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Duty to consult application is premature – what's the big deal?

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Case and decision commented on:

Metis Nation of Alberta Region 1 v Joint Review Panel, 2012 ABCA 352 and decision of the Joint Review Panel

In this decision Justice Slatter denied the application of the Metis Nation and of the Athabasca Chipewyan First Nation (ACFN) for leave to appeal the decision of the Joint Review Panel (JRP) constituted to deal with Shell's Jackpine Mine Expansion Project application. In its decision the JRP concluded that it did not have jurisdiction to assess whether or not the Crown had fulfilled its duty to consult with respect to the Jackpine Mine Project. In the alternative, the JRP concluded that any application to assess whether or not the Crown had fulfilled its constitutional obligation was premature. The JRP is established by federal\provincial executive agreement and has the responsibility of discharging obligations under both the federal *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 and the responsibilities of the provincial Energy Resources Conservation Board under a number of statues including the *Oil Sands Conservation Act*, RSA 2000, c O-7 – all with respect to the Jackpine Mine expansion project.

In light of the JRP's decision, both the Metis Nation and ACFN drafted questions on which they sought leave to appeal. There is some overlap between the proposals and the Metis Nation proposed some additional questions but I quote here ACFN's proposed question as capturing the essence of the issue (at para 10):

> a) Did the Panel err in determining that it does not have jurisdiction to determine whether the Crown in Right of Alberta and Canada ("Alberta" and "Canada" or collectively the "Crown") discharged their duties to consult and accommodate Athabasca Chipewyan First Nation ("ACFN") with respect to the adverse impacts arising from the Shell Jackpine Mine Expansion Project (the "Project") on ACFN's Treaty Rights … and as protected by section 35 of the Constitution Act, 1982?
> b) Did the Panel err in deciding that, even if it had jurisdiction over the ACFN's questions of constitutional law, it would be premature for the Panel to make a finding on the adequacy of Crown consultation?

The basic legal and constitutional issues at stake here have been canvassed in my previous posts "Who decides if the Crown has met its duty to consult and accommodate?" here, and "The Supreme Court of Canada clarifies the role of administrative tribunals in discharging the duty to consult" here.

Justice Slatter measured these questions against the test for leave to appeal articulated in *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 at paragraph 2:

> (a) Is the proposed issue a question of law or jurisdiction? This is a condition precedent to the granting of leave under the *Act*.
> (b) Is the issue of general importance, in that the issue is of interest to more than the immediate parties, and has a wider relevance?
> (c) Is the point raised of significance to the action itself? If the issue is merely interlocutory or collateral, or tangential to the action, leave may not be granted, particularly if a determination of the issue will not affect the ultimate outcome of the proceedings.
> (d) Does the appeal have arguable merit? Leave is less likely to be granted when the appeal appears to have little chance of success. This factor is balanced with the importance of the issue. If the issue is of lesser importance, a more compelling argument must be shown than if the issue is of great public importance.
> (e) What standard of review is likely to be applied? This factor is a corollary of whether there is a good arguable case. There is no point in granting leave if the standard of review that the Court of Appeal will apply is highly deferential, such that the Court is unlikely to engage the issue upon which leave is sought. Such issues do not have "arguable merit."
> (f) Will the appeal unduly hinder the progress of the action? This factor assumes that the hearing is still ongoing, and has been or will be delayed by any appeal.

Justice Slatter ruled (at para13) that ACFN's first question raised a question of law but held that the second did not (*id*), and, principally on that basis denied leave.

If that is the case, then all that Justice Slatter has decided is that the JRP does not need to answer the question posed by the posed by the ACFN and the Metis Nation at the outset of the hearing. This makes sense. At the outset of the hearing the record is pretty thin. There is a lot of filed evidence, none of it tested though cross examination or other more informal means and the record will be expanded in the course of the hearing. The JRP itself is a long way from making any recommendations or decisions that it has to make. So presumably, it is still open to the ACFN and the Metis Nation to renew this argument at the close of the hearing as part of final argument. I leave to others to figure out whether it is necessary for an applicant to renew its notice of a constitutional question as part of any such argument.

It may be that others think that Justice Slatter has decided more than this and I would be interested in hearing in the comment section of ABlawg if others believe that Justice Slatter has effectively denied leave on the substantive grounds for reasons other than prematurity. It is true that Justice Slatter offered the advice at paragraph 23 that "The applicants are, however, entitled to address any justiciable issues in the Court of Queen's Bench of Alberta," but that can hardly be taken as a definitive statement that this is their only recourse. Furthermore, it would likely be unwise to rely on that advice given the possibility that the applicant (Shell) or one of the governments might take the view that any decision to take up the issue in the Court of Queen's Bench rather than commencing a new leave application smells like an inadmissible collateral attack designed to avoid the privative provisions of the *Energy Resources Conservation Act*, RSA 2000, c E-10, ss 41 & 42, which also channel applications for judicial review to the Court of Appeal.