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Reasons, Respect and Reconciliation

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Case Commented On: *Kainaiwa/Blood Tribe v Alberta (Energy)*, 2017 ABQB 107 (CanLII)

Reconciliation between Canada's settler society and First Nations and other indigenous communities certainly requires mutual respect but it should also require reasons in appropriate cases according to Justice Paul Jeffrey, at least where the Crown dismisses an application for the exercise of a statutory discretion which is closely linked to efforts to right an historic grievance. This is an important decision which should be required reading for every Minister of the Crown with a responsibility for the relationship between Her Majesty and Canada's first peoples, and for all senior civil servants responsible for advising those Ministers.

The Blood/Kainaiwa Band agreed to take reserve land (Treaty 7) in southern Alberta in the area of the Oldman and St. Mary's rivers rather than lands originally identified at Blackfoot Crossing. By mistake, the federal government sold certain lands within the boundaries of the new reserve to Akers. When Akers refused to relocate, the Crown concluded that the only way to deal with the issue was to have the Blood surrender the relevant lands. The surrender was procured in 1889. Some of the lands were subsequently reacquired by the Crown (1970) and reincorporated in the reserve.

The Band submitted a Claim under Canada's specific claim policy in 1995 and, following negotiations entered into two settlement agreements with Canada. In Akers No.1 the Band received $2.346 million in full and final settlement of the Band's claim that Canada had failed to pay compensation for the surrender. In Akers No. 2 the Band received $3.555 million for the Band's claim that the surrender was invalid. It was agreed that the Band could use the monies to buy additional lands and that such lands could then be included in the Reserve provided that the concerns of the provincial government could be addressed. Akers No. 2 specifically referenced subsurface rights (Akers No. 1 was silent on the subject, see at para. 77) with respect to these lands and contemplated that they might have to be acquired from the provincial government. The Band purchased surface rights to 6 parcels of land, totaling 664.8 acres. The subsurface rights remained vested in the Provincial Crown. Portions of the subsurface rights of the purchased lands were subject to coal leases, an ammonite lease and oil and gas leases.

The Band first contacted the government with respect to the transfer of mineral rights in October 2008. There were various meetings and exchanges of correspondence between the parties over the following years until the Minister of Energy (Frank Oberle) sent a letter (at para 48) to the Band's counsel on January 2, 2015:

> Dear Ms. O'Keeffe,
>
> Thank you for your letter of October 22, 2014 to the Honourable Jim Prentice, Premier of Alberta and Minister of Aboriginal Relations, and myself inquiring about the status of the Blood Tribe's request to transfer or sell Crown mineral

> rights underlying surface lands purchased with funds from the settlement of the Akers claim (the Land).
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> After careful consideration, the Government of Alberta is not prepared to transfer or sell the underlying mineral rights to the Blood Tribe. The Government of Alberta has no objection to the addition of the Land to the Blood Reserve provided satisfactory arrangements are made with Alberta Energy's current and future agreement holders if they require access to the Land to win, work, and recover Alberta's minerals.

In response to this decision the Band commenced this application on June 29, 2015. The Band sought an order of *mandamus* directing the provincial Crown to transfer the mineral rights, and, in the alternative, an order quashing the Minister's decision and a direction to reconsider the matter.

Justice Jeffrey denied the application for *mandamus* but granted the application for judicial review.

The parties were agreed that the Minister's authority to make the decision requested by the Band arose under s.11 of the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*). That section provides that:

> 11(1) No disposition may be made of an estate in a mineral owned by the Crown in right of Alberta unless the disposition is specifically authorized by this or another Act.
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> (2) Subsection (1) does not preclude
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> > (a) the Lieutenant Governor in Council from transferring the administration and control of minerals to the Crown in right of Canada, or
> >
> > (b) the Minister from executing and delivering a transfer under the Land Titles Act in favour of the Crown in right of Canada of an estate in minerals of which the Crown in right of Alberta is the registered owner.

The parties evidently agreed (at para 54) not to take issue with the fact that the application was commenced out of time (six months from the date of the decisions, *Alberta Rules of Court*, s. 3.15(2)) or that s.11(2) of the *MMA* dealt with transfers to Canada and not with transfers to the Band. On this last point the parties must have assumed that any transfer would in fact be to the Crown in right of Canada in trust for the Band. If that were not a common assumption, s.11 could not be the source of the Minister's authority.

