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## Constitutional Questions and the Alberta Energy Regulator

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**Decisions commented on:** (1) [ERCB Letter Decision, April 18, 2013](#), re Fort McKay First Nation, Notice of Question of Constitutional Law; (2) [ERCB Letter decision, May 23, 2013](#), reasons for decision in relation to Fort McKay First Nation, Notice of Question of Constitutional Law; (3) [2013 ABAER 014](#), Dover Operating Corporation, Application for a Bitumen Recovery Scheme Athabasca Oil Sands Area, August 6, 2013; and (4) *Fort McKay First Nation v Alberta Energy Regulator*, [2013 ABCA 355](#)

The Alberta Court of Appeal has granted leave to the Fort McKay First Nation (FMFN) to appeal two questions of law or jurisdiction in relation to decisions made by the Energy Resources Conservation Board (ERCB) (the predecessor to the Alberta Energy Regulator (AER)) and the AER itself in approving, subject to the further approval of the Lieutenant Governor in Council, Dover's application for a major steam assisted gravity drainage (SAGD) bitumen recovery project. The two questions on which leave was granted are as follows:

- (a) Whether the Tribunal erred in law or jurisdiction by finding that the question whether approval of the project would constitute a meaningful diminution of the Treaty rights of the Fort McKay First Nation and therefore be beyond provincial competence was not a question of constitutional law as defined in the *Administrative Procedures and Jurisdiction Act*;
- (b) Whether the Tribunal erred in law or jurisdiction by finding that it had no jurisdiction to consider constitutional issues other than those defined as "questions of constitutional law" in the *Administrative Procedures and Jurisdiction Act*.

This is a significant development since to this point it has proven to be extremely difficult for First Nations in Alberta to persuade the Court of Appeal to grant leave on ERCB/AER decisions where the effect of the activities carried out pursuant to the relevant decision will arguably impair treaty based hunting rights or other aboriginal or treaty rights. The decision also creates significant uncertainty for the developer in this particular case.

In other posts I have commented on previous decisions of the ERCB in which the ERCB declined to answer constitutional questions with respect to the discharge of the Crown's duty to consult and accommodate on the grounds that such questions fell outside the jurisdiction of the Board, not because they were constitutional questions *per se* but because these issues fell outside the jurisdictional scope of the Board's responsibilities under its substantive statutes. See "Duty to consult application is premature – what's the big deal?", [here](#), commenting on the Joint Review Panel's decision in the Jackpine Mine application and the subsequent (unsuccessful) leave to appeal application, and "Who decides if the Crown has met its duty to consult and accommodate?", [here](#).

Since then the *Responsible Energy Development Act*, SA 2012, c.17 (*REDA*) has entered into force (June 17, 2013). One of the significant features of that new statute is that it makes it clear (s 21) that while in general the AER still has the jurisdiction to determine constitutional matters that arise in the course of making its decisions (see Designation of Constitutional Decisions Makers Regulation (AR 69/2006) passed pursuant to the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3 (*APJA*)) the AER has no authority to assess the adequacy of Crown consultation with respect to the rights of aboriginal peoples.

In this post I review the following questions: (1) What were the constitutional issues that the FMFN put before the ERCB? (2) What did the ERCB decide? (3) What did the AER decide in its August decision on the merits? (4) What were the matters on which the Court of Appeal granted leave? (5) What were the matters on which the Court of Appeal declined to grant leave? (6) What happens now? and (7) The AER's policy in deciding what to publish on the web – Bankes as a broken record.

### **(1) What were the constitutional issues that the FMFN put before the ERCB?**

FMFN filed a notice of questions of constitutional law (NQCL), which posed the following two questions:

1. Would approvals sought by Dover ... if granted, constitute a *prima facie* infringement of the rights guaranteed by Treaty 8, s. 35 of the *Constitution Act, 1982* and the *Indian Act*, so as to be of no force or effect or otherwise inapplicable by virtue that the Province of Alberta has no jurisdiction over Indians and Lands Reserved for the Indians under s. 91(24) of the *Constitution Act, 1867* (“Inter-jurisdictional Immunity Argument”)? [Constitutional Question No. 1]
2. Has the Crown discharged its duty to consult and accommodate Fort McKay with respect to adverse impacts arising from the proposed project upon the rights guaranteed to Fort McKay pursuant to Treaty 8, s. 35, and the *Natural Resources Transfer Agreement* (“Inadequate Consultation Argument”)? [Constitutional Question No. 2]

