In the Court of Appeal of Alberta

Citation: Fort McKay First Nation v Prosper Petroleum Ltd, 2020 ABCA 163

Date: 20200424
Docket: 1803-0183-AC
Registry: Edmonton

Between:

Fort McKay First Nation

Appellant

- and -

Prosper Petroleum Ltd and Alberta Energy Regulator

Respondents

- and -

Her Majesty the Queen in Right of Alberta

Intervenor

The Court:

The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment of the Honourable Madam Justice Veldhuis and the Honourable Madam Justice Strekaf

Memorandum of Judgment of the Honourable Madam Justice Greckol Concurring in the Result

Appeal from the Decision of
The Alberta Energy Regulator
Dated the 12th day of June, 2018
(2018 ABAER 005, Docket: 1803 23781)

Memorandum of Judgment

The Majority:

Introduction

[1] This appeal arises out of negotiations that began in 2003 between the Government of Alberta and the Fort McKay First Nation (FMFN) to develop a Moose Lake Access Management Plan (MLAMP) to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The MLAMP has not yet been finalized.

[2] The Alberta Energy Regulator (AER) approved an application by Prosper Petroleum Ltd (Prosper) in June 2018 for the Rigel bitumen recovery project (Project), which would be located within 5 kilometers of the FMFN's Moose Lake Reserves. The AER approval is subject to authorization by the Lieutenant Governor in Council (Cabinet), which has yet to be granted.

[3] The FMFN was granted permission to appeal on the question of whether the AER erred by failing to consider the honour of the Crown and refusing to delay approval of the Project until the FMFN's negotiations with Alberta on the MLAMP are completed.

[4] For the reasons that follow, the appeal is allowed.

Background

[5] The FMFN is an "aboriginal people of Canada" under s 35 of the *Constitution Act, 1982* and a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5 that has Treaty 8 rights to hunt, fish and trap within the Moose Lake Area, part of its traditional territory. The Moose Lake Area is north west of Fort McKay and consists of the area around Moose Lake (also known as Gardiner Lake) and Buffalo Lake (also known as Namur Lake), on which lakes the FMFN has two reserves (Moose Lake Reserves). The Moose Lake Area is of cultural importance to the FMFN.

[6] Due to the extensive industrial and resource development surrounding Fort McKay, FMFN is concerned that the ability of its members to pursue their traditional way of life in the Moose Lake Area has been severely and adversely affected by the cumulative effect of oil sands development in the surrounding area. The record shows that 70% of FMFN's traditional territory is leased for oil sands purposes: Lagimodiere Report, p. 3, AEKE Tab 31, A165. The FMFN's traditional territory has been described as "the *most* severely affected of all First Nations by oil sands development in the region": Review Panel Report 2015, p. 156, AEKE Tab 11, A50, emphasis in original.

[7] A March 2010 report commissioned by FMFN and submitted to a Joint Review Panel established in 2012 as part of the AER process for a separate project proposed by Shell Canada was also submitted to the AER in its consideration of the Rigel Project at issue in this appeal. This report spoke to the need for "the mitigation and accommodation of cumulative effects ... beyond the project-level": Fort McKay Specific Assessment, Disturbance and Access: Implications for Traditional Use, p. 61. The Joint Review Panel found that the cumulative effects of oil sands development on the First Nation's cultural heritage are "already adverse, long-term, likely irreversible and significant": 2013 ABAER 011 at para 1741. However, the Panel found that these cumulative effects could not be addressed within the context of the project-specific AER review process: *ibid* at para 1720.

The MLAMP Negotiations

[8] The FMFN began negotiating with Alberta in 2001 to obtain protection for the Moose Lake Area. They began discussing a possible MLAMP in 2003 to address the cumulative effects of oil sands development on the FMFN's Treaty 8 rights. The MLAMP negotiations were delayed while the Lower Athabasca Regional Plan (the LARP) was negotiated and implemented. It is envisaged that when the MLAMP is finalized, it will be adopted as a sub-plan of the LARP.

[9] The LARP is a regional plan under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*] to manage the region's natural resources. The purpose of the *ALSA* includes providing "a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples": s 1(2)(b). The LARP addresses conservation areas, water, recreation, air quality and sustainable resource development. The "Regulatory Details" section of LARP is legally binding on the Crown and administrative decision-makers. The Regulatory Details section stipulates that the Strategic Plan and Implementation Plan sections of LARP, while not themselves legally binding, must be considered by decision-makers before they make their decisions: LARP, s 7(1).

[10] During negotiations with Alberta about the LARP between 2009 and 2010, FMFN specifically sought a 10 km buffer zone from oil sands development around the Moose Lake Reserves. Alberta denied this request. The LARP was proclaimed into force in September 2012.