Mandamus

In order to succeed in *mandamus* the Band had to show that it had the right to the performance of a duty, and, in the case of a discretionary statutory provision such as s.11 of the *MMA*, it had to show that the only permissible decision for the Minister was a decision to grant the request for a transfer of the mines and minerals. In order to establish the latter the Band tried to show that this result was required by one or more of the following: Treaty 7, the Natural Resources Transfer Agreement (NRTA) or the honour of the Crown.

Justice Jeffrey rejected each of these contentions. He rejected the Treaty 7 argument (combined with the NRTA) on the basis that even if it could be said that Treaty 7 reserve lands included mines and minerals, the purchased lands were never part of the reserve. While this specific conclusion seems justified, Justice Jeffrey couched his decision in somewhat broader terms than necessary and to the effect that (at para 64) "when the NRTA was enacted, the Band did not have any interest in or claim to the subsurface rights underlying the Purchased Lands. Alberta received those subsurface rights unencumbered by any obligation to the Band." I would simply say that this may or may not be the case. There is ongoing litigation in which Treaty 7 First Nations take the position that the surrender provisions of Treaty 7 do not extend to mineral rights: see *Wesley First Nation v Alberta*, 2015 ABCA 76. If the First Nations were to succeed in that litigation it might well follow that any unextinguished aboriginal interest would be an interest other than that of the (provincial) Crown in those lands within the meaning of paragraph 1 of the NRTA (and s.109 of the *Constitution Act, 1867*): see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (CanLII), and *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 (CanLII).

Justice Jeffrey rejected the argument based on the honour of the Crown on the simple basis, following *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 (CanLII), that (at para 67) "the honour of the Crown 'is not a cause of action in itself, rather, it speaks to how obligations that attract it must be fulfilled' (*Manitoba Metis Federation Inc* at para 73)."
Even if he were wrong on the above Justice Jeffrey concluded (at paras 68 – 91) that Akers No. 2 extinguished any possible claim that the Band was entitled to a transfer of the minerals as of right. As Justice Jeffrey pointed it (at para 74)

> The language used by the Band and Canada in the 2nd Akers Settlement surrender clause was broad (emphasis added [by Justice Jeffrey]):
>
> > "the Tribe hereby assents to the Surrender to Canada of all claim, right, title, interest, benefit, and possession, beneficial, equitable, or otherwise, which the Tribe, and its heirs, descendants, executors, successors and assigns past, present and future may have had or may now have in the Claim Lands".

In his view this language was amply broad enough to include any possible Treaty-based claims that the Band might maintain.

The Application to Quash

The starting point for any application to quash the Minister's decision must of course be an assessment of the standard of review. Here Justice Jeffrey concluded (at para 103) that "insofar as the Minister's decision entails extricable questions of constitutional interpretation, of an enactment (the NRTA) or an agreement (Treaty 7), or determining the scope of what is entailed by the honour of the Crown, the standard of review is correctness." But Justice Jeffrey had already concluded as part of the *mandamus* application that the Minister was not under any such duty and thus, insofar as the Minister's decision was based upon the absence of a legal duty to make a transfer, the Minister was correct.

But that was not enough to dispose of the issue. It was still open to the Band to demonstrate (and the onus was clearly on the Band, see at para 127) that the decision fell outside what might be considered a reasonable possible exercise of the Minister's discretion.

It was clear that the Band faced an uphill battle. As Justice Jeffrey noted at para 109:

> In this case, the power to decide has been delegated to a Minister of the Crown without any statutory limitations, guidance, criteria or considerations. The range of acceptable outcomes therefore is very broad. Further, the decision involves whether to relinquish rights of property ownership. A holder of property rights can rarely be forced to relinquish them against their will, for example by operation of law when the public interest is shown to override the private. The owner of property can choose for arbitrary reasons, even on a whim, to refuse all offers to sell or transfer their property, no matter how extravagantly rich those offers might be. He just cannot refuse on grounds that are prohibited discrimination. The Crown owns the property at issue here and has all the rights of ownership that a private owner would enjoy. Therefore, in this context of *almost* unfettered discretion, involving whether to relinquish property rights, *a priori* the range of acceptable outcomes is extremely broad, easily encompassing both approving and denying a request.