The bracketed labels seem to have been supplied by FMFN. The first label is somewhat misleading insofar as the question seems to raise constitutional questions of both *validity* and *applicability*. Validity is not an issue in an applicability argument. Thus in the present case it is clear that the province has the jurisdiction to make a law like the *Oil Sands Conservation Act*, RSA c. O-6 (*OSCA*); the only issue is whether it is applicable to these particular lands or in this particular set of circumstances. Since the project will not take place on reserve lands (although it may affect reserve lands) the argument of the FMFN (once they get to make it) must presumably be that while the *OSCA* would ordinarily be applicable to these lands, it ceases to be applicable where the project, if authorized, would breach FMFN's treaty rights. Such treaty rights are part of the core content of s 91(24), (Indians and lands reserved for Indians) of the *Constitution Act, 1867*. The FMFN must allege that the breach of treaty rights would occur in this case because the substantive limits of the Crown's power to take up lands under the treaty have been reached, since (it must be alleged) there is no longer an adequate land base on which to meaningfully exercise the right to hunt. It will be observed that this argument is necessarily a form of cumulative effects argument.

### **(2) What did the ERCB decide?**

In its letter decision (LD) of May 2013 the Board decided that it lacked the jurisdiction to consider these specific constitutional questions.

With respect to question # 1 the Board took the view (LD at 8) that this question was not a question of constitutional law within the meaning of the *APJA* and “for that reason the Board is not authorized to consider it.” The *APJA* defines a question of constitutional law as follows:

(i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*.

Since a Board approval is not an enactment and the FMFN was therefore not contesting the validity of an enactment the validity part of clause (i) was not relevant. But the Board also disposed of the applicability track of clause (i) on the grounds that the applicability analysis would require the Board to assess the core content of a federal head of power (here, s 91(24), Indians and Lands Reserved for Indians) and that, according to the Board, fell outside its legislated mandate under its various statutes (LD at 9):

There is nothing in its mandate .... which cloaks the ERCB with the authority to determine the “basic minimum unassailable core” of a federal head of power or to determine if the exercise of that core is impaired. As the Board does not have the jurisdiction to make the enquiries required to answer Question # 1, it cannot have jurisdiction over that question.

This conclusion must be wrong for the simple reason that in an applicability analysis the decision maker (court or tribunal) must always start by assessing the core content of the federal head of power. Since it is unlikely that the provincial legislature will ever confer this authority expressly, the Board is effectively saying that a tribunal can never consider the applicability of a provincial law even where that tribunal has been listed under the *APJA* and even though the *APJA* expressly refers to applicability as well as validity. In short, the Board’s reasons prove too much since they deprive the reference to applicability in the *APJA* of any meaning.

There may also be a problem with the first part of the analysis (i.e. the *validity* part of the analysis) which is that if the Board interprets the term “question of constitutional law” too narrowly there is a risk that a court may turn around and say that that may be appropriate as an interpretation of the statutory term but it is so narrow that it does not encompass all possible constitutional questions. Perhaps a more appropriate way to put this point is that a reviewing court will say the following: (1) review of the interpretation of the term “question of constitutional law” should proceed on the basis of the standard of correctness; (2) a narrow interpretation of “constitutional question” would undermine the purpose of the notice provisions of the statute (and because of the argument described in the previous sentences) and accordingly the Board’s interpretation should be rejected.

The Board was also of the view that it had no jurisdiction under clause (ii) of the definition of questions of constitutional law. The Board’s reasoning on this point is somewhat obscure (LD at 8 – 9) but in general the Board seems to be saying that while FMFN was seeking a determination

on the meaning or scope of its rights, that was not a necessary part of the Board's jurisdiction in assessing the project before it:

The panel is also satisfied that its mandate, as set out in the sections of the ERCA and the OSCA ... does not ... extend to determining the meaning and scope of Aboriginal rights including the right to reserve lands. The Board's mandate ... is to consider ... if energy matters [sic] meet the Board's technical requirements and are in the public interest having regard to any social, economic or environmental impacts which may emanate from these matters. Neither part of this mandate, whether the technical review or considering impacts, encompasses defining the extent of Aboriginal rights.