[11] In August 2013, FMFN applied for a review of the LARP, which led the Minister responsible for administration of the *ALSA* to appoint a Review Panel. The Review Panel's June 2015 report found that "[t]he LARP has not taken adequate measures to protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite ... in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities".

[12] In November 2014, Alberta's then Premier, the late Jim Prentice, met with Chief Jim Boucher of FMFN to discuss the MLAMP. In February 2015, Alberta advised FMFN that it "could

commit to developing a Moose Lake Access Management Plan under LARP on an expedited basis pursuant to terms of a letter of intent that would be agreed upon" by the parties: Affidavit of Karla Buffalo.

[13] In March 2015, Premier Prentice and Chief Boucher signed a Letter of Intent to confirm "our mutual commitment and interest in an expedited completion of the [MLAMP]". It went on to state that "Alberta acknowledges the importance of Moose Lake to the community of Fort McKay and looks forward to advancing mutual goals for the management of the region". The letter contemplated that the draft MLAMP was to be completed and approved by March 31, 2016 and that planning and implementation of the portion of the Access Management Plan within 10 kilometers of the Moose Lake Reserves was to be completed by September 30, 2015.

[14] Alberta issued a press release on March 25, 2015 titled "Traditional First Nations lands in the heart of Alberta's Oil Sands region to be protected". It states:

> The Moose Lake area is culturally significant to the First Nation and Metis people of Fort McKay, so the Alberta government is taking steps to ensure this sacred land is protected for generations to come.
>
> Premier Jim Prentice, Environment and Sustainable Resource Development Minister Kyle Fawcett and Fort McKay First Nation Chief Jim Boucher signed a Letter of Intent in March to develop an access management plan for the Moose Lake area.
>
>> The Fort McKay First Nation has done a wonderful job of preserving their traditional way of life. While allowing for responsible oil sands development near their community. This has enabled their people to thrive economically within the oil sands region. But it has also meant that some land that is meaningful to them near their reserve has been used for development. When Chief Boucher asked for our support to protect the small parcel of land near Moose Lake for his community, I didn't hesitate to say yes.

- Jim Prentice, Premier of Alberta and Minister of Aboriginal Relations

[15] Despite the 2015 Letter of Intent, characterized by FMFN as the "Prentice Promise", the MLAMP has still not been finalized and is the subject of ongoing negotiations between Alberta and the FMFN.

Prosper's application to the AER

[16] Prosper is the proponent of the Rigel Project, a proposed bitumen recovery project that would use steam-assisted gravity drainage to produce 10,000 barrels a day. Prosper applied to the predecessor of the AER in 2013 for three approvals for the Project under the *Oil Sands Conservation Act*, RSA 2000, c O-7 [*OSCA*], the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and the *Water Act*, RSA 2000, c W-3.

[17] The Project would be located within the 10-kilometer buffer zone surrounding the Moose Lake Reserves; that is, within the area covered by the MLAMP.

[18] On May 6, 2016, the AER suspended its consideration of Prosper's application as "a result of its recognition of the ongoing discussions between the Government of Alberta and Fort McKay First Nation regarding the [MLAMP] and the close proximity of the activities proposed in the Applications to the areas under consideration in those discussions". It was further noted in the same letter that land use policies stemming from these discussions will "directly impact the outcome of the Applications before the AER".

[19] Prosper requested the AER reconsider its decision to suspend processing of its application for the Project.

[20] On November 2, 2016, the AER resumed the approval process for the Project. By letter dated November 8, 2016, counsel for the AER advised that its "decision was made because MLAMP is still not finalized, there is no indication that finalization of the MLAMP is imminent and there is no certainty when submission of the plan will occur" and that it was prohibited by s 7(3) of the LARP from postponing its consideration of the Project until the MLAMP negotiations were completed.

[21] The AER issued a notice of hearing with respect to Prosper's application in January 2017. The FMFN took part in the hearing as a full participant. After receiving submissions from the parties on the process, scope and timing for the hearing, the AER identified the issues to be addressed. The following issues were "deemed to be not in the scope of this proceeding":

1. The adequacy of Crown consultation. The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation.

2. The adequacy of LARP and any existing subregional plans under LARP.

3. MLAMP does not exist as a subregional plan and consideration of it is not within the panel's mandate.

4. Cumulative effects unrelated to the effects that might be caused by the Rigel Project.

2018 ABAER 005 at para 16 (AER Decision)

[22] The AER hearing was held in Fort McMurray. Evidence was heard by the AER from January 9 to 18, 2018, the Aboriginal Consultation Office (ACO) report was issued on February 22, 2018, and final oral arguments were heard on March 14, 2018.

The AER Decision

[23] The AER issued its decision on June 12, 2018. It found the Project to be in the public interest and approved the Project on conditions, subject to authorization by Cabinet pursuant to s 10(3)(a) of *OSCA*.

