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The AER Must Consider the Honour of the Crown

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Decision Commented On: *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163

In this important decision, a unanimous panel of the Court of Appeal concluded that the Alberta Energy Regulator (AER) has an obligation to take into account the honour of the Crown when deciding whether to recommend approval of a new oil sands project under s 10 of the *Oil Sands Conservation Act*, RSA 2000, c O-7 (*OSCA*). The AER had not done so in this case. Accordingly, the Court vacated the AER's approval of Prosper's Rigel project and referred the matter back to the AER. The decision is an important decision on the implications of the honour of the Crown in the context of a regulatory tribunal, but it is also an important decision on cumulative impacts and the limits that cumulative impacts may impose on the Crown's power to take up lands under the numbered treaties. Previous posts on ABlawg have emphasized the importance of this point for the prairie provinces and other provinces with numbered treaties within their boundaries: see here, here, here and here.

I characterized the judgment (above) as unanimous. In fact, there is a majority judgment (Justices Veldhuis and Strekaf) and a concurring judgment from Justice Greckol; but Justice Greckol joins in the reasons for the majority (at para 72), and thus there is unanimity amongst the members of the Court on all the main points. Justice Greckol's concurring or supplementary judgment merits attention, however, for its extended treatment of the honour of the Crown in the context of treaty implementation, especially within the context of managing cumulative impacts.

While there are a number of different strands to the 'honour of the Crown' (see *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 and ABlawg post here) the strand most directly engaged here was that of the honour of the Crown in *treaty implementation*.

Section 10 of the *OSCA* prohibits anybody from proceeding with a commercial scale oil sands operation without the approval of the AER. The AER may only approve such a project if, in its opinion, "it is in the public interest to do so" and subject to the ultimate authorization of the Lieutenant Governor in Council (Cabinet), which body may impose additional terms and conditions.

The Fort McKay First Nation (FMFN) is a Treaty 8 First Nation in northern Alberta. The record shows that 70% of FMFN's traditional territory is leased for oil sands purposes. The area is also included within the Lower Athabasca Regional Plan (LARP) (for a post on LARP see here) under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*), but in 2015, a Review Panel (initiated by FMFN) of the LARP, concluded 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" (quoted at para 11 of the Court's decision). As part of the LARP process, FMFN had specifically sought a 10 km buffer zone from oil sands development around the Moose Lake Reserves. Alberta denied that request (at para 10).

Given the pressures on its traditional territory, the FMFN had long nurtured the idea of developing the Moose Lake Access Management Plan (MLAMP) for part of its territory close to two existing reserves, and of particular cultural significance to the Nation. One possibility was that the MLAMP, once negotiated, might be adopted as a sub-plan of the LARP. Negotiations between the FMFN and the province on this topic began in 2003.

Following the LARP Review report referenced above, Alberta and the FMFN signed a letter of intent (LOI) (March 2015) to confirm the commitment of the parties to the expedited completion of the MLAMP by March 2016, with the goal of addressing the area within 10 km of the Moose Lake Reserves by September 2015. The FMFN characterized the LOI (at para 15) as the "Prentice Promise". The MLAMP has still not been finalized.

Prosper's proposed Rigel project falls within the 10 km buffer zone. Prosper filed its applications for approval of the project in 2013. The AER originally suspended its consideration of the applications pending work on the MLAMP but later resumed the process in late 2016. In preliminary rulings the AER Hearing Panel took the view that the following matters were out of scope:

> 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 sub-regional 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. (Judgment at para 21 and referencing 2018 ABAER 005 at para 16).

The AER ultimately approved the project subject to terms and conditions and subject to cabinet approval under s 10 of the *OSCA*. Cabinet has yet to make a decision on the project. This delay has been the subject of other ongoing litigation: see *Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta*, 2020 ABQB 127 (CanLII) and *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, 2020 ABCA 85 (CanLII) and my post here.

The Court of Appeal summarized some elements of the AER's decision as follows:

> 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. (at para 25)

The Court also noted that the AER declined to consider whether the 'Prentice Promise' implicated the honour of the Crown (at para 26). The AER was generally of the view that this and the proposed MLAMP were matters that could and should be considered by Cabinet (at para 27). Permission to appeal was granted to FMFN on the following question of law: 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?

