is how to reconcile the "causal relationship" test with the "novel" impacts requirement in the case of renewal or reissuance of government authorizations in respect of existing undertakings.

What's at Stake?

If the Province of Nova Scotia has correctly applied ***Carrier Sekani***¸ then governments could permit the continued interference with Aboriginal interests associated with existing undertakings or even new undertakings so long as the adverse impacts did not change for the worse. These decisions could be made in perpetuity *without ever again consulting with or accommodating* affected Aboriginal groups. This would be the case no matter what the initial life expectancy of the project or the term of any permit, approval and other authorization associated with it. Aboriginal groups involved in consultation on a proposed project would have to proceed on the basis that once the project was approved, no matter what the anticipated life of the project, the adverse impacts will remain in place forever without further consultation, and would be wise to seek accommodation accordingly.

"Causal Relationship" Test

[8] Ibid at para. 49.

What does the Supreme Court of Canada mean when it uses the terms "causal relationship",[9] "causal connection",[10] or "flowing from",[11] in the context of a government decision and a possible adverse impact?

The concept of causation is fundamental to many areas of law including the law of tort, criminal law, insurance law, contract law, the law of fiduciary obligations and constitutional law. Determining when A is the cause of B seems straightforward; and yet in recent decisions, the Supreme Court of Canada has found it necessary to clarify the law of causation in criminal law[12] and in automobile insurance law[13] and has also granted leave to appeal a recent decision of the British Columbia Court of Appeal which sought to clarify the law of causation in tort,[14] demonstrating that causation is by no means clear cut.

As noted above in ***Carrier Sekani***, as in other cases, the Court uses the terms "causal relationship", "causal connection" and "flowing from" interchangeably. However, unlike in other decisions, the words are not modified by other terms such as "direct", "indirect", "substantial", "real", "proximate", "immediate" or "sole".

In ***Amos v. Insurance Corp. of British Columbia,***[15] the Supreme Court of Canada distinguished "causal relationship" from "direct" or "proximate" cause and also contrasts "causal relationship" with a connection that is merely "incidental" or "fortuitous":

> 20 In the same way, while s. 79(1) must not be stretched beyond its plain and ordinary meaning, it ought not to be given a technical construction that defeats the object and insuring intent of the legislation providing coverage. The two-part test to be applied to interpreting this section is:
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> > 1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
> >
> > 2. Is there *some* nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous?
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> This two-part test summarizes the case law interpreting the phrase "arising out of the ownership, use or operation of a vehicle", and encompasses both the "purpose" and "causation" tests posited in the jurisprudence.

In ***Vytlingam (Litigation Guardian of)* v. *Farmer,***[16] the Court referred to the "causal relationship" test in ***Amos*** as a "relaxed causation" test.

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[9] *Supra* note 1 at para. 45.
[10] *Supra* note 1 at para. 51.
[11] *Supra* note 1 at para. 53.
[12] *R. v. Nette*, 2001 SCC 78.
[13] See generally *Vytlingam (Litigation Guardian of)* v. *Farmer*, [2007] 3 S.C.R. 373 and *Herbison v. Lumbermens Mutual Casualty Co*., 2007 CarswellOnt 6628.
[14] *Joan Clements, by her Litigation Guardian, Donna Jardine v. Joseph Clements* (B.C.) (Civil) (By Leave) (34100)].
[15] 1995 CarswellBC 424 (SCC) at para. 20.

These cases confirm that "causal relationship" does not imply a connection as close as "direct" or "proximate" cause as those terms are used in tort law. However, it does imply more than a chance connection or coincidence. Thus if an adverse impact occurs on the same day that a government decision is made and the two events have no connection except that they happened to occur on the same day, there is no causal relationship. Similarly in ***Carrier Sekani***, where the power purchase agreement and the decreased water levels in the Nechako River had no relationship to each other except that they related to the same mining project, no causal relationship existed.

In ***R. v. Bryan***[17] and ***Thomson Newspapers Co. v. Canada (Attorney General)***[18] the Supreme Court of Canada reiterated that a "causal relationship" in the context of justifying a ***Charter*** breach can be established by "common sense, logic or reason" and that scientific evidence was not necessarily required. Likewise in ***Ross v. New Brunswick School District No. 15,***[19] the Court was prepared to presume a causal relationship in an obvious case without the need for scientific proof.

"Causal relationship" then can be summarized as a low threshold test for causation which is established when by evidence, common sense, logic, reason or presumption, a connection arises between two events and is above mere coincidence.