[24] The AER recognized that the overarching question to be answered was whether the Project is in the public interest: AER Decision at para 46. It addressed safety, efficiency, and the effects on existing rights of aboriginal peoples. The AER understood the FMFN submission was that it either deny the Prosper application or, if approval is given, that it be subject to the condition that the central processing facility be located more than 10 kilometers from the Moose Lake reserves: AER Decision at para 92.

[25] In considering the potential effects of the Project on FMFN's Treaty 8 rights, the AER found that: (1) the Project will cause members of the First Nation to experience a sense of disruption to their connection to the land but this is not an impact on a Treaty 8 right; and (2) the Project will not render the First Nation's Treaty 8 rights meaningless and will not prevent the First Nation from continuing to exercise its treaty rights on the Moose Lake Reserves or in reasonable proximity to them: AER Decision at paras 126 and 130-32. With respect to several discrete Treaty 8 rights, the AER found that the evidence was insufficient to allow it to determine how the Project will affect those rights.

[26] The AER posed the question for deciding the *OSCA* application as "whether the impacts on Fort McKay First Nation's treaty rights identified above are or are not in the public interest when weighed in the balance with the other impacts, such as social, environmental, and economic impacts": AER Decision at para 134. In finding the Project to be in the public interest, the panel declined to consider the MLAMP negotiations that contemplated a 10-kilometer buffer zone, the Prentice Promise, and whether it implicates the honour of the Crown.

[27] The AER concluded the status of the MLAMP negotiations was not a valid reason to deny Prosper's application. Specifically, the AER concluded that s 21 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*] precludes it from assessing the adequacy of Crown consultation, and that it is prohibited from deferring consideration of a project on the basis that a LARP regional plan is incomplete. The AER also noted that Cabinet is required to authorize the Project and concluded that "Cabinet is the most appropriate place for a decision on the need to finalize the MLAMP". These conclusions were set out at paras 180-182 of the AER Decision:

> [180] In our view, the balance between the overall economic benefits, including employment, and the negative impacts of the Prosper Rigel project are more or less even. So to answer the question of whether the Rigel project is in the public interest, we also considered the following public-interest considerations: first, Fort McKay First Nation's argument that we should not frustrate the MLAMP negotiations; second, Prosper's submissions about the desirability of regulatory and investment certainty; and third, public policy guidance expressed through the OSCA, EPEA, the Water Act and REDA.
>
> [181] Fort McKay First Nation described MLAMP as accommodation owed to it by the Crown to address historical impacts on their treaty and Aboriginal rights. LARP indicates that, once finalized, MLAMP will be a LARP regional plan.
>
> [182] Fort McKay First Nation provided a significant amount of evidence—e.g. Ms. Buffalo's affidavit and her oral evidence about the adequacy of the LARP and MLAMP processes. To the extent that Fort McKay First Nation frames LARP and MLAMP as elements of Crown consultation, section 21 of REDA says we may not assess their adequacy. LARP prohibits decision makers, including the AER, from "adjourning, deferring, denying, refusing, or rejecting any application…" by reason only of incompletion of a LARP regional plan. We may not deny Prosper's application solely because MLAMP negotiations are not yet complete. Furthermore, AER approval of an application made under section 10 of OSCA is subject to prior authorization by the lieutenant governor in council (cabinet). Cabinet is the most appropriate place for a decision on the need to finalize MLAMP. Consequently, Fort McKay First Nation's assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project.

Permission to Appeal

[28] A decision by the AER can be appealed to this court with permission on a question of law or jurisdiction: *REDA*, s 45(1). The FMFN sought permission to appeal various questions arising out of the AER decision. Permission was granted on the following question (*Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14):

> Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP are completed?

Standard of Review

[29] As this is a statutory appeal brought pursuant to s 45(1) of *REDA*, the standard of review to be applied to the question of law on which permission to appeal was granted is correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37.

Positions of the Parties

FMFN

[30] FMFN submits the AER erred in failing to ensure Alberta's obligation to act honourably with respect to its treaty and aboriginal rights when determining whether approval of the project was in the public interest. The honour of the Crown is implicated by treaty implementation issues and requires consideration of whether approval of the Project is consistent with maintaining a mutually respectful long-term relationship. The direct promise to get the MLAMP completed by March 31, 2016 in the Letter of Intent signed by Alberta's Premier and the Chief of the First Nation attracts the honour of the Crown, and required Alberta to fulfill its promise to complete the MLAMP process to ensure that additional development would proceed in accordance with a cumulative-effects-based approach before any further oil sands facilities were approved within the Moose Lake Area.