In considering this further, Justice Jeffrey acknowledged the importance of examining the Minister's decision in light of the entire record, perhaps particularly the case here since, as can be seen from the Minister's letter quoted above, the Minister offered no reasons for his conclusion. There was simply a bare statement to the effect that "After careful consideration, the Government of Alberta is not prepared to transfer or sell the underlying mineral rights to the Blood Tribe." It followed therefore that this was not a case in which the reasons could be reviewed in the broader context of the record, since there were no reasons to review, indeed (at para 115), "the reasons are not transparent and intelligible; they are missing from the decision."

That led Justice Jeffrey to dig deep into the record to find any reasons that had been articulated for the refusal to make the transfer. It also led him to offer some powerful commentary on the connection between the honour of the Crown and reasons. I will come to that in a moment. As for the record, perhaps the best evidence of the reasons for the Minister's decision were the reasons recorded in a note from the Assistant Deputy Minister (ADM) for Energy in December 2014, shortly before the letter was sent to the Band in early January 2015. In that note the ADM reasoned (at paras 47 and 121) that:

> ... (1) there were existing subsurface rights in the Purchased Lands that were presently being leased, (2) Alberta does not sell subsurface rights except in exceptional cases, (3) Alberta did not have a legal obligation to transfer the subsurface rights in this case and (4) selling subsurface rights where no legal obligation exists may lead other First Nations to purchase land and seek similar treatment.

Justice Jeffrey submitted each of these reasons to careful scrutiny. He noted that the first reason on its own terms was misleading insofar as each of the lessees had consented to the Band acquiring the residual interest in the property. The second was hardly convincing since all of the information available in this case suggested that this *was* an exceptional case. The third reason was not relevant to the question of the discretionary power to make the transfer. As for the floodgates argument the principal reason for doubt here was simply that in his previous position as Minister of Aboriginal Relations, Minister Oberle had not found this particular reason convincing. This made it difficult for Justice Jeffrey to ascribe this reason (drawn from the ADM's note) to the Minister. While there might be reasons for this difference (including that the

Minister had simply changed his mind (at para 127)) "those differences between what the Minister himself earlier wrote and what was later attributed to him in the ADM's email to the Premier, impair my ability to find the requisite transparency in the process of articulating the reasons and outcomes."

But equally important for Justice Jeffrey was what was missing from this itemization of the possible reasons for the decision. Here Justice Jeffrey identified the failure to weigh in the balance one important consideration favouring the transfer and that was the "ongoing process of reconciliation". Justice Jeffrey put the point this way (at para 129):

> Finally, it does not appear that the Minister's deliberations at any time considered the role the decision could play for the Band in the ongoing process of reconciliation between Aboriginal peoples and the Crown. This is despite the fact that, acknowledged internally by Alberta (see para 34 above), granting the request would have at most a nominal adverse impact on the interests of the Province. Opportunities to advance and promote this 'process of reconciliation' warrant attention and consideration with that in mind. It is constitutionally mandated by Section 35 of the *Constitution Act, 1982*: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII) at para 24. At paragraph 42 of that decision the Court states:
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> > The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.

This is an important step since it suggests that the meta-idea of reconciliation should always inform the proper interpretation of statutory powers, at least where the exercise of those powers relates to the rights or interests of indigenous communities. Indeed Justice Jeffrey makes this crystal clear when he continues as follows (at paras 130 - 132)

> [130] Therefore, even though the Act contains no mandatory considerations by the Minister for such decisions, or limitations on the breadth of his discretion, the broader law does. This is one of the reasons I described the Minister's discretion in paragraph 109 above as "*almost* unfettered". In these circumstances the Constitution requires the Minister to consider whether, and if so how, his decision may advance or impair the process of reconciliation. His brief decision does not indicate he did. The reasons attributed to him do not indicate he did. Nothing in the entire record reveals the Minister considered the importance his decision might play in promoting the process of reconciliation with the Band. His considering that possibility might not have changed the outcome, but it was a mandatory consideration given the circumstances presented.
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> [131] The failure to turn his mind to a mandatory consideration may alone have rendered his decision unreasonable, but I need not go that far. The combination of the diminished intelligibility and rationality of the decision and reasons and his failure to consider how his decision might affect the process of reconciliation, results in my finding his decision unreasonable.
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> [132] The Minister of Energy was not legally required to transfer or sell the subsurface rights underlying the Purchased Lands to the Band. Nevertheless the Minister has the discretion to transfer or sell them. I find his decision not to do so unreasonable because of the deficiency in the intelligibility and rationality of his decision and reasons, exacerbated by his failure throughout to consider the

> opportunity for his decision to promote the process of reconciliation between the Crown and the Band, as the law requires.