This seems appropriate in the context of determining whether the duty to consult applies to a decision or act of government for several reasons. First, the duty to consult has as its object the protection of actual or claimed constitutionally protected rights from interference by actions by the State. It is therefore better to err on the side of inclusion, rather than exclusion. Second, it is in the consultation process itself that a determination will be made as to whether and to what extent rights or potential rights will be accommodated. Weaker claims will be weeded out. Third, if a proper claim is excluded from consultation the result will be future litigation which the Supreme Court has characterized generally as expensive, time consuming and ineffective when dealing with Aboriginal claims: ***Carrier Sekan.***[20] Finally, a lower "causal relationship" threshold "corresponds to the generous, purposeful approach that must be brought to the duty to consult": ***Carrier Sekani.***[21]

Application to renewal of government approvals

In the case of the Nova Scotia ***Environment Act*** approval, as noted above, there is an obvious causal relationship between the issuance of an approval to release contaminants into the air and water and the adverse impacts caused by the discharge of those same contaminants. This is one of those cases where the Court would be inclined to use logic and reason alone, if not common sense. Without the ***Environment Act*** approval, the discharge of contaminants would be illegal and would not occur. Therefore the decision to issue a new approval would be causally related to the contamination released under the approval and would trigger the duty to consult and accommodate.

The "novel" adverse impacts problem

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[16] *Supra* note 13 at para. 11.
[17] 2007 CarswellBC 533 (SCC) at para. 39.
[18] 1998 CarswellOnt 1981 (SCC) at para. 39.
[19] 1 S.C.R. 825 (1996).
[20] *Supra* note 1 at para. 34.
[21] *Supra* note 1 at para. 43.

This would be the end of the analysis except that the Court in ***Carrier Sekani*** held that: "Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right."[22] In the case of the issuance of a new ministerial approval under the ***Environment Act***, there is an existing project (the treatment facility) which will continue to emit the same contaminants into the air and discharge the same contaminants into the water as it did under the old approval leading to the same adverse impacts that had been occurring for 40 years. On the surface it appears that there would be no novel adverse impacts. If this was the case, the Province would be correct and there would be no need to consult and accommodate.

However, if this is indeed the case, then the application of the causal relationship test and the requirement for "novel" adverse impacts lead to opposite results. Surely this is not what the Supreme Court intended. How can this result be avoided? There are at least four possibilities.

First, a "novel" adverse impact could be seen as one that would not otherwise occur without the government decision or act in question. Under this approach "novel" would incorporate a causal element such that any adverse impacts caused by the government decision or act are "novel" even if on the surface they look the same as the impacts from before. This approach has the benefit of requiring governments to take into account future impacts relating to existing projects where the government has the ability to avoid further harm in the regulatory process. Since the past adverse impacts are not causally related to the new government decision or act, accommodation or compensation for past adverse impacts would still be beyond the scope of the current consultation. This approach would be consistent with the purpose of the duty to consult, as it focuses on the prevention of future impacts arising from government conduct and would also avoid bogging down current consultations with discussions about past losses.[23]

This in fact was the approach taken by the Court in ***Carrier Sekani***. The Court focused on the Commission's finding of fact that the decision of BC Hydro to enter into a power purchase agreement for excess electricity generated by the project would have no impact on the flow of water into the Nechako River (because there would be other purchasers for the electricity in any event).[24] In that case the government had permanently given up its ability to regulate water flow into the Nechako River by way of a Final Water Licence in the 1950's.[25] If the decision to enter into a power purchase agreement might have had an impact on the Nechako River water flow, as it would have if BC Hydro was the only potential customer for excess electricity generated by the project, the result would surely have been different. However, the finding that there was no causal relationship between the decision under consideration and future water flows allowed the Court to conclude that there were no "novel" or "new" impacts.[26]

The second possibility is that the terms "underlying" or "continuous" also incorporate an element of causation. In other words, adverse impacts can only be "underlying" or "continuous" if they are causally related to an earlier government decision or act. A "causal

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[22] *Supra* note 1 at para. 49.
[23] *Supra* note 1 at para. 46.
[24] *Supra* note 1 at paras. 12-14, 77-78.
[25] *Supra* note 1 at para. 3.
[26] *Supra* note 1 at para. 14.

relationship" requires an "unbroken chain of causation".[27] The chain of causation can be broken by an intervening event.[28] In the ***Environment Act*** example, the expiration of the earlier ministerial approval would break the causal connection between the government conduct which lead to the first approval and the adverse impacts that occur after the new approval is granted. Alternatively, the new ministerial approval could be said to intervene thereby severing the causal relationship between the past decision and the future impacts. Accordingly, it cannot be said that adverse impacts are still connected to an "underlying" or "continuous" earlier breach.

