DONOVAN AND COMPANY

BARRISTERS AND SOLICITORS

"ABORIGINAL LAW ON THE ABORIGINAL SIDE"

ABORIGINAL LAW NEWSLETTER

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OUR NEW LOGO:

A SYMBOL OF PROTECTION AND GUARDIANSHIP

Donovan & Company has welcomed the New Year with a new logo. The Bear symbolizes strength, healing, and unconditional support. As an emblem of protection and guardianship, the Bear reflects our firm's approach to aboriginal legal issues.

Our logo has been designed by Shain Jackson, Sechelt Nation member. Shain has taken a break from practicing aboriginal law to follow his passion as an artist. Shain focuses on design, production and distribution of Aboriginal artwork such as jewellery, bentwood boxes and paddles. Through his company Spirit Works, Shain has developed programs aimed at providing employment and training to Aboriginal youth, he donates time and artwork to numerous charitable organizations and he has designed and facilitated workshops aimed at providing cultural teachings for at-risk Aboriginal youth.

NOTE TO THE READER

This ABORIGINAL LAW NEWSLETTER is intended to provide our general comments on new developments in the law. The NEWSLETTER is not intended to be a comprehensive review of all developments. It is not intended to provide legal advice. Readers should not act on information in the NEWSLETTER without first seeking legal advice on the particular matters that are of concern to them.

WHAT'S INSIDE:

BECKMAN V. *LITTLE SALMON/CARMACKS FIRST NATION:* DEFINING THE CROWN'S DUTY TO CONSULT IN MODERN TREATIES

Background and Case History

In November 2010, the Supreme Court of Canada released its decision on *Beckman* v. *Little Salmon/ Carmacks First Nation*. This decision helps clarify the law developing on the nature and application of the Crown's duty to consult with and accommodate Aboriginal peoples. Mr. Justice Binnie, who delivered the reasons of the majority, held that where a modern treaty sets out a consultation process, neither a First Nation nor Canada can claim that there is an additional, lower or different consultation process that must be followed. A modern treaty is reached through government-to-government negotiations between a First Nation, the government of Canada and, at times, the provincial or territorial government. The Little Salmon/Carmacks First Nation Final Agreement was negotiated between the Little Salmon/Carmacks First Nation, the federal and the territorial government.

The crux of this dispute was whether the Crown had a duty to consult and accommodate a First Nation on an issue where the Treaty did not provide for a process of consultation. The territorial government had approved a grant of 65 hectares of land for agricultural use to a Yukon resident. The land applied for was within a Little Salmon/Carmacks First Nation's trapline but surrendered by the Little Salmon/ Carmacks First Nation pursuant to the Little Salmon/Carmacks First Nation Final Agreement. The Yukon government approved the land grant at a meeting that the Little Salmon/Carmacks First Nation was invited to but did not attend.

The trial court held that the government had not met the duty to consult by merely providing Little Salmon/Carmacks First Nation with notice of this opportunity to make their views known. This decision was appealed to the Court of Appeal. The Court of Appeal disagreed with the trial court and held that the duty to consult was met by the territorial government. This decision was appealed to the Supreme Court of Canada. The Supreme Court upheld the Court of Appeal's decision but rejected the government's argument that the Treaty excluded the duty to consult because it did not provide for consultation regarding agricultural land grants.

WHERE A MODERN TREATY SETS OUT A CONSULTATION PROCESS, NEITHER A FIRST NATION NOR CANADA CAN CLAIM THAT THERE IS AN ADDITIONAL, LOWER OR DIFFERENT CONSULTATION PROCESS THAT MUST BE FOLLOWED

The Supreme Court of Canada's Ruling

Little Salmon/Carmacks won on its legal point but lost the case. The Supreme Court held that the Crown did owe the First Nation a duty to consult, but held that the duty was met on the facts of this case. The Supreme Court noted that the first step is to look at the Treaty provisions to determine the parties' obligations. While consultation may be shaped by an agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. The honour of the Crown is a doctrine that applies independently from the intention of the parties as expressed or implied by a modern treaty.

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BECKMAN V. *LITTLE SALMON/CARMACKS FIRST NATION, CONTINUED.*

In this case, despite the silence of the Treaty, a continuing duty to consult still existed. Members of Little Salmon/Carmacks possessed an express Treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such a possibility, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks. The Yukon government was therefore required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects.

THE SCOPE OF THE CROWN'S DUTY TO CONSULT WAS AT THE LOWER END OF THE SPECTRUM IN THIS CASE GIVEN THE MINOR ADVERSE IMPACTS OF THE GRANT, THE EXISTENCE OF THE MODERN TREATY AND LEGISLATION IN PLACE TO IMPLEMENT IT.

