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Crown Oil Sands Dispositions and the Duty to Consult

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Case commented on: *Buffalo River Dene Nation v. Ministry of Energy and Resources and Scott Land and Lease Ltd*., 2014 SKQB 69

In this decision Justice Currie of the Saskatchewan Court of Queen's Bench concluded that the Crown owes no duty to consult a Treaty 10 First Nation when issuing Oil Sands Special Exploratory Permits (OSSEPs) in the traditional territory of that First Nation. In reaching this conclusion Justice Currie focused on his assessment that in issuing a permit the Minister did not make a decision that could affect the use of the land. Justice Currie also distinguished the Supreme Court of Canada's decision in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, where that Court held that the Crown's decision to authorize the assignment of tree farm licence could trigger the duty to consult on the basis that it was a high level strategic planning decision that could have subsequent on-the-ground effects. Justice Currie took the view in this case that there was no Crown "plan of action" and no high level strategic planning decisions and therefore no duty.

The question of whether a Crown disposition of mineral rights might trigger a duty to consult had been put at issue in an earlier Alberta case, *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29, aff'g 2009 ABQB 576 (*ACFN*) but it will be recalled that in that case both levels of Court in Alberta preferred to decide the case on the basis that the application for judicial review was commenced out of time. I posted on both decisions here and here.

This post reviews the process for issuing oil sands permits in Saskatchewan and then argues that Justice Currie's decision is: (1) inconsistent with the language of the numbered treaties and the decisions of the Supreme Court of Canada in *Haida Nation*, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (*Mikisew Cree*) and *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43), and ignores the reality that any grant of an exclusive right by the Crown has the potential to create investment-backed expectations from which the Crown, as a matter of practice, will find it very difficult to withdraw, and (2) ignores the further reality that the industry-driven nomination policy of the Crown is itself a Crown decision that attracts the duty to consult.

The process for issuing OSSEPs (Saskatchewan)

An OSSEP is issued under the terms of the *Petroleum and Natural Gas Regulations, 1969*, Sask Reg 8/69 on the basis of a bonus bid (s 23.11(b)(ii)). Under those Regulations "a permittee has the right, licence, privilege and authority to explore for oil and gas or oil sands or oil shale, as the case may be, within the permit lands." A permittee commits to drill (s 23.3(1)) "a minimum of one well per permit to a depth that is satisfactory to the minister" during the term of the permit. A permittee also commits to expend minimum amounts per hectare exploring the lands held under permit. A permittee that fails to meet either of these obligations is subject to forfeiture. There was evidence before the Court to the effect that permits were commonly forfeited for lack of work (at para 26).

Much as in Alberta, lands are posted for bidding on the basis of nominations from industry (at para 32). The relevant official (Mahnic) made the decision to post and did so without any information as to any particular possible exploration or development plans. While the judgement suggests (at para 33) that "No planning was involved in the decision to post the permits for sale" Mahnic also indicated that there were a number of grounds on which the Department might decide not to post including "some of the lands falling within an environmentally sensitive area" (at para 34). Similarly, while the permit would normally go the highest bidder, the Crown in Saskatchewan apparently reserves the right not to award the lands on a number of grounds including low bids (at para. 35).

Both the Saskatchewan *Crown Minerals Act*, SS 1984-85-86, c C-50.2, s 19 and the terms of the permit made it clear that a permit itself does not authorize a permittee to access the surface of any lands. Further authorization for such activity would have to be obtained from the Minister of the Environment and such authorization might be denied for environmental reasons.

This overall disposition scheme is clearly similar to that of Alberta's. In the *ACFN* case referred to above, the Alberta Crown, through the Minister of Energy, took the position (para 9 at trial) that:

> The Minister states that he does not consult with First Nations in respect to mineral dispositions made under the tenure system, because mineral dispositions do not result in the taking up of any land under the terms of Alberta's historical treaties, and because the leasing of Crown mineral rights does not result in any adverse impact on the exercise of First Nations rights and traditional uses. Any actual development of the mineral resources under the terms of the Leases, such as exploration, drilling, mining, etc. are, however, subject to the Government of Alberta's "First Nations Consultation Guidelines on Land Management and Resource Development".

Evidently the Saskatchewan Crown took a similar view here (at para 6).

