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## Crown Oil Sands Dispositions and the Duty to Consult

**By: Nigel Bankes**

**Case Commented On:** [\*Buffalo River Dene Nation v Ministry of Energy and Resources and Scott Land and Lease Ltd\*](#), 2015 SKCA 31

The Saskatchewan Court of Appeal has confirmed Justice Currie’s decision (discussed [here](#)) to the effect that the grant of an oil sands exploration permit in Saskatchewan does not trigger the Crown’s duty to consult principally on the grounds that there is no potential for conflict between the rights conferred by the permit and the First Nation’s treaty rights. This is because the permit alone gives the permittee no right to use the surface while the First Nation (at para 88) “does not advance here a treaty right or Aboriginal claim to subsurface rights or rights exercisable in relation to the subsurface of *Treaty 10* lands.” Furthermore, at the time that the permit is granted there is no project on which to consult about; this will only become apparent when the permittee (if ever) develops a plan for its proposed exploration or development of the underlying minerals which requires surface access – at which time consultation will occur. And (at para 92) “It is at this point that the Crown and Buffalo River DN would have something meaningful, in the sense of quantifiable, to consult about, to reconcile.” Until then there is no project.

In this picture the Crown is an empty vessel patiently waiting on industry (and world oil prices). That is a large part of the picture but I’m not sure that it is the whole picture as discussed in my earlier post on the trial decision. The Crown has a project of its own. The reality is that the Crown has made a decision or a series of decisions. It has made the decision that the lands in question are potentially open to oil sands exploration; and most important of all the Crown has made the decision that other values including environmental values (see para 9(a)) are not sufficiently important to deny industry’s request to have the lands posted.

The 65 page judgement contains a useful review of the leading consultation decisions from across the country. It also contains an intriguing discussion about the relative merits of consulting on every permit issuance versus consulting on the bigger picture and (at para 85) the “broader effects of Crown conduct”. Thus the judgement notes (*id*), referring to Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, 2014, that consultation on every permit would be “death by a thousand cuts” in which Aboriginal groups might not appreciate the significance of each permit; better perhaps therefore to structure consultation around the Crown’s overall strategy for oil sands development in this part of the province. There is no doubt much to

be said for this sort of dialogue. A dialogue that considers competing visions for the use of traditional territory; a dialogue that takes cumulative impacts seriously; and a dialogue that perhaps seeks to address which lands should be open to oil sands exploration and which withdrawn. But having raised this issue Justice Caldwell backs away from its implications implicitly, preferring to emphasize (at para 87) that consultation is better left to the “well-defined and linear regulatory process” that will kick in if and when there is a more concrete development proposal rather than the Crown’s broader strategic decisions.

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