[31] The FMFN also submits that the AER erred in finding that it was precluded by s 21 of *REDA* and s 7(3) of the LARP from considering matters relating to the MLAMP. The FMFN says that s 21 of *REDA* only removes assessment of the sufficiency of consultation, and s 7(3) of the LARP only contemplates delay by reason of the Crown's noncompliance with a provision of the LARP Strategic or LARP Implementation Plan or any direction or commitment made therein, none of which are at issue in relation to the MLAMP process.

Prosper

[32] Prosper submits the AER has no statutory authority to consider whether the honour of the Crown required finalization of the MLAMP before the Project is approved, or authority to delay hearing the Project application until the MLAMP was implemented. The AER properly reserved determinations on the MLAMP to Cabinet; because Cabinet has not issued its decision, the appeal is premature.

AER

[33] The AER's submissions were limited to the record of the proceeding, the standard of review and an explanation of the statutory scheme. It did not address the merits of the appeal.

Alberta

[34] Alberta submits that FMFN's assertion that the AER erred in not considering the honour of the Crown would effectively require the AER to consider the adequacy of Crown consultation (which is contrary to s 21 of *REDA*), or place the AER in a supervisory role over whether, when or how the Crown makes policy decisions, which is beyond its jurisdiction. The AER is a statutory tribunal that is required to act within the confines of its statutory authority. It is neither required nor permitted to indefinitely delay an application for approval of a project while Alberta engages in negotiations with First Nations. Moreover, the LARP specifically prohibits it from doing so.

[35] Alberta also submits that the honour of the Crown is a narrow and circumscribed doctrine that only applies in four situations, none of which require the AER to delay approval of a project while the Crown and a First Nation are discussing a land management policy. The Letter of Intent was a good faith commitment to work with the First Nation and other stakeholders, not an accommodation of the Project.

[36] In oral argument, Alberta conceded that if the honour of the Crown is implicated by the Project in light of the outstanding MLAMP negotiations, Cabinet bears the responsibility for ensuring any resulting obligations are met.

Discussion

The Jurisdiction of the AER

[37] The AER is a public agency which exercises adjudicative functions pursuant to the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5. As the regulator of energy development in Alberta under *REDA*, its constituent statute, the AER is mandated to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta: *REDA*, s 2. It has final decision-making power over many energy project applications. However, Cabinet authorization is required where, as here, a project is governed by s 10 of *OSCA*.

[38] In deciding whether to approve a project, the AER is required to consider various factors prescribed by its governing regulations: *REDA*, s 15; *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, 3 [*REDA General Regulation*]. To this end, the AER has broad powers of inquiry to consider the "public interest" in making its decisions: *OSCA*, s 10.

[39] Tribunals have the explicit powers conferred upon them by their constituent statutes. However, where empowered to consider questions of law, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise, absent a clear demonstration the legislature intended to exclude such jurisdiction: *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 69, [2010] 2 SCR 650 [*Rio Tinto*]. This is all the more so where the tribunal is required to consider the "public interest": *ibid* at para 70. In such circumstances, the

regulatory agency has a duty to apply the Constitution and ensure its decision complies with s 35 of the *Constitution Act, 1982*: *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 36, [2017] 1 SCR 1069 [*Clyde River*]. As the Supreme Court has noted, "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest": *ibid* at para 40. The tribunal cannot ignore that aspect of its public interest mandate.

[40] It follows from a review of its constituent legislative scheme that the AER has the implied jurisdiction to consider issues of constitutional law as they arise in its proceedings. As discussed further below, that jurisdiction is explicitly removed where the adequacy of Crown consultation is concerned: *REDA*, s 21. However, issues of constitutional law outside the parameters of consultation remain within the AER's jurisdiction, including as they relate to the honour of the Crown. Section 21 of *REDA* does not prevent the AER from considering other relevant matters involving Aboriginal peoples when carrying out its mandate to decide if a particular project is in "the public interest".

[41] Nor is the AER confined to considering "questions of constitutional law" as that term is defined in the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3 [*APJA*]. Section 11 of *APJA* provides that "a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so". In the case of the AER, it has been given the jurisdiction to determine "all questions of constitutional law" (*Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s 2 and Schedule 1), subject to notice requirements being complied with under s 12 of *APJA*. However, not all constitutional issues that arise in an AER hearing will fall within the definition of "questions of constitutional law" in the *APJA*, meaning that the AER will at times be asked to consider constitutional issues for which it has not received formal notice under *APJA*.

[42] In other words, a statute like the *APJA* should not be read as confining the AER's jurisdiction to consider constitutional issues as they relate to the "public interest": *Rio Tinto* at para 71-72. Indeed, the AER itself acknowledges its responsibility to address such issues, having considered under "the public interest" the potential adverse impacts of the Project on Aboriginal rights under s 35 of the *Constitution Act, 1982*. This broad jurisdiction to consider treaty rights outside the scope of the *APJA* is itself recognized in Ministerial Order (Energy 105/2014 and ESRD 53/2014).