The decision is inconsistent with the text of the treaty and high authority

The hunting clause of Treaty 10 provides as follows:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory 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 His

> Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The Supreme Court examined the implications of this clause for Crown disposition policies in *Mikisew Cree*. *Mikisew Cree* stands for the proposition that an alienation of land or resources by the province for one of the purposes contemplated by the lands taken up provision may trigger a duty to consult. This is because:

> … it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. (at para 30)

> …. the Crown's right to take up lands under the treaty … is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. (at para 56)

See also *Keewatin v. Ontario (Minister of Natural Resources),* 2013 ONCA 158 at paras 207 – 211). It is notable that Justice Binnie's formulation did not make triggering the duty to consult conditional on proof of adverse effect. While proof of some risk of adverse effect may be an integral part of the test (this is suggested in both *Haida:* "contemplates conduct that might adversely affect" (at para 35) and *Rio Tinto:* "the potential that the contemplated conduct may adversely effect…" (at para 31)) it is entirely possible in the treaty context of *Mikisew Cree* that Justice Binnie was prepared to infer an adverse effect simply on the basis that any "taking up" serves to shift lands from Category A ("hunting allowed") to Category B ("hunting not allowed"). In this case the mere grant of a permit will not likely cause the lands to shift categories (see *R v. Badger*, [1996] 1 SCR 771 at para. 54 and the "concept of visible, incompatible land use") but it is the first step in a process that might lead to a category shift and should therefore trigger consultation. It is, for example, a greater likelihood post-permit as opposed to pre-permit that these particular lands might be taken up. To paraphrase *Haida* (at para 74 and substituting "treaty right" for an asserted Aboriginal right or title"):"Where the government has knowledge of a treaty right it must consult the Aboriginal peoples on how exploitation of the land should proceed."

There are other reasons for thinking that the concept of "adverse effect" as used in both *Haida* and *Rio Tinto* is not confined to a physical effect but must include other ideas such as vulnerability, prejudice, or perhaps inertia or lock-in. This is because both decisions contemplate that the duty to consult may be triggered by policy decisions that have no direct impact on the ground. Thus in *Haida* the principal decisions in question were the decisions to renew and approve the assignment of a tree farm licence (TFL). Such a decision is far removed from physical action on the ground as para 76 in the judgement makes clear:

> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the

> determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

Here Chief Justice McLachlin mentions no less than four different types of decision: (1) decisions relating to the renewal and transfer of a TFL, (2) decisions relating to the approval of a management plan, (3) decisions relating to the determination of the allowable annual cut (AAC), and (4) decisions relating to cutting permits. Even though decisions relating to the establishment of an AAC and the actual issuance of cutting permits to harvest the AAC in particular locations would be much closer to on-the-ground effects than the first two categories of decision the *Haida* Court still concluded that the Crown had a duty to consult.

In this case it is no doubt true that the construction of access roads or the drilling of wells would all be more direct examples of adverse effect but it does not follow from that that decisions back in the chain might not also trigger a duty to consult on the basis that they pave the way for the subsequent decisions. Just as Weyerhauser could not obtain a determination of an AAC or a cutting permit without approval of the assignment of the TFL so here the permit is a condition precedent to obtaining any form of surface authorization. It may be true that the grant of a permit does not imply a commitment to grant any necessary surface authorizations but a party that has tendered a bonus payment to acquire the permit and sunk time and effort into analyzing the geological potential of the lands will be entitled to a surface authorization unless the Crown can show good reason why it should not be. In this sense issuance of an OSSEP has at the very least created a new interest in the lands that competes with the treaty interest of the First Nation. The decision to recognize a competing interest should itself attract the duty to consult.

Was there a policy decision here?

As noted above, Justice Currie seems to offer two main reasons for concluding that there was no duty to consult. The first reason that there is no duty to consult is because the permits themselves do not authorize any physical activity. The second reason that there is no duty to consult is because there is no "high level policy decision". The Court reaches this conclusion on the basis that most of the decisions to post lands and to accept bids are automatic. There are two reasons for thinking that this characterization misses the point. First, a decision to adopt an industry driven nomination policy is itself an important policy or strategic decision of the highest order. There were other possible policy positions. For example, the Crown might have adopted a policy of opening up new areas for exploration sequentially and only following a strategic environmental assessment. Second, even within this policy there is apparently room in any particular case for not acceding to a request to post including on the grounds of environmental sensitivity (and notwithstanding the fact that a permit does not itself allow any physical activity on the lands). If this is the case is it not possible that there might be other potential grounds for declining to post (e.g. the importance of the area to First Nations) and if that is the case (and why would it not be?) then there must be a duty to consult.

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