The Court quickly concluded that the standard of review for this question was correctness as required by *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37. There is nothing particularly controversial about this although it is interesting to note that the Court reached this conclusion on the more general basis of the appeal provision that governs judicial supervision of the AER rather than on the basis that the question raises issues of constitutional law.

The Court concluded, following *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, that the AER had the implied right to consider questions of constitutional law unless there was something in the AER's legislation or other legislation that removed that jurisdiction. This is the case for issues related to the duty to consult since s 21 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*) provides that:

> 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*.

But other "issues of constitutional law outside the parameters of the duty to consult remain within the AER's jurisdiction, including as they relate to the honour of the Crown." (at para 40) In particular, given its public interest mandate and the decision in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 (and see an ABlawg post on that decision here), the AER was required to take into account the constitutionally protected rights of the FMFN (at para 39). Furthermore, it was obliged to do so even if the FMFN had not given notice of a constitutional question under the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3 (*APJA*):

> … 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*. (at para 41)

….

> 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". (at para 43).

The question for present purposes was whether the AER erred by failing to take into account the honour of the Crown, as implicated in the MLAMP process, as an element of treaty implementation. The Court concluded that it had.

The Court was of the view that the AER could not hide behind s 21 of *REDA*. The duty to consult was not a complete statement of the obligations associated with the honour of the Crown: see *Manitoba Metis*. Neither could the AER hide behind a provision in the LARP (s 7(3), given legal effect by s 20 of *REDA*) which provides that a decision-maker could "not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of … (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." The short answer to that submission was that:

> A planning initiative ([.e. the MLAMP]]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). (at para 60).

Neither could the AER legitimately defer all consideration of the MLAMP and the implications of the honour of the Crown to Cabinet. Cabinet might well have its own obligations in that regard (at para 64) but

> 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. (at para 65)

The Court also rejected efforts to insulate the AER's decision from judicial supervision on the basis that the real decision was to be made by Cabinet. The Court concluded (at para 66) that the AER was a final decision and that as such there was no real analogy with the line of cases (including: *Tsleil-Waututh Nation v Canada (Attorney Genera)*, 2018 FCA 153 at paras 170-203) dealing with the role of the National Energy Board (now the Canadian Energy Regulator) in making recommendations (i.e. not final decisions) to the federal Cabinet with respect to the issuance of a certificate of public convenience and necessity. (And for criticism of that line of cases see "TMX Litigation Takes an Unusual Turn at the Federal Court of Appeal".)

As I noted in the introduction to this post, Justice Greckol's supplementary concurring opinion is particularly insightful in working through the implications of characterizing treaty

implementation as engaging the honour of the Crown, especially in the context of managing cumulative effects. As Justice Greckol emphasizes, treaty implementation is not a one-off event, and different treaty obligations (and other "solemn promises"), will trigger different implementation obligations. In this case, the relevant treaty obligation is the obligation to ensure that the treaty right to hunt remains meaningful in the face of (at paras 79 and 80) "the *cumulative effects* of numerous developments over time" (emphasis in original). And that promise, while easy to fulfil initially, becomes "more difficult to *keep* as time goes on and development increases." (at para 80, emphasis in original.)

Given this challenge, it is clear that project-based assessments cannot themselves fully discharge the implementation obligations demanded of the honour of the Crown. Seen in this light, the MLAMP was one possible mechanism for keeping faith with the treaty obligation:

> 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. (at para 82)

Nor could the Crown suggest that the loss of a meaningful right to hunt should be dealt with as a matter of treaty infringement. The Crown needed to be more proactive:

> [The honour of the Crown] is engaged prior to treaty infringement (*Mikisew* 2018 at para 67) [*Mikisew Cree First Nation v. Canada (Governor General in Council*), 2018 SCC 40 (CanLII), [2018] 2 SCR 765] 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. (at para 83)

Conclusion

This decision has the potential to be a game-changer in numbered treaty litigation. There will, no doubt, be attempts to limit the impact of the decision to the specific facts of the case, in particular the MLAMP negotiations and the "Prentice Promise". But, as Justice Greckol demonstrates in her valuable and well-reasoned concurring opinion, treaty implementation of the right to hunt requires the engagement of the Crown with affected treaty nations to address the problem of cumulative and landscape level impacts. This is also consistent with Canada's obligations under Article 27 of the International Covenant on Civil and Political Rights: see my earlier post: "*Grassy Narrows*, Division of Powers and International Law".

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