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Environmental Permitting and the Scope of the Duty to Consult

By Nigel Bankes

Cases Considered:

Siksika First Nation v. Alberta (Director Southern Region Environment) 2007 ABCA 402

The Town of Strathmore faced a sewage problem. It proposed to deal with that problem by constructing a pipeline and disposing of some of its waste water into the Bow above the Siksika Reserve. Not surprisingly the Siksika took a dim view of this and when the Director approved the town's application under the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, the Siksika appealed that decision to Alberta's Environmental Appeal Board (the EAB). The Siksika also sought judicial review arguing amongst other things that the government of Alberta was in breach of its constitutional duty to consult the Nation. Justice Peter McInytre (oral reasons for judgement, available on the EAB's website) rejected the Siksika's JR application on the grounds that the Siksika's application was premature and therefore moot (because they might succeed before the EAB). In addition Justice McIntyre reasoned that the EAB procedure (and subsequent consideration of the EAB decision by the Minister) might cure any defect (want of consultation) there might have been in the Director's procedure. There is no suggestion that Justice McIntyre rejected the application on the basis that the Siksika had not exhausted their local remedies.

As it happens the EAB did recommend some changes to the Director's decision most of which were accepted by the Minister but the changes did not satisfy the Siksika and the Siksika have also sought judicial review of the Minister's decision. This application is still outstanding.

The Court of Appeal (Justice Jack Watson, concurred with by Justices McFadyen and Ritter) held that Justice McIntyre ought to have considered the Siksika's consultation argument. The Court recognized that the consultation issue could not be considered by the EAB since (unlike the Energy and Utilities Board) the EAB has not been given the authority to decide questions of constitutional law under the terms of the Administrative Procedures and Jurisdiction Act, R.S.A. 2000, c. A-3. And the Court also recognized that the Minister was not likely to do anything more than presuppose the constitutionality of his decision.

As a result, the Court of Appeal remitted the matter to the Court of Queen's Bench and ordered that the matter be joined with the Siksika's outstanding JR application of the Minister's decision in respect of the EAB appeal.

The significance of the decision is two fold. First, the decision emphasises that regulatory approvals may trigger a duty to consult aboriginal people whose rights (here a treaty right) might be affected by a proposed decision and that any evaluation of that duty may require consideration of the entire decision-making procedure. Whether or not there was a breach of duty in this case

remains to be decided. The Court seems to have implicitly refused to apply the familiar administrative law argument that breach of a procedural duty might be cured by an internal appeal or de novo hearing. The Court is perhaps signaling that the duty to consult has a distinctive content and that administrative law analogies will not always be persuasive. Second, the case stands for the proposition that a First Nation concerned about the absence (or quality) of consultation may seek judicial review of a decision without first needing to exhaust local remedies, at least where the local remedies decision maker does not have a duty to decide constitutional questions.