[43] The AER therefore has a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown, as part of its determination of whether an application is in the "public interest". The question raised by this appeal is whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of this assessment.

[44] In determining whether the Project was in the "public interest", the AER considered the effect on FMFN's treaty rights generally but declined to consider whether approval would frustrate MLAMP negotiations. It gave three reasons for that narrow approach:

a. Section 21 of *REDA* prohibits the AER from assessing the adequacy of Crown consultation;

b. Section 7(3) of LARP prohibits the AER from "adjourning, deferring, denying, refusing, or rejecting any application" by reason only of incompletion of a LARP regional plan; and

c. AER approval of the Project under s 10(3) of *OSCA* is subject to authorization by Cabinet, which is "the most appropriate place for a decision on the need to finalize MLAMP".

[45] A statutory decision-maker is required to perform its mandate as outlined in the applicable legislation. Where directed by legislation to grant an approval "if in its opinion it is in the public interest to do so", consideration must be given to all matters relevant to determining the "public interest". A conclusion that legislation precludes considering certain matters does not relieve the decision-maker of its obligation if that legislative interpretation proves incorrect. Nor can a decision-maker decline to consider issues that fall within its legislative mandate because it feels the matter can be better addressed by another body. As a result, the three reasons given by the AER for declining to consider anything relating to the MLAMP process when considering the public interest must be examined to determine if their reasons justify its decision.

Section 21 of *REDA*

[46] When an energy project is under consideration in Alberta that could affect the treaty interests of a First Nation, the provincial Crown has a duty to consult and potentially accommodate. This duty stems from the honour of the Crown, a constitutional principle (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24, [2018] 2 SCR 765 [*Mikisew 2018*], citing *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42, [2010] 3 SCR 103) that has as its ultimate objective the reconciliation of pre-existing Aboriginal interests with the assertion of Crown sovereignty: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [*Manitoba Metis*].

[47] The responsibility to ensure the honour of the Crown is upheld remains with the Crown: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 37, [2017] 1 SCR 1099; *Clyde River* at para 22. However, the Crown can determine how, and by whom, it will address its obligations to First Nations, meaning that aspects of its obligations can be delegated to regulatory bodies.

[48] Alberta has delegated procedural aspects of the duty to consult and to consider appropriate accommodation arising out of that consultation to the AER. Under Ministerial Order (Energy 105/2014 and ESRD 53/2014), the AER must "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*". It is said that "AER processes will constitute part of Alberta's overall consultation process as appropriate". The Order also sets out the Aboriginal Consultation Direction, which describes its objective as follows:

> [T]o ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta
>
> (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982; and
>
> (b) in undertaking its consultation obligations pursuant to The Government of Alberta's [consultation policies] as amended and replaced from time to time ("Consultation Policy") and associated Consultation Guidelines ("Guidelines")

[49] The AER is ultimately responsible for considering and accommodating potential adverse impacts on the advice of the Aboriginal Consultation Office (ACO), a specialized office housed within the Ministry of Indigenous Relations. 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.

[50] The Government of Alberta has retained the responsibility to assess the adequacy of Crown consultation on AER-regulated projects. This is reflected in s 21 of *REDA*, which provides as follows:

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

[51] In the present case, the ACO held consultations with FMFN regarding the Rigel Project, and the AER considered the recommendations of the ACO and the impact of the Project on the FMFN's treaty rights as part of its hearing. FMFN has challenged the adequacy of the ACO process in another proceeding, and it is not the subject of this appeal.

[52] Neither the ACO nor the AER considered the issue raised on this appeal, namely whether the honour of the Crown was implicated by the MLAMP process and the Letter of Intent. Are the matters that FMFN sought to put before the AER in relation to the MLAMP negotiations limited to the "adequacy of Crown consultation"? We find they are not.

[53] The honour of the Crown can give rise to duties beyond the duty to consult. The Supreme Court of Canada in *Manitoba Metis* at para 73 stated that the "duty to consult" is only one of four situations recognized "thus far" where the honour of the Crown arises:

> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
>
> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution* Act, 1982, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
>
> (3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

[54] While the honour of the Crown is always at stake in its dealings with Aboriginal peoples, it is not engaged by every interaction: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511 [*Haida Nation*]; *Mikisew 2018* at para 23; *Manitoba Metis* at para 68. Rather than being an independent cause of action, the honour of the Crown "speaks to *how* obligations that attract it must be fulfilled": *Manitoba Metis* at para 73, emphasis in original. It will give rise to different duties in different circumstances: *Haida Nation* at para 18; *Mikisew 2018* at para 24. In the present case, FMFN asserts that the honour of the Crown is implicated through treaty implementation, relying on *Manitoba Metis* and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew 2005*]. It notes that the honour of the Crown infuses the performance of every treaty obligation, and stresses the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development under Treaty 8.