The territorial government was required to be informed about and consider the nature and severity of any adverse impacts of the proposed grant and to determine whether accommodation was necessary or appropriate. Before issuing the grant, the territorial government considered the potential adverse impacts of the grant and concluded that these impacts would not be significant. For this reason, and given the existence of the Treaty surrender, the legislation in place to implement the Treaty and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the Supreme Court concluded that the scope of the Crown's duty to consult in this situation was at the lower end of the spectrum. The purpose of consultation, the Supreme Court added, was not to re-open the Treaty or to renegotiate the availability of the lands for an agricultural grant. Rather, consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted reconciliation.

In this case, the duty of consultation was discharged. Little Salmon/Carmacks acknowledged that it received appropriate notice and information. The Little Salmon/Carmacks objections were made in writing and they were dealt with at a meeting which Little Salmon/Carmacks was entitled to be present (but failed to attend). Both Little Salmon/Carmacks' objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved agricultural land tenure application. The Supreme Court held that neither the honour of the Crown nor the duty to consult required more. While the Yukon government had a duty to consult, there was no further duty of accommodation on the facts of this case.

Implications of the *Beckman* v. *Little Salmon/Carmacks* Decision

The *Beckman* v. *Little Salmon/Carmacks First Nation* decision will affect First Nations in several ways. First Nations do not have to provide for consultation processes for every government decision that could infringe a First Nation's treaty rights. There is a risk, however, that the Court recognized obligations will require only a low level of consultation.

Increasingly, the government's duty to consult is being clarified through the courts. In *Haida Nation*, the Supreme Court of Canada established that the Crown must consult with the relevant aboriginal groups when a course of action could negatively affect their aboriginal rights. By explaining the application and implications of the Crown's duty to consult in the context of modern day treaties, the Supreme Court of Canada has helped this well established concept to evolve.

RIO TINTO ALCAN INC. V. *CARRIER SEKANI TRIBAL COUNCIL:* ADMINISTRATIVE TRIBUNAL'S DUTY TO CONSIDER THE "DUTY TO CONSULT"

Background and Case History

The Kenny Dam was built on the Nechako River in the 1950s for the production of hydroelectric power to run an aluminum smelter. Water is diverted through a tunnel through a mountain to generate electricity at the Rio Tinto Alcan Kemano hydro facility. Since the 1960s, Rio Tinto Alcan (Alcan) has sold excess power generated by the dam to BC Hydro under Energy Purchase Agreements. The 2007 Energy Purchase Agreement (2007 EPA) committed Alcan and BC Hydro to a commercial contract for sale and purchase of excess power from the Kemano site until 2034. The Carrier Sekani Tribal Council (CSTC) claims the Nechako Valley as an ancestral homeland, an Aboriginal right to fish in the Nechako River, and that the dam infringes these rights.

The 2007 EPA was submitted to the BC Utilities Commission (BCUC) by BC Hydro and Alcan for approval. The first step in BCUC's process was a preliminary decision regarding the scope of the hearing. The Commission's scoping order determined that Aboriginal consultation was relevant to the same extent as consultation of all stakeholders' interests.

The CSTC was not a participant in the original scoping decision, but successfully applied for late intervener status and requested BCUC to reconsider its scoping decision. On a reconsideration of the application, BCUC asked whether it had jurisdiction to consider issues of Crown-Aboriginal consultation. BCUC held that pursuant to its general power to decide issues of law it was able to consider constitutional issues, including whether the Crown met its constitutional duty to consult with the CSTC. BCUC found, however, that the 2007 EPA would not have any direct adverse physical impacts on the Nechako River or its fisheries. BCUC, therefore, refused to rescope the hearing to include the consultation issue.

The CSTC appealed BCUC's decision to the B.C. Court of Appeal. The Court of Appeal concluded that BCUC erred by not including aboriginal consultation in the scope of factors it considered in the context of the approval of the 2007 EPA. This decision was appealed to the Supreme Court of Canada.

The Supreme Court of Canada's Ruling

The Supreme Court of Canada allowed the appeal and reinstated BCUC's decision. The Supreme Court agreed with BCUC's conclusion that, on the basis of the evidence before BCUC, the 2007 EPA would not result in any potential impacts on the CSTC's aboriginal interests. The Supreme Court also confirmed the Court of Appeal's finding that BCUC was legally obligated to consider the issue of consultation. At the time of its decision the *Utilities Commission Act* required the Commission to consider "any other factor that the Commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest. BCUC, therefore, had an obligation to decide constitutional issues related to the duty to consult. Note that while the *Utilities Commission Act* was amended in 2008, the Commission still must consider whether energy supply contracts are in the public interest and decide constitutional issues related to the duty to consult.

