Court of Queen's Bench of Alberta

Citation: Athabasca Chipewyan First Nation v Alberta, 2018 ABQB 262

Date: 20180405
Docket: 1501 00395
Registry: Calgary

Between:

Athabasca Chipewyan First Nation

Applicant

- and -

Her Majesty the Queen in Right of Alberta as represented by the Minister of Aboriginal Relations (Aboriginal Consultation Office)

Respondent

Memorandum of Decision of the Honourable Madam Justice K.D. Nixon

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Introduction

[1] This is an application for judicial review of a decision of the Aboriginal Consultation Office, dated July 17, 2014, that a duty to consult with the Athabasca Chipewyan First Nation was not triggered in relation to a pipeline project. The pipeline project, entitled Grand Rapids, (the "Project") was proposed in Treaty 8 territory, and the Athabasca Chipewyan First Nation is a Treaty 8 First Nation. The Project was proposed by TransCanada Pipelines Limited and Phoenix Energy Holdings Limited ("TransCanada").

[2] Although the Aboriginal Consultation Office determined the Crown had no duty to consult, the Athabasca Chipewyan First Nation was granted standing before the Alberta Energy

Regulator, participated in the regulator's process, and was consulted extensively by TransCanada. The Project was approved by the Alberta Energy Regulator on October 9, 2014.

[3] This judicial review is novel. The Athabasca Chipewyan First Nation seeks to quash the decision of the Aboriginal Consultation Office that the duty to consult was not triggered, but does not ask for the matter to be returned to the Aboriginal Consultation Office for reconsideration, nor does it challenge the decision of the regulator to approve the Project.

[4] Rather, the Athabasca Chipewyan First Nation is dissatisfied with the Aboriginal Consultation Office's policies and procedures in determining whether a duty to consult is triggered, and in particular its use of maps in making that determination. Accordingly, it seeks the following declarations:

1. the Aboriginal Consultation Office had no authority to make the decision whether the duty to consult was triggered;
2. the Aboriginal Consultation Office's decision that there was no duty to consult was incorrect; and
3. the manner in which the Aboriginal Consultation Office made its decision that there was no duty to consult was procedurally unfair and in violation of the honour of the Crown.

[5] This judicial review raises the issue of mootness and whether the Court should exercise its discretion to give bare declarations, with the parties taking opposing positions on this point.

The Parties

The Applicant – the ACFN

[6] The members of Athabasca Chipewyan First Nation (the "ACFN") today are the descendants of the K'ái tailé Dene who signed Treaty 8 at Fort Chipewyan in 1899. The ACFN has eight reserves, with the main reserve near Fort Chipewyan, at the southeast end of Lake Athabasca, and seven smaller reserves located at various points from Lake Athabasca south along the Athabasca River. It is common ground that its members are entitled to the benefits of Treaty 8. Treaty 8 gives rise to the procedural right to consultation as well as the substantive rights to hunt, fish and trap.

[7] Under Treaty 8, the First Nations signatories' lands were surrendered and extinguished in exchange for reserves and other benefits including rights to hunt, trap and fish in the surrendered land subject to the taking up of land by the Crown for settlement, mining, lumbering, trading or other purposes: ***Mikisew Cree First Nation v Canada Minister of Canadian Heritage***, 2005 SCC 69 at paras 2, 31. Treaty 8 contemplated that portions of the surrendered lands would be "transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not": ***Mikisew*** at para 30. The Crown is required to honourably manage the change arising from the treaty: ***Mikisew*** at para 31.

[8] Treaty rights are protected under section 35(1) of the *Constitution Act, 1982* and the Crown's duty to consult arises in that context. The purpose of section 35 is the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": ***Beckman v Little Salmon/Carmacks First Nation***, 2010 SCC 53 at para 10.

The Respondent - The Crown/ACO

[9] The named Respondent is Her Majesty the Queen in Right of Alberta as represented by the Minister of Aboriginal Relations, and will be referred to herein variously as the Crown, the Government of Alberta, or the Government.

[10] A branch of the Ministry of Aboriginal Relations is the Aboriginal Consultation Office (the "ACO"). The ACO was established in November 2013 to manage consultation for the Crown, to strengthen the Crown's role in the consultation process, and to bring consultation matters previously housed under a number of different ministries under one Ministry.

[11] The ACO directs, monitors, and supports the consultation activities of Government of Alberta departments as well as proponents and First Nations. It manages the consultation process for the Crown.