### **(3) What did the AER decide in its August decision on the merits?**

In its decision on the merits of Dover's application (2013 ABAER 014) the AER addressed seven issues: (1) the need for the project, (2) the Lower Athabasca Regional Plan (LARP), (3) resource recovery, (4) environmental effects, (5) traditional land use, (6) FMFN's proposal for a 20 km buffer zone around its reserves, and (7) social and economic effects. In addition, the AER largely reaffirmed the position that the ERCB had taken in its letter decision with respect to the constitutional issues raised by FMFN, with the additional qualification (at para. 32) that the new s.21 REDA further precluded the AER from considering any matters relating to the duty to consult.

Dover's project is a large scale project. Dover's leases cover some 376.8 sq km and Dover estimates that they contain about 4.1 billion barrels of recoverable bitumen. Dover proposes that the project will proceed in a number of phases with two central processing facilities. Maximum production is estimated at 250,000 barrels per day and the project will produce over a 65 year period. The Dover property is located northwest of Fort McMurray and some of the producing wells will be located within 1.5 kms of the Moose Lake Reserves of the FMFN.

The need for the project was established on the basis of the need to recover the identified reserves. The applicant and the Board relied on LARP as evidence that the province favoured development of this resource, i.e. the project is located in an area that is designated for oil sands development under LARP (at paras 44 – 46). The configuration of the identified reserves favoured development of the deeper reserves first in order to maximize resource recovery.

Under the environmental effects heading the AER considered water use, Dover's environmental impact assessment and cumulative effects, wildlife (including a modeling report based on [ALCES](#)), access management, sulphur recovery and odours, emissions and air quality. The AER approved the plans to use principally non-saline water for the project (at paras 107 – 108) (no apparent requirement to consider alternatives). On the important subject of cumulative impacts the AER seemed dismissive, commenting that *predictions* of cumulative impacts were not very useful ("What is more important are the actual effects detected through monitoring", para 110) and further noting the AER process was concerned with project level effects. Broader policy objectives could be achieved through the terms of the order in council approval and through other policies that fell within the jurisdiction of Alberta Environment and Sustainable Resource Development (AESRD). The not so subtle message in all of this is that if it's in the LARP (or any other regional plan) we'll take account of it; if it isn't then (as in pre-ALSA days) cumulative effects are not our responsibility.

The AER was scarcely more forthcoming with respect to the impacts on wildlife and the related matter of the ALCES. Yes, the AER was concerned about potential declines in woodland caribou (a threatened species) but some mitigation matters (deer and wolf population control programs) were the responsibility of others; while the ALCES program apparently tended to over-estimate project-scale impacts all leading to the rather lame exhortation *encouraging* (not even “should” and certainly not “must”):

[122] Dover to work with other in situ operators and ESRD to develop and implement appropriate, regionally-based monitoring and compensation programs that would offset the effects of oil sands development on caribou habitat. These plans could inform the decisions of regulatory agencies issuing surface dispositions on Crown lands.

All of this suggests that unless regional plans under *Alberta Land Stewardship Act*, SA 2009, c. A-26.8 (*ALSA*), deal prescriptively with issues of thresholds and cumulative effects the AER, like its predecessor, will continue to go through this ritualistic washing of hands.

The AER returned to the subject of cumulative impacts under the heading of traditional land use concluding that:

[174] While the Panel understands the importance of its traditional territory to Fort McKay and acknowledges that there will be some localized adverse effects from the project, it finds that the disturbance levels will not prevent Fort McKay from exercising its traditional land use activities in the Moose Lake Reserves area or regionally.