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RIO TINTO ALCAN *INC.* V. *CARRIER SEKANI TRIBAL COUNCIL, CONTINUED.*

The Supreme Court also confirmed its ruling in *Haida Nation*. The duty to consult arises when the Crown has real or constructive knowledge of a potential Aboriginal claim or right, when there is Crown conduct or a Crown decision, and where there is a possibility that the Crown conduct may affect the Aboriginal claim or right. The Court added that, "If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order".

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The duty to consult is a constitutional duty invoking the honour of the Crown; it cannot be ignored. If a tribunal is incapable of considering the duty to consult, then the Aboriginal peoples affected must seek appropriate remedies in the courts.

One of the critical issues of this case was whether a historic breach of the duty to consult was sufficient to trigger a duty to consult. The Court held that past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. The duty to consult is triggered when the present decision has the potential of causing a novel adverse impact on a present claim or existing right. The focus is on whether there is a claim or right that may be adversely impacted by the current government conduct or decision, not on the past or continuing adverse impacts. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

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Implications of the Supreme Court of Canada's Decision

The Supreme Court of Canada's decision in *Rio Tinto* confirms the existing law on consultation and accommodation. The decision affirms that an administrative body may have an obligation to assess the adequacy of Crown consultation. It also clarifies that BC Hydro, as an agent of the Crown, must act in accordance with the honour of the Crown and consult with First Nations. Consultation, however, is limited to the impact on claimed rights flowing from the current action or decision that is being contemplated. Past and existing infringements are properly the subject of negotiations and compensation. First Nations should be cautious to not compromise these remedies in any agreements that may be reached on current activities.

R. v. *ROBERTSON:* EXPANDING INCOME TAX EXEMPTIONS

Background and Case History

In *R.* v. *Robertson,* the Tax Court of Canada held that two aboriginal fishermen's income earned from commercial fishing was exempt from income tax.

The Minister of National Revenue (as part of the Canada Revenue Agency) had ruled that fishing income was subject to income tax. The Norway House fishermen appealed this decision, arguing that their income benefits are exempt from taxation by virtue of s. 81 of the *Income Tax Act*, s. 87 of the *Indian Act* or the provisions of Treaty No. 5. They also argued that the *Income Tax Act* infringes an existing aboriginal right contrary to subsection 35(1) of the *Constitution Act, 1982*.

Section 87 of the *Indian Act* protects an Indian's or band's personal property situated on reserve band from tax.

Determining Whether Income is from Indian Property on the Reserve

Section 87 of the *Indian Act* protects an Indian's or band's personal property situated on reserve from taxation. The courts have concluded that income is personal property. The question is always where that income is located: on- or off-reserve? In this case, the Court concluded that the income earned from the commercial fishing is property on the reserve and was therefore tax exempt under s. 87 of the *Indian Act.* Taxing this income would erode the Norway House Cree's entitlement to tax-free income earned on-reserve.

In this case, the Court concluded that the income earned from the commercial fishing is property on the reserve and was therefore tax exempt under s. 87. Taxing this income would erode the Norway House Cree's entitlement to tax-free income earned on reserve.

In order to reach this conclusion, the Court considered the factors that connect the property to the reserve in a meaningful way. These "connecting factors" include the purpose of the exemption, the type of the property in question, and the nature of the taxation of that property. Additionally, the Court looked at how intimately the activity or property was connected to the reserve and whether the property was an integral part of the reserve and traditional ways of life.

The Court focused on the location of the fishing activities, the role of the Norway House Fisherman's Co-operative, which manages the fishermen, and the extent that current fishing practices were part of the "commercial mainstream". First, the Court concluded that a tax exemption could apply even though some of the fishing activities were located off-reserve. Second, the Court held that the Co-op's central role was to represent its members as Indians on-reserve even though a purely contractual analysis would indicate the income as being located off-reserve. Third, the Court noted that the Norway House Cree had chosen to pursue a traditional livelihood. The accessibility of globalized and "commercial markets" did not prejudice or diminish the traditional importance of fishing to aboriginal life on the reserve. For these reasons, fishing income of the two members was exempt from tax under s. 87 of the *Indian Act*.

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R. v. *ROBERTSON:* EXPANDING INCOME TAX EXEMPTIONS,

The Court supported its conclusion that commercial fishing income was tax exempt by closely examining the relevant treaty, Treaty No. 5, and Norway House's historical fishing practices. Treaty No. 5 affirmed that the Norway House Cree fished as an avocation and trade. Their ancestral hunting and fishing tradition was confirmed by Norway House's historical fishing trade with the Hudson's Bay Company. According to the Court, this interaction was "pivotal" to its analysis on the commercial nature of the fishing activities of the Native people of Norway House.