[55] Since *Haida Nation*, it is clear that the honour of the Crown and its attendant focus on reconciliation arise prior to questions of rights infringement, or even proof of Aboriginal rights

claims. Where rights have yet to be concluded through treaty, "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims": *Haida Nation* at para 20. And while treaties "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (*ibid*), they do not end the need for reconciliation, which is "not a final legal remedy" but a "process flowing from rights guaranteed by s 35(1)": *Haida Nation* at para 32; see also Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 at 440.

[56] In this case, FMFN argues that the MLAMP process and the Letter of Intent give rise to additional obligations stemming from the honour of the Crown beyond the duty to consult on an individual project. Specifically, FMFN suggests that the honour of the Crown is engaged in this case on the basis of treaty implementation.

[57] Section 21 does not prevent the AER from considering relevant matters involving aboriginal peoples when carrying out its mandate to decide if a particular project is in the public interest. The issues raised here are not limited to the adequacy of the consultation on this Project, but raise broader concerns including the Crown's relationship with the FMFN and matters of reconciliation. These issues engage the public interest and their consideration is not precluded by the language of s 21.

[58] Accordingly, the AER erred in concluding that s 21 of *REDA* prevented it from considering whether the MLAMP process was relevant to assessing whether the Project was in the public interest. While that provision removes the adequacy of Crown consultation from the AER's jurisdiction, the issues raised here are not so limited.

Section 7(3) of LARP

[59] The AER is required to "act in accordance with any applicable ALSA regional plan": *REDA*, s 20. The LARP is the applicable *ALSA* regional plan for the area where the Project is proposed. Section 7(3) of the LARP states:

> Notwithstanding subsections (1) and (2), a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of
>
> (a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or
>
> (b) the incompletion by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

[60] The AER interpreted s 7(3) as prohibiting it from delaying or denying approval of the Project because "LARP indicates that, once finalized, MLAMP will be a LARP regional plan" (para 181). However, the only mention of the MLAMP in the LARP is a statement in the "Introductory Section" that "the Moose Lake Access Management planning initiatives will be assessed for inclusion in the LARP implementation" (LARP, page 5). A planning initiative that will be assessed for inclusion in the LARP implementation does not fall within the scope of a "provision of either the LARP Strategic Plan or LARP Implementation Plan" or a "direction or commitment made in a provision of either the LARP Strategic Plan or Implementation Plan" so as to be subject to s 7(3).

[61] The AER failed to properly interpret s 7(3) of the LARP when it concluded that it applied to the MLAMP process.

Deferring consideration to Cabinet under s 10(3) of *OSCA*

[62] Section 10(3) of *OSCA* provides that the AER may "if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Regulator considers appropriate ".

[63] As noted, the AER viewed the positive and negative impacts of the Project as being "more or less even" (para 180), and that FMFN's "assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project" (para 182). The AER referred to s 10 of *OSCA* and concluded that Cabinet was "the most appropriate place for a decision on the need to finalize MLAMP".

[64] A statutory decision-maker is required to follow the directions in the applicable legislation. It is the legislature, not the statutory decision-maker, which delegates responsibility for making a particular decision. The responsibility to determine whether projects reviewed under s 10 of *OSCA* are in "the public interest" was delegated to the AER. Only projects deemed by the AER to be in the public interest may proceed to the next stage. Cabinet then has the authority to decide whether "to authorize" and impose "terms and conditions" on the project. Matters that fall within the scope of the "public interest", within the meaning of s 10(3) of *OSCA*, must be considered by the AER as part of its public interest mandate; the regulator is not entitled to decline to address such matters because, in its view, they could be better addressed by Cabinet. This is not to say that Cabinet cannot also take such matters into account when considering whether to authorize the Project, but that does not relieve the AER of its responsibility.

[65] The legislature granted to the AER a broad mandate to determine whether a project is in the public interest; factors to consider include the social and economic effects of the energy resource activity, the effects of the energy resource activity on the environment, and the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located: *REDA*, s 15; *REDA General Regulation*, s 3. The "public interest" also includes adherence

to constitutional principles like the honour of the Crown, and the AER is no less responsible for considering the Crown's constitutional obligations than is Cabinet. To the extent the MLAMP negotiations implicate the honour of the Crown and therefore need to be considered as part of the "public interest", the AER was under a statutory duty to consider that issue.