Finally (and here I am passing over the Panel’s treatment of social and economic effects), the Panel dealt with FMFN’s proposals for a 20km buffer zone between the project area and the FMFN’s reserve. While acknowledging the value of such an area as a refugium the AER appeared to give several reasons for rejecting the proposal. The first reason was that a similar proposal had been proposed (and presumptively rejected) under the LARP process (at para. 205). Second, the FMFN had plenty of other areas within its traditional territory which supported traditional activities. (I can only assume that the AER is familiar with Justice Binnie’s trenchant response to this “let them eat cake argument” in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 45 - truffles in that case). Third, while drilling and production might occur close to the reserve, Dover’s activities were some distance from the settlement area of the reserve such that (at para 208) “community members in the Moose Lake settlement area are unlikely to hear, smell, or see Project-related activities.” Fourth and finally, the creation of a buffer zone would preclude recovery of over a billion barrels of oil. This would create an “adverse impact on the project” which was “not acceptable”. Why was it not acceptable? Here the reasoning becomes circular:

[210] The Panel therefore finds that the economic impacts on the province and regional municipality of establishing a buffer are significant and would not be in the public interest.

(Emphasis added)

Thus, while the AER agreed that it had “the authority to create a setback between a project and adjacent lands .... given that there would be little if any impact on the Moose Lake Reserves lands directly, it is not necessary or in the public interest to impose the requested buffer.”

#### **(4) What were the matters on which the Court of Appeal granted leave?**

The applicants applied for leave on four questions. Justice Frans Slatter as noted above, granted leave on the first two questions which raised questions of constitutional law (at least in a general sense – the question of whether or not they are *real* questions of constitutional law within the meaning of the *APJA* presumably remains to be determined).

(a) Whether the Tribunal erred in law or jurisdiction by finding that the question whether approval of the project would constitute a meaningful diminution of the Treaty rights of the Fort McKay First Nation and therefore be beyond provincial competence was not a question of constitutional law as defined in the *Administrative Procedures and Jurisdiction Act*;

(b) Whether the Tribunal erred in law or jurisdiction by finding that it had no jurisdiction to consider constitutional issues other than those defined as “questions of constitutional law” in the *Administrative Procedures and Jurisdiction Act*;

It should be observed that these questions differ from the specific questions of which the FMFN gave notice in its Notice of Constitutional Questions in two respects. First, the FMFN is no longer raising a duty to consult argument. This makes sense in light of s.21 of *REDA*. Second, the questions are now focused on the definition of the question of constitutional law in the *APJA* and the implications of that definition. Some of the parties on the application for leave to appeal tried to make something of the differences between the constitutional questions as originally formulated and the grounds of appeal but Justice Slatter took a more robust view ruling that the matters raised in the first two questions of the leave application fell within the earlier Notice.

That said, Justice Slatter offers very little in support of his conclusion that leave to appeal should be granted in this case on these two grounds. In particular, while he refers (at para 7) to *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 as a principal authority for the criteria that an applicant must satisfy in order to obtain leave, Justice Slatter does not even recite those criteria, let alone apply them in a rigorous manner to the case at bar. Given the many similar cases in which the Court has denied leave Justice Slatter has, I think, missed an opportunity to provide some guidance to the regulatory bar as to why this was such an easy case by comparison with some of the earlier cases.

#### **(5) What were the matters on which the Court of Appeal declined to grant leave?**

Justice Slatter declined to grant leave on the third and fourth issues raised by FMFN:

(c) Whether the Tribunal erred in law or jurisdiction by reason of its narrow interpretation of its inquiry jurisdiction and its remedial jurisdiction to consider and respond, respectively, to cumulative environmental effects; and

(d) Whether the Tribunal erred in law or jurisdiction by reason of the process through which it purported to make findings respecting project impacts on constitutionally protected Treaty rights of the Fort McKay First Nation.

In essence Justice Slatter concluded that the AER had not refused to consider cumulative effects as part of its decision had done so, at least to a limited degree. Since it had done so there could be no question of law or jurisdiction (at paras 17 – 18). While I can see the argument that if the AER did consider cumulative effects then the applicants are simply arguing that the AER did not give this evidence sufficient weight and that can never be a question of law or jurisdiction, there must come a point at which the treatment of a matter is so cursory or dismissive that such (non) treatment can be characterized as raising a point of law or jurisdiction. I suggest (see my comments in part 2 above on the AER's treatment of cumulative effects) that we must have been close to that line here. But in any event I think that the more serious issue as I hinted at in part 1 of this post is that the constitutional and cumulative effects arguments are actually inextricably linked. At some point FMFN must be forced to argue that the AER's treatment of cumulative effects was so cursory that it could not form an opinion as to whether or not the provincial power to authorize a project had become inapplicable.