While Treaty No. 5 helped establish the historical importance of Norway House's fishing practices, the fishing income was ultimately tax exempt because of s. 87 of the *Indian Act*. Since the fishing income was exempt under s. 87 of the *Indian Act*, the Court did not analyze s. 35(1) of the *Constitution Act, 1982*. The Court did, however, emphasize that the connecting factors, treaties and statutes relating to Indians should be liberally construed and doubtful expressions should be resolved in favour of the Indians. Statutes and treaties should be interpreted to favour a tax exemption, rather than denying it.

Setting Precedents

R. v. *Robertson* sets an important precedent for tax exemptions for First Nations. This case helps to displace a "commercial mainstream" analysis by focusing on whether the income is being earned as an Indian as part of their customary way of life on the reserve. The Court focused on the importance of fishing to the community and stated that protecting the economic base of life on a reserve was one of the main goals of a tax exemption under s. 87 of the *Income Act*. In light of these considerations, the Court reiterated that treaties and statutes should be liberally applied in favour of Indians. This type of precedent creates greater opportunities for First Nations to protect from taxation income generated from property or activities connected to, or integral to the reserve.

In December 2010, the government appealed this decision. It is likely that the appeal will be heard later this year. We will keep you posted.

IMPORTANT DEADLINE: SURVIVORS HAVE A LIMITED TIME TO CLAIM FOR RESIDENTIAL SCHOOL ABUSE

INDEPENDENT ASSESSMENT PROCESS (IAP)

Since September 2007, Survivors of Indian Residential Schools have been bringing forward compensation claims through the Independent Assessment Process. This out-of-court process provides compensation to Survivors who suffered sexual abuse, physical abuse or other wrongful acts during their time at a residential school. ***Those Survivors who may have a claim, but have not yet applied, should be aware of the time limits for the IAP***. Prior to the Indian Residential School Settlement Agreement, a Survivor could sue Canada and the Churches for sexual abuse when they were ready to do so. In British Columbia, the *old rules* were that a lawsuit for sexual abuse did not have any legal time limits. The *Indian Residential School Settlement Agreement* changed all of that. There is now a **strict legal deadline** for filing an application to obtain compensation for residential school abuse (sexual, physical or other wrongful acts). The Agreement sets an "IAP Application Deadline". Now all claims must be filed within a five-year window. This means that the IAP Secretariat will only be accepting IAP applications until **September 19, 2012**.

> There is now a strict legal deadline for filing an application to obtain compensation for residential school abuse. All Cep claims must be filed by September 19, 2011 and all IAP claims filed by September 19, 2012.

It is important that all Survivors are aware of the IAP Application Deadline because the *Settlement Agreement* also took away their right to go to court. Unless a survivor opted out of the class action settlement (the deadline for opting out has already passed), the IAP is the only option to be compensated for abuse. **If a residential school survivor does not submit an IAP Application before September 19, 2012, they will lose their chance to obtain compensation for the harms they suffered at residential school.**

COMMON EXPERIENCE PAYMENT (CEP)

The Common Experience Payment is a component of the Indian *Residential Schools Settlement Agreement*. The CEP recognizes the experience of residing at an Indian Residential School and its impacts. All former residents who resided at one or more recognized Indian Residential Schools and who were alive on May 30, 2005 will be eligible for the CEP, as long as they did not opt out or were not deemed to have opted out of the settlement agreement.

Eligible applicants may receive $10,000 for the first school year (or partial school year) of residence at one or more residential schools, plus an additional $3,000 for each subsequent school year (or partial school year) of residence at one or more residential schools. Eligible recipients will receive a one-time payment of their full CEP entitlement. **The deadline to apply for the CEP is September 19th, 2011.**

CONSULT A LAWYER

Survivors should consult a lawyer to determine if they have a claim under the CEP and/or the IAP and submit their application *before the deadline* to ensure that their rights are protected.

For more information on Indian Residential Schools matters, please call Karim Ramji or Niki Sharma at 1-866-688-4272. Your talk with Karim or Niki is completely free of charge and the number provided above is toll free.

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Donovan & Company:
"Aboriginal Law on the Aboriginal Side"
Energy and Experience

Donovan & Company provides services in all areas of aboriginal practice including litigation, specific claims, treaty negotiations, residential schools claims, aboriginal business issues, corporations, trusts, natural resource ventures, tax matters, negotiations with government and industry, and other issues faced by First Nations.

The lawyers at Donovan & Company practice exclusively in the service of Aboriginal Nations and Aboriginal peoples concerning a wide range of issues. Please feel free to contact any one of us at any time.

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