[12] In Alberta, pipeline projects like the one in this case must be approved by the Alberta Energy Regulator (the "AER"). The AER is a decision-making body that provides for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta. The AER is tasked with considering First Nations' section 35 rights, but is prohibited by its governing statute from assessing the adequacy of the Crown's consultation with Aboriginal peoples. Instead, this task has been delegated to the ACO through a Ministerial Order.

[13] Ministerial Order 141/2013 outlines the relationship between the ACO and the AER. The Order directs the AER to ensure that the AER considers and makes decisions in respect of energy applications in a manner consistent with the Government of Alberta's consultation obligations; however, it mandates that it is the ACO's responsibility to provide advice on the adequacy of such consultations. The Order confirms that:

- the AER has a responsibility to consider potential adverse impacts of energy applications on First Nations' section 35 rights;
- the AER's processes will form part of the Government of Alberta's overall consultation process;
- the Government of Alberta retains the responsibility to assess the adequacy of Crown consultation with respect to energy applications; and
- prior to making a decision, the AER shall request advice from the ACO respecting whether the Government of Alberta has found consultation to have been adequate, or adequate pending the outcome of the AER's process, or not required.

[14] Thus, the ACO works closely with the AER to ensure that the consultation required for energy applications occurs before the AER's regulatory decision. The Ministerial Order requires the AER to provide the ACO with a copy of an energy application, a copy of any Statement of Concern filed by a First Nation in respect of the application, and copies of any evidence and information submitted by or with respect to a First Nation.

[15] The ACO makes the final determination on whether the Crown has a duty to consult a First Nation group, and, if so, whether that duty has been discharged.

[16] Prior to November 2013, the government department responsible for consultation was Environment and Sustainable Resource Development ("ESRD"). TransCanada applied for approval of the Project in August 2013 and it was approved in October 2014. This means that

TransCanada's early interactions were with the ESRD, then later with the newly established ACO.

Facts

Grand Rapids Project

[17] The Grand Rapids Project consists of two parallel main transmission pipelines of approximately 460 km that will share a common right of way to transport blended crude bitumen and diluent between the west Athabasca oils sands area and the Edmonton market.

[18] In December 2012, TransCanada contacted ESRD seeking guidance on consultation with First Nations for the Project. The ESRD determined this was a large-scale pipeline project requiring extensive consultation and advised TransCanada that it needed a consultation plan. ERSD directed consultation with eight First Nations. The ACFN was not among the eight First Nations identified by the ESRD.

[19] TransCanada decided, on its own initiative, to provide notice to 33 additional First Nations, including the ACFN. TransCanada shared information with respect to the Project and the regulator's process with the ACFN. It consulted extensively with the ACFN and provided it with funding for a study in respect of the Project.

[20] On August 30, 2013, TransCanada formally applied to the AER for approval to construct and operate its pipeline project.

[21] In early December 2013, ACFN filed a Statement of Concern in relation to the Project with the AER. It set out ACFN's concerns with the Project and included three Witness Statements from ACFN land users, attesting to their practice of treaty rights within areas on which the Grand Rapids Project was proposed.

[22] The AER provided the ACFN with details about the project and advised that ACFN's concerns would be taken into consideration by the AER in its review. The AER advised ACFN that it expected parties to discuss outstanding concerns and copied the letter to TransCanada asking it to address ACFN's concerns.

[23] In mid-April 2014, the AER forwarded ACFN's Statements of Concern to the ACO; however, it did not include the appendices such as witness statements or the map created by ACFN of its traditional territory. The witness statements were eventually provided later in May.

[24] The AER decided to hold a hearing for the Project, and issued a notice of hearing on April 29, 2014 to request participation from interested parties. The AER granted standing in the hearing to 54 participants, including ACFN. The hearing was to commence in June 2014.

Decision on Duty to Consult

[25] As noted, in the early stages when the Project was first proposed, the government department in charge of consultation was ERSD. ERSD made the "pre-consultation assessment" of which First Nations needed to be consulted in December 2012. It appears that this initial pre-consultation assessment was based on mapping that the Government of Alberta had created through its GeoData Mapping Project.