[66] The need for ultimate Cabinet approval does not provide the AER a lawful reason to decline to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown. For that reason, we reject Prosper's argument that this appeal is premature on account of the fact that Cabinet has yet to give final authorization to the Project. Prosper notes that only final decisions can be reviewed and likens the decision of the AER to the National Energy Board (NEB), whose recommendations to Cabinet are said not to be amenable to judicial review: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 170-203, leave to appeal to SCC refused, 38379 (2 May 2019). However, as FMFN points out, the decision of the AER regarding whether the Project is in the public interest is, unlike an NEB recommendation, a final decision subject to statutory appeal. Whether the AER erred in failing to consider the honour of the Crown as it relates to MLAMP negotiations when determining "the public interest" is a matter for which permission to appeal was granted and is properly before us.

[67] Moreover, the AER's consideration of these issues does not, contrary to Alberta's argument, place the AER in an improper role with respect to government policy decisions. The issue before the AER is whether the approval of a project is in the public interest. Considerations of the effect of the project on aboriginal interests and adherence with constitutional principles are part of the AER's public interest mandate. The AER's consideration of these issues in the context of a proposed project does not relieve the Crown of its ultimate constitutional responsibilities.

Conclusion

[68] We are satisfied that there was no basis for the AER to decline to consider the MLAMP process as part of its assessment of the public interest rather than deferring the issue to Cabinet. The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation.

[69] At the oral hearing, FMFN asked that the matter be remitted back to the AER to consider this issue, acknowledging it is for that decision-maker to determine whether the Project should be delayed, approved or denied. We agree.

[70] We have had the opportunity to review the concurring judgment of Greckol JA. She concludes that the honour of the Crown was engaged by the MLAMP negotiation process. As the AER declined to consider this issue at the hearing, a full evidentiary record relating to this matter

is not available. We are therefore of the view that the issue should be determined by the AER on an appropriate record.

[71] Accordingly, the appeal is allowed and the AER's approval of the Project vacated. The AER is directed to reconsider whether approval of the Project is in the public interest after taking into consideration the honour of the Crown and the MLAMP process. In so concluding, we stress that nothing in this decision should be viewed as a comment on whether approval of the Project is in the public interest.

Appeal heard on October 29, 2019

Memorandum filed at Edmonton, Alberta
this 24th day of April, 2020

Authorized to sign for: Veldhuis J.A.

Authorized to sign for: Strekaf J.A.

Greckol J.A. (concurring in the result):

[72] I agree that the appeal must be allowed and join with them in the reasons for doing so. However, I wish to make a few additional comments by way of guidance regarding the honour of the Crown and the MLAMP negotiations in this case.

[73] The honour of the Crown is a constitutional principle which governs the relationship between Aboriginal peoples and the Crown: *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at paras 21, 24 [*Mikisew 2018*]. Dating back to the *Royal Proclamation of 1763*, the Crown's duty of honourable dealing arises out of its assertion of sovereignty over an Aboriginal people who had *de facto* control of land and resources: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32, [2004] 3 SCR 511 [*Haida Nation*]; *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [*Manitoba Metis*]; *Mikisew 2018* at para 21.

[74] Reconciliation of these opposing realities – pre-existing Aboriginal societies with the assertion of Crown sovereignty – is the ultimate purpose of the honour of the Crown: *Mikisew 2018* at para 22; *Manitoba Metis* at para 66. The duty to treat Aboriginal peoples honourably is also enshrined in s 35 of the *Constitution Act, 1982*, of which "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose": *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

[75] The continued need to reconcile Aboriginal interests with Crown sovereignty through treaty implementation is evident from *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew 2005*], itself a case involving the Crown's ability to "take up" land under Treaty 8. As noted by Binnie J at para 54, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage". In *Mikisew 2005*, the Supreme Court of Canada held that the duty to consult imposed upon the Crown in *Haida Nation* similarly applied to the "taking up" of land where a First Nation's treaty rights might be affected. The implementation of Treaty 8 was said to "demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not)", the content of which was dictated by the duty of the Crown to act honourably: *Mikisew 2005* at para 33, emphasis in original.

[76] That the honour of the Crown attaches to the implementation of its constitutional obligations is particularly clear from *Manitoba Metis*, where the Supreme Court of Canada granted a declaration that the Crown failed to implement the *Manitoba Act, 1870* in a manner consistent with the honour of the Crown. *Manitoba Metis* considered s 31 of that constitutional document, which obliged the Crown to distribute 1.4 million acres of land to the children to Metis families. In implementing such obligations, the honour of the Crown requires that the Crown (1) take a

broad purposive approach to the interpretation of the promise, and (2) act diligently to fulfill it: para 75. The latter duty was said to arise because "the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled" (para 79) and not leave the Aboriginal group "with an empty shell of a treaty promise" (para 80, citing *R v Marshall*, [1999] 3 SCR 456 at para 52).