The third possibility is that the "novel" impacts test does not apply where the decision at issue involves granting a government authorization such as a ministerial approval. If it does, the Court is then not concerned with whether there are new physical impacts. The Court in ***Carrier Sekani*** quoted with approval the decision of the Commission which seemed to apply this approach: "Applying this test to its findings of fact, it stated that 'a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error' ".[29] Clearly the outcome would have been different had the decision been the renewal of the 1950's Final Water Lease but as noted earlier that lease had permanently granted Rio Tinto the right to control water flow in the Nechako River and was not subject to expiration and renewal.

This approach is consistent with ***Haida Nation v. British Columbia (Minister of Forests)***, where the Supreme Court of Canada found that the province of British Columbia owed a duty to consult in respect of the renewal of long term tree farm licences even where the renewal of the licences would have no immediate changes in the method or rate of timber cutting[30].

The final possibility is that the decision to renew an approval or similar government authorization is a policy decision and as such the "novel" impacts requirement does not apply. This is consistent with ***Haida Nation*** in which the decision to renew the tree farm licences in was characterized as policy decision:

> 75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence (T.F.L.), or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64). [31]

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[27] Supra note 15 at para. 22.
[28] *Supra* note 13 at paras. 70 & 80.
[29] *Supra* note 1 at para. 14.
[30] [2004] 3 S.C.R. 511, at paras. 73-77.
[31] *Ibid* at para. 74.

Policy decisions by their nature involve prioritization, and to the extent that the government is free to make them, there is no reason why Aboriginal interests ought not to be considered. That is indeed the purpose of consultation.

Industry Expectations

The impact on industry of a requirement that all past wrongs had to be righted before any government decisions could be made was clearly in the minds of the justices in ***Carrier Sekani***. However, it must be remembered that in that case Rio Tinto had been granted a *permanent* water lease by the Province and therefore could be seen as having a legitimate expectation that its water use would continue indefinitely. It likely took this into account in the planning stages of the project and planned for a longer period to recover its capital costs.

However, when dealing with modern government authorizations which are most often time-limited and subject to various terms and conditions (one of which is often that they can be changed at any time), project owners cannot rely on the renewal or extension of permits, licences, leases and other instruments beyond their term. It must be assumed that they have factored this into their business plans and accordingly have planned for shorter periods to recover their capital investment. In the Nova Scotia example, the initial wastewater treatment agreement was for a term of 25 terms and was renewable only in the discretion of the minister. The mill owner must be presumed to have planned to recover its initial capital investment within that 25 year period. The minister was free to terminate or amend the agreement thereafter. The same can be said of the 10 year lease of the wastewater treatment facility that followed the expiration of the original agreement; the mill owner would presumably look to recover new capital investment, if any, within the ten year window afforded by the lease.

From this perspective the expectations of industry will not be frustrated by requiring consultation and accommodation with Aboriginal groups at the expiry of an existing government authorization.

Honour of the Crown

On the other hand, it is surely a legitimate expectation of Aboriginal groups that the Crown would intervene to prevent any further impacts on Aboriginal interests where it is open to the Crown to do so in the regulatory process. This, one would hope, would flow from the Honour of the Crown and the goal of reconciliation through negotiation and accommodation.

Conclusion

In ***Carrier Sekani*** the Supreme Court of Canada attempted to strike a balance between commercial certainty for existing undertakings and protecting Aboriginal interests from the future effects of current government decisions. However, the introduction of the concept of "novel" impacts as led at least one Province to restrict the scope of consultation in respect of an established undertaking unless new physical impacts would occur. This interpretation of ***Carrier Sekani*** flies in the face of the causal relationship test mandated in ***Haida Nation*** and ***Carrier Sekani***. To be consistent with the causal relationship test, a "novel" impact must be one that is causally connected to a current government decision, or conversely, one that is not causally connected to a previous government decision. The "novel" impact requirement

cannot apply to the grant of government authorizations, as these involve policy decisions which can shape the future use of a resource.

Hopefully, the position taken by the Province of Nova Scotia is not the start of a trend. If it is, the trend should be resisted vigorously, as it is totally inconsistent with the Honour of Crown, which compels the Crown to prevent the continuation of adverse impacts where it has the power to do so. There will be fewer obvious cases like ***Carrier Sekani***, in which resource rights have been permanently granted to a private corporation. The vast majority of cases will involve time-limited approvals, licences, leases, permits and other authorizations which must be reviewed, renewed or reissued from time to time. Where these have been granted in the past without consultation and adversely impact on actual or claimed Aboriginal interests, there is no compelling reason that they should be renewed without consultation and, where necessary, accommodation of affected Aboriginal interests. It is difficult to argue that industry could be taken by surprise when these time-limited authorizations expire, as corporations cannot assume that a discretionary authorization will be renewed without change and the risks of non-approval should have been factored into their business model.

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