Is there then some risk that the panel that hears the appeal will rule that Justice Slatter's decision precludes FMFN from framing the issue this way? I don't think so. I think that the better response is that while the AER did consider cumulative effects it never considered the implication of those cumulative effects in the context of the constitutional argument but only in the context of the discharge of its statutory responsibilities. Thus the remedy, if this is the way things go, is for the Court of Appeal to send the matter back to the AER with the instructions to assess the question of applicability in light of the cumulative effects of activities authorized by the Crown in taking up lands in the traditional territories of the FMFN.

## **(6) What happens now?**

There has been much discussion in the media (see for example, Dan Healing, "[Athabasca Oil shares sink on band appeal](#)" Calgary Herald, October 22, 2013, C4) about the next steps for the Dover (now Brion Energy) project. It has been correctly observed that the granting of leave to appeal does not itself suspend the AER's decision; but the AER's decision is not itself enough for Dover/Brion to proceed since the AER's decision must be confirmed by order of the Lieutenant Governor in Council (LGiC). While the LGiC could, as a matter of law, proceed to confirm the AER's decision (assuming it is satisfied that the Crown has fully discharged its duty to consult and accommodate, see here Robert Janes' comment on "[What's the big deal?](#)") it may wish to delay doing so. In either event the result is uncertainty for Dover/Brion until the matter can be heard and decided by the Court of Appeal.

## **(7) The AER's policy in deciding what to publish on the web – Bankes as a broken record.**

Anybody who has followed my posts on ABlawg relating to both the ERCB and the AER will know that I have a bit of a thing about the ERCB/AER and transparency ("bit of thing" might be understating it, a prominent member of the Calgary bar recently accused me of missionary zeal in relation to some of my posts, not I think in relation to this issue, but if the cap fits ...). In particular, I have questioned why the Board/Regulator does not post its letter decisions, especially where such decisions are on significant points of statutory interpretation or other points of law: see in particular "The letter decisions of the Energy Resources Conservation Board" [here](#). It seems especially bizarre not to do so when one considers what both the Board and the Regulator do publish. Visitors to the ERCB's website over the last few years will have noticed that the Board regularly took the trouble to issue written reasons in which it said little

more than this: “The application has been granted. A party with intervenor status has now withdrawn its objection. Accordingly the matter has been processed as a routine application.” Sometimes the Board even published decisions in which it told us that the applicant had withdrawn its application. While such matters might, just might, merit a press release I have no idea why they are included in a catalogue of Board decisions. It is dismaying to me that the AER is continuing this practice (see for example, [2013 ABAER 012](#), [2013 ABAER 010](#) (withdrawal of a very significant matter from the AER’s hearing list) and [2013 ABAER 008](#)).

But as for the matter at hand (i.e. what the Board/Regulator does not publish rather than what it does) I believe that the Board/Regulator itself has now provided its own convincing reasons for publishing its letter decisions. I refer to the fact that the ERCB in its May 23, 2013 decision not only referred to its earlier decisions in the Osum and Jackpine matters but went on to say (at 10) that “The Panel acknowledges that it is not bound to follow the reasoning in *Osum* or *Jackpine*. However, it does note the desirability of having consistency and certainty in decisions made by it in its proceedings. Like courts, tribunals such as the ERCB should make consistent decisions on the same legal issue. Predictability in the regulatory process is a good thing.” To which I say bring it on. But how do I know what you’ve already decided unless you tell me (the Panel decision in Jackpine would be in the CEAA public record because it was a joint panel decision and it was also included as Appendix 4 of the panel’s [final decision](#), but the only place I know where Osum is readily and publicly available is on the ABlawg website). I acknowledge that Board counsel (at least until they read this post) have always been willing to accommodate requests for particular letter decisions – but my point here is that I can only ask for decisions the existence of which I am aware. And if the Board and the AER really do subscribe to values like consistency, transparency and efficiency then that’s not good enough.

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