

June 15, 2020

Oil Sands Approvals and Bill 22, the *Red Tape Reduction Implementation Act*, 2020

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Bill Commented On: [Bill 22, Red Tape Reduction Implementation Act, 2020](#)

This post deals with one aspect of this large omnibus bill, namely the proposed amendment to the *Oil Sands Conservation Act*, [RSA 2000, c O-7](#) (*OSCA*). This amendment will remove the need to seek Cabinet authorization for the approval of new oil sands projects and related processing facilities. More specifically, this post assesses whether the amendment will have any implications for the Crown's duty to consult First Nations and Métis communities, and to observe the honour of the Crown in its dealings with those communities. The main conclusion is that these proposed changes will not simplify or shorten the steps that the Crown needs to take to discharge its constitutional responsibilities. None of these responsibilities constitute "red tape." Any shortening in project review timelines as a result of removing the opportunity for Cabinet review will be no more than a few months (a drop in the bucket in the time frame for characterizing and developing a new oil sands prospect), a steep price to pay for the loss of an opportunity to hit pause, or to impose additional terms and conditions to protect the public interest.

The *OSCA* Amendments

Section 12 of Bill 22 (at 154) amends the *OSCA* so as to significantly reduce the circumstances in which a decision of the Alberta Energy Regulator (AER or Regulator) requires a prior authorization from the Lieutenant Governor in Council (Cabinet) before the AER approval is effective. Cabinet will continue to have some responsibilities under the Act but henceforward Cabinet will have no role to play in authorizing new oil sands projects (s 10) or processing facilities (s 11).

This removal of Cabinet oversight is not completely unprecedented. For example, some of the more interventionist orders under the *Oil and Gas Conservation Act*, [RSA 2000, c O-6](#) (*OGCA*) (common carrier, common processor and common purchaser orders, and compulsory pooling orders) used to require the approval of Cabinet before they were effective, but this requirement was removed from the *OGCA* in 2009. However, while such orders did interfere with normal market rules insofar, for example, as a party might be required to transport or process somebody else's product, the scale of such orders was, and is, very limited. By contrast, any new oil sands approvals and related processing facilities (assuming that the market will support any new projects) will always be on a larger scale. Thus, the removal of political oversight from the oil sands project approval process seems significant.

I suspect that project proponents will welcome this move. I don't think that anybody has published anything on Cabinet second-guessing of AER approval decisions, but the evidence presented in the *Prosper* case (*Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, [2020 ABQB 127 \(CanLII\)](#); for my post see [here](#)) suggests that the need for Cabinet approval will always occasion some delay. In *Prosper*, it was very significant delay. The evidence in *Prosper* (at para 43) was that, on average, Cabinet approval takes four months and, with the exception of Prosper's Rigel project, the previous longest delay was seven months. In *Prosper*, the AER had found the project to be in the public interest in June 2018 and Cabinet had yet to make its decision on the project at the time of Justice Barbara Romaine's decision in February 2020. The AER's decision has, in the meantime, been quashed (*Fort McKay First Nation v Prosper Petroleum Ltd*, [2020 ABCA 163 \(CanLII\)](#) (*FMFN*); for my post see [here](#)), but from a proponent's perspective, the simple point is that the need for Cabinet approval will always occasion delay, and in Prosper's case that delay was unconscionable.

But proponents are not the only parties interested in the review and approval process for new oil sands projects and facilities. In particular, First Nations and Métis communities have a significant interest in the structure of that process, insofar as it may affect questions as to how the Crown's duty to consult and accommodate may be discharged as well as an interest in other "constitutional principles like the honour of the Crown" (*FMFN* at para 65). How these responsibilities are allocated and discharged also has implications for the form of judicial supervision that may be available. For example, judicial supervision of the AER is always, with the Court's permission, before the Court of Appeal (*Responsible Energy Development Act*, [RSA 2000, c R-17.3](#), s 45 (*REDA*)), whereas any question as to the lawfulness of a Cabinet authorization would be raised by way of an application for judicial review in the Court of Queen's Bench.

The next few paragraphs describe how the rules pertaining to the duty to consult and accommodate and the honour of the Crown will change if Bill 22 passes in its current form. To be clear, however, all that this post is talking about is the question of *how* these duties are discharged. Bill 22 cannot excuse the Crown, or the Government of Alberta, taken as a whole, from the discharge of these obligations; all that it can do is assign or re-assign responsibilities within government. But, at the end of the day these duties must be discharged, and First Nations and Métis communities must have some means of securing judicial supervision of the discharge of those duties.

The Current Rules

Under the current rules there are, in addition to the project proponent, three governmental entities that play a role in discharging the Crown's duty to consult and accommodate and protecting the honour of the Crown: the Aboriginal Consultation Office (ACO), the AER, and the Lieutenant Governor in Council (Cabinet).