That was the decision. And it is a powerful and brave decision. It is a rare case in which the Court impugns the exercise of a broad discretionary power of a Minister of the Crown in a matter as sensitive as the resource rights of a province and where the standard of review is reasonableness. But the decision should be welcomed. If we are committed to the values underlying reconciliation then those values should inform our understanding of administrative law and the interpretation of statutory powers. See my earlier comment on *Canada v Courtoreille*, 2016 FCA 311 (CanLII) here.

I think that we should also welcome what Justice Jeffrey had to say about the link between the honour of the Crown and reasons for the exercise of a statutory power. Although these observations take the form of obiter comments rather than ratio they are a useful reminder of the important role that reasons can play in reconciling aggrieved parties to outcomes but also in ensuring that the decision-maker has indeed gone through an adequate process of reasoning and justification, rather than simply reaching for an outcome. Justice Jeffrey had this to say (at paras 117 – 118):

> [117] Even though the honour of the Crown does not require that the Minister grant the Band's request, it does extend to the nature and manner of the Minister's communications with the Band. Communicating reasons to the Band is a sign of respect. Providing reasons displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation. Providing reasons is also important for a decision holding such significance to the Band as does this one. Of course there are also here the more common benefits from proper reasons, of revealing to the losing party whether they were properly understood, of the losing party learning why their thinking was not persuasive, and of enabling the losing party to consider whether to challenge the decision by legal process.
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> [118] *Prima facie*, the high standard of honourable dealing – of dealing in good faith and integrity that is to characterize the honour of the Crown – is not met by the Minister's uninformative one sentence decision. *Prima facie*, just because the Act does not limit the broad discretion of the Minister in such decisions, does not mean it is acceptable for the Minister to have no reasons for his decision or to communicate his decision to a First Nation without stating his reason(s). First Nations are deserving of more respect from the Crown in matters of such importance to them as this. The courtesy of explaining the decision was all the more warranted here where the Band perceived, rightly or wrongly, an injustice was done to them over a century ago, followed by its decades-long struggle for a remedy. Its historic claim obviously had some legitimacy given the magnitude of Canada's payment in settlement. Following settlement with Canada the Band embarked on what has become, no doubt to the Band's dismay, a further years-long struggle imploring the Alberta Crown to cooperate in realizing the Band's negotiated 'next-best-thing' solution (the 'next-best-thing' to getting their original land back). The Band dealt with the Minister in his previous portfolio; at that time and in that capacity he appeared to favour the Band's request. *Prima facie*, these factors all militate strongly in favour of the honour of the Crown obliging the Minister himself to explain his one sentence denial to the Band.

While Justice Jeffrey went on to qualify these observations with the statement (at para 119) that this was just a *prima facie* case and that in the end he was making no formal determination that the honour of the Crown required the Minister to provide reasons, the force of his comments still stands. I also think that the comments inform at least at some level what he had to say later (and already referenced above) to the effect that missing from the ADM's reasons for denying the transfer was any consideration of the goal of reconciliation.

I have one final and more technical comment on the decision and that relates to the record. It is clear from the extensive discussion in the judgement that the Band was able to obtain a very rich and comprehensive record as part of the proceedings including documents containing advice to the Minister. An applicant for judicial review is entitled have included in the record anything touching on the matter (former Rule 753.13 see *Milner Power Inc. v Alberta (Energy and Utilities Board)*, 2007 ABCA 265 (CanLII)) or as the Rules now put it (Rule 3.18(2)) "anything ... relevant to the decision or act in the possession of the person or body". It would be nice to know about this aspect of the case and whether or not there was much argument as to what was to be included in the record.

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