[77] Alberta points out that the promise at issue in *Manitoba Metis* is quite different from any promise in this case. However, in my view, the question is not whether the so-called Prentice Promise must itself attract the label "solemn obligation" or "solemn promise", or even whether it is sufficiently exacting to preclude any development in the Moose Lake area. The question, rather, is whether it was made in furtherance of the Crown's obligation to protect FMFN's rights under Treaty 8. If so, then it can properly be said to fall within treaty implementation as a measure designed to ensure the Crown's obligations are fulfilled. To see why this is the case, the precise nature of FMFN's treaty rights must be considered.

[78] First Nations groups who adhered to Treaty 8 in 1899 – of which FMFN is a descendant – ceded a large amount of land to the Crown in exchange for certain guarantees, chief among them a provision protecting the right of the signatories to hunt, trap, and fish: *Mikisew 2018* at para 5. Indeed, it has been said that "the guarantee that hunting, fishing and trapping rights would continue was the *essential element* which led to their signing the treaties": *R v Badger*, [1996] 1 SCR 771 [*Badger*] at para 39, emphasis added. These rights as set out in Treaty 8 were subsequently circumscribed by the *Natural Resources Transfer Agreement*, a schedule of the *Constitution Act, 1930*, of which paragraph 12 provided for a continuing right to hunt for food on unoccupied land: *Badger* at para 100. The right to hunt will accordingly be lost where land has been "taken up" as contemplated by Treaty 8, meaning it will not extend to private lands put to a visible use incompatible with hunting: *Badger* at paras 49, 51, 58, 66.

[79] As later clarified in *Mikisew 2005*, however, not every "taking up" by the Crown constitutes an infringement of Treaty 8: para 31. Instead, an action for treaty infringement will only arise once, as a result of the Crown's power to take up land, "no meaningful right to hunt" remains over the Aboriginal group's traditional territories: *Mikisew 2005* at para 48; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 52, [2014] 2 SCR 447. This raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt; instead, the extinguishment of the right will be brought about through the *cumulative effects* of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt – however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their treaty rights.

[80] The right to hunt (in a meaningful way) in Treaty 8 is a "solemn promise" (*Badger* at para 41) made by the Crown, just as the promise of land in *Manitoba Metis* was a solemn constitutional

obligation. And yet it is clear that, given the nature of the respective rights, their implementation will necessarily look very different. The obligation in *Manitoba Metis* was met at the point in which the Crown distributed the 1.4 million acres of land to Metis children (and would have accorded with the honour of the Crown had it been done diligently). Conversely, the "promise" of hunting – given the reality of large-scale oil and gas developments in Treaty 8 territory, which is incompatible with Aboriginal hunting – is not fulfilled definitively. Rather, the promise is easy to fulfill initially but difficult to *keep* as time goes on and development increases.

[81] The foregoing makes clear that the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one. Proper land use management remains a perennial concern for the Crown, as "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint": *Mikisew 2005* as para 27. Reconciling this "inevitable tension" (para 33) between Aboriginal rights and development in Treaty 8 territory has, first and foremost, been a matter of the Crown adhering to its duty to consult on individual projects, as mandated in *Mikisew 2005*. Acting honourably in this fashion has promoted reconciliation, in part, by "encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew 2018* at para 26), much as *Haida Nation* had counselled with respect of unproven Aboriginal rights claims. And yet, as this record itself attests, the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights.

[82] That is exactly what has been taking place in this case between the Crown and FMFN. The Crown has long been on notice that the piece-meal approach to addressing FMFN's concerns through consultation on individual projects has not adequately considered the cumulative effects of development. Whether MLAMP itself is mandated by Treaty 8 is not the issue. If the evidence establishes that the Crown entered into negotiations with FMFN on a buffer zone and ultimately agreed to implement MLAMP as a way of seeking to uphold its ongoing constitutional obligation to protect FMFN's right to hunt within its traditional area, then these were not, as suggested by Alberta, mere "policy" discussions. They would instead be negotiations designed to ensure that the Crown meet its treaty obligations. In such circumstances, the honour of the Crown would be engaged.

[83] Nor would it be an answer to say – as both Prosper and Alberta have suggested – that FMFN's concerns could instead be addressed in its treaty infringement claim against the Crown. The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty. It is engaged *prior* to treaty infringement (*Mikisew 2018* at para 67) and seeks to protect Aboriginal rights from being turned into an empty shell. Whether or not the treaty rights of FMFN have been infringed remains to be seen. Regardless, the Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the

Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation.

Appeal heard on October 29, 2019

Memorandum filed at Edmonton, Alberta
this 24th day of April, 2020

Greckol J.A.

Appearances:

J.J. Arvay, Q.C
J. Woodward, Q.C.
for the Appellant

S. Duncanson
S.R. Sutherland
for the Respondent, Prosper Petroleum Ltd.

M.G. Lacasse
for the Respondent, Alberta Energy Regulator

D.L. Sharko
A.J. Croteau
for the Intervenor