The ACO

Alberta's [Guidelines on Consultation with First Nations on Land and Natural Resource Management](#) (2014) indicate that the ACO is established within the Ministry of Aboriginal Relations (now the Ministry of Indigenous Relations) and has the following objectives (at 3):

- Uphold the honour of the Crown with respect to First Nations consultation for land and natural resource management matters...;
- Clearly discharge the legal duty of the Crown and ensure that the [Government of Alberta] works towards reconciling First Nations Treaty rights and traditional uses and the interests of all Albertans;
- Ensure consistency, certainty and predictability with clear roles and a standardized process that First Nations, proponents and the Crown can follow; and
- Enhance relationships with the federal and provincial governments, leading to a coordinated approach to First Nations consultation.

In the *FMFN* case, the Court of Appeal further noted that:

Most of the responsibility for managing Crown consultation on AER applications rests with the ACO. The ACO has the responsibility to: (1) determine if consultation is required; (2) manage the consultation process; (3) assess the adequacy of consultation undertaken; and (4) advise the AER on whether actions may be required to address potential adverse impacts of a project on Treaty rights and traditional uses. (at para 49)

Although there is no reference to the ACO on the statute books of Alberta, the ACO must be amenable to judicial review (see *Athabasca Chipewyan First Nation v Alberta*, [2019 ABCA 401 \(CanLII\)](#) (*ACFN*) at paras 38–52). In the *FMFN* case, for example, the Court of Appeal acknowledges (at para 51) that the Fort McKay First Nation has an additional outstanding challenge as to the adequacy of the ACO's consultation with respect to Prosper's Rigel project.

The AER

The AER's responsibilities are described in a Ministerial Order making the Aboriginal Consultation Direction, issued in 2014: [Energy Ministerial Order 105/2014; Environment and Sustainable Resource Development Ministerial Order 53/2014](#) (see also *ACFN* at para 25). That Direction recognizes that (at 1 of the Appendix):

- i. the AER has a responsibility to consider potential adverse impacts of energy applications on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* within its statutory authority under REDA,
- ii. AER processes will constitute part of Alberta's overall consultation process as appropriate, [and]
- iii. Alberta retains the responsibility to assess the adequacy of Crown consultation in respect of energy applications.

Furthermore, the Direction instructs the AER, before making a decision with respect to an energy project, to request advice from the ACO (at 3 of the Appendix):

- 7 a) respecting whether Alberta has found consultation to have been adequate, adequate pending the outcome of the AER's process, or not required, and
- b) on whether actions may be required to address potential adverse impacts on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* or traditional uses as defined in the Consultation Policy.

In sum, while the AER's procedures may contribute to the discharge of the Crown's responsibilities, it is the ACO that coordinates the Crown's efforts and advises the AER as to the adequacy of the Crown's consultation efforts and any accommodations that may be required. The AER's limited role with respect to the duty to consult is confirmed by s 21 of *REDA*:

The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

However, the recent decision of the Court of Appeal in *FMFN* confirms that this is not the entire story, since the honour of the Crown goes beyond the duty to consult and accommodate and engages good faith treaty implementation. Given that, the Court of Appeal held in *FMFN* that, as part of its responsibility under section 10 of the *OSCA* to assess whether an oil sands project was in the public interest, the AER had to assess whether those good faith treaty implementation responsibilities (in that case relating to the so-called Prentice promise with respect to a proposed access management plan for the Moose Lakes area) had been discharged. Since neither the ACO nor the AER had addressed this issue (at para 40), the Court concluded that the AER had not discharged its statutory obligations and “vacated” (at para 71) the AER's approval of the project.

In sum, the AER's statutory public interest mandate requires it to assess whether its proposed decisions comport with the honour of the Crown. Its assessment of those matters is subject to supervision by the Court of Appeal, with leave, on a standard of review of correctness for questions of law.

Cabinet

Under the current rules, Cabinet also has a role to play insofar as sections 10 and 11 of the *OSCA* provide that the AER can only approve a new oil sands project or processing facility with the prior authorization of Cabinet, and that Cabinet may make its authorization subject to additional terms and conditions. I think that it is now clear that in making such a decision, Cabinet will have a constitutional responsibility to satisfy itself that the Crown has fulfilled both its consultation and accommodation obligation and its honour of the Crown obligations. It cannot just assume, even after the *FMFN* decision, that these issues have been dealt with by the ACO and the AER; it must turn its mind to that question and perform an independent assessment. In particular, it must have regard to the possibility that Crown obligations remain unfulfilled because they fall outside the statutory remit of either the AER or the ACO. I think that this

argument follows from the *FMFN* decision as well as *Tsleil-Waututh Nation v Canada (Attorney General)*, [2018 FCA 153 \(CanLII\)](#) leave to appeal to SCC refused, [2019 CanLII 37489 \(SCC\)](#), *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40 \(CanLII\)](#) (*Clyde River*) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, [2017 SCC 41 \(CanLII\)](#) (*CTFN*).

Recall that in *FMFN* the Court was careful to say (at para 67) that “The AER’s consideration of [the honour of the Crown issues] in the context of a proposed project does not relieve the Crown of its ultimate constitutional responsibilities.” As for *Tsleil-Waututh Nation*, that case stands for the proposition that where Cabinet (in that case the federal Cabinet) also has a role to play in project approval, Cabinet has the jurisdiction to impose additional terms and conditions in any proposed project approval to address the Crown’s constitutional responsibilities (at paras 634 - 637). And finally, *Clyde River* and *CTFN* both stand for the proposition that the Crown can only rely on regulatory proceedings to discharge its responsibilities to the extent that the mandate of the regulatory agency is adequate to address the concerns raised by Indigenous communities (*Clyde River* at paras 27 & 30 and *CTFN* at para 32; for my comment on this aspect of those decisions see [here](#)).

Unlike in *Tsleil-Waututh Nation*, Cabinet under the *OSCA* is not obliged to provide reasons for issuing or not issuing an authorization, although the Court in *Clyde River* did advert (at para 41) to the connection between reasons, respect and reconciliation (see also *Kainaiwa/Blood Tribe v. Alberta (Energy)*, [2017 ABQB 107 \(CanLII\)](#) at para 117 and my comment on that decision [here](#)). Furthermore, the recent decision in *Alexis v Alberta (Environment and Parks)*, [2020 ABCA 188 \(CanLII\)](#) suggests that post-*Vavilov* (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#)), there may be risks associated with failing to provide reasons (for my comment on *Alexis* see [here](#)).

A party seeking to question whether or not Cabinet had discharged its obligations under section 10 of the *OSCA* would need to raise that question in an application for judicial review in which, post-*Vavilov*, the standard of review would be reasonableness for questions of law and correctness for questions of constitutional law.

Summary of Current Position

In sum, under the current rules, each of the ACO, the AER, and Cabinet has a role to play in ensuring that, prior to permitting a new project that adversely impacts Aboriginal and treaty rights, the Crown has fulfilled its consultation and accommodation obligations and that government conduct has been consistent with the honour of the Crown (see *Coldwater First Nation v Canada (Attorney General)*, [2020 FCA 34 \(CanLII\)](#)).

The Position under Bill 22

We are now in a position to consider how things will change if Bill 22 becomes law. Most of what is described above will remain the same. The one significant change is that Cabinet will no longer have a *statutory* role to play in discharging the Crown’s consultation and accommodation obligations and its honour of the Crown obligations. But this does not and cannot mean that these

obligations have just disappeared. After all, they are constitutional obligations and such obligations cannot be erased or ‘disappeared’ by the simple expedient of a statutory amendment. The Crown must still fulfill these obligations and an aggrieved party must still have access to the courts to question whether it has done so.

So, will this amendment cut red tape or clarify the rules for proponents, the governments, First Nations and Métis communities? I have two responses.

First, these duties of the Crown are just that, constitutional duties. They are not red tape; there is no red tape to be cut.

Second, I think that there is some chance that this amendment will obfuscate rather than clarify the *means* by which the Crown discharges its obligations. I say this for the simple reason that there will be no overall decision from government to justify how it thinks that it has discharged its consultation obligations. *Coldwater* suggests that the courts will be very deferential to such a decision if that decision is properly articulated. Absent such a reasoned decision there is nothing for a court to defer to. Hence, if a First Nation makes the argument that it is concerned with the effect of cumulative impacts on its treaty rights and the AER says that these are not issues that it can consider as part of a project-specific application, what form will judicial supervision take?

To the extent that the First Nation frames the issue as a duty to consult and accommodate issue, the First Nation must seek judicial review against Her Majesty in the Court of Queen’s Bench because section 21 of the *REDA* precludes the AER from considering these questions (see *ACFN* and *FMFN*). To the extent that the issue is framed as an honour of the Crown issue, *FMFN* confirms that the AER *must* address the issue and it must reach a conclusion as to whether or not the Crown has acted honourably. To the extent that the AER concludes that the Crown has not, the AER must further conclude that the project is not in the public interest and must reject the application. That decision (or indeed a decision to approve the project) may still be appealed, with permission, to the Court of Appeal where the standard of review will be correctness (see *FMFN*). And of course, the First Nation might well frame the issue as in part a duty to consult issue and in part an honour of the Crown issue. In that case, there would be proceedings in both the Court of Queen’s Bench and the Court of Appeal, much as is the case with the Rigel project.

In sum, the removal of Cabinet from the decision-making process under sections 10 and 11 of the *OSCA* will remove the need for an additional approval and the attendant four-month or so “delay” that this might entail, but it will not simplify or shorten the steps that the Crown needs to take to discharge its constitutional responsibilities. Furthermore, insofar as there will be no formal Cabinet decision to authorize the project, Cabinet will lose the opportunity to put its best foot forward and provide a reasoned decision (an all-of-government response) as to how it thinks that it has discharged those constitutional obligations, and in particular its duty to consult obligations.

This post may be cited as: Nigel Bankes, “Oil Sands Approvals and Bill 22, the *Red Tape Reduction Implementation Act*, 2020” (June 15, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_NB_Bill22.pdf

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