[26] The GeoData Mapping Project was established in 2010 as a cross-ministry undertaking to assist the Government in its obligation to consult First Nations. The Government recognized that

identifying the geographic areas where First Nations exercise their treaty rights is an ongoing challenge in the consultation process. To address these challenges, the Government began developing a series of maps to show where First Nations may have an interest in being consulted on land management and resource development. The goal is standardized maps created and updated by the Government of Alberta with First Nations' input to help guide decisions during the consultation process.

[27] More will be said about the mapping project later, but for present purposes it is worth noting that the ACFN has been unhappy with the project, seeing the Government's assessment of its land use and exercise of its treaty rights on the map as "incredibly narrow".

[28] After the pre-consultation assessment for the Project, the Government of Alberta, the next involvement of Government, now through the ACO, was when the ACO received the AFCN Statement of Concern in the spring of 2014.

[29] Once the ACO was aware of the ACFN's interest in the Project, it reviewed the Statement of Concern and the witness statements. On June 6, 2014, the ACO issued a report to the AER, cc'd to the ACFN, stating it still believed there was no duty to consult:

> The ACO did not direct consultation with the Athabasca Chipewyan First Nation (ACFN) because the ACO does not ordinarily require consultation with the ACFN in this area. On May 21, 2014, the ACO was made aware of three individual witness statements attached as an appendix to ACFN's Statement of Concern filed with the AER. The ACO has reviewed the statements of these three individuals and, based on this review, the ACO has not changed its position that consultation with ACFN is not required with regard to this project.

[30] The ACO advised the AER that this was a preliminary report and that it would be attending the AER hearing before issuing its final report. Prior to the hearing, the ACO reviewed the ACFN's pre-hearing submissions. It then attended the portions of the hearing in which the ACFN participated and reviewed transcripts from the rest of the hearing.

[31] On July 17, 2014, the ACO submitted its Final Report to the AER (the "Decision"). With respect to ACFN, the report stated "[t]he ACO did not direct consultation with (ACFN) and it is the ACO's position that consultation with ACFN is not required with regard to this project." The final report did not provide further reasons for the ACO's Decision.

[32] That same day, the ACFN responded to the Decision, expressing the view that it should have been consulted and requesting disclosure of the information relied on by the ACO to make its determination.

[33] On July 18, 2014, the ACO replied that the basis for the Decision was as stated in the June 6 ACO report - that the Project is outside the geographic area in which the ACO ordinarily requires consultation with ACFN. The ACO advised that the ACFN was aware of its consultation area and that if it wished to modify the area the appropriate approach was through the GeoData Mapping Project.

[34] The reasoning behind the ACO's decision was most clearly articulated in a briefing to the Minister the day before the Decision was issued. It is in the Record to these proceedings, but was not provided to the ACFN or others at the time.

[35] In the briefing on July 16, 2014, the ACO advised that consultation was not directed with the ACFN because the project is in an area where the Government of Alberta does not ordinarily require consultation with ACFN. The ACO stated that the ACFN has been aware of the Government of Alberta's process for determining where to consult with First Nations since 2011, and that the ACO, through the cross-ministry GeoData Committee, was currently engaging with ACFN in a review of the information that the Government of Alberta had pertaining to ACFN's consultation boundary. The briefing stated that the ACO reviewed the Statement of Concern to the AER, the witness statements, and observed the portions of the hearing that the ACFN participated in. The ACO stated that the ACFN did not present any new information as to how the Project may potentially affect the Treaty rights and traditional uses of ACFN members. The ACO therefore maintained its earlier position that consultation with ACFN was not required.

[36] The AER approved the Project (with conditions) on October 9, 2014.

Position of the Parties

The ACFN submits that:

a) the ACO has no jurisdiction to consider whether the duty to consult was triggered with the ACFN;

b) the ACO's decision that there was no duty to consult was incorrect insofar as it determined the existence of a duty to consult and accommodate the ACFN solely by reference to a geographical area, unless that geographical area is the one identified in Treaty 8 as the "tract surrendered"; and

c) the ACO's decision that the duty to consult with the ACFN was not triggered was reached in violation of a duty of procedural fairness and in breach of the honour of the Crown.

The ACFN seeks the following declarations:

a) the ACO's decision that there was no duty to consult with the ACFN was *ultra vires*;

b) the Crown had a duty to consult and to accommodate the ACFN on the Project, without determination of the content of that duty and whether the consultation that occurred was adequate; and

c) the Crown breached the honour of the Crown and violated a duty of procedural fairness in making its decision.

The Crown replies that:

a) no statute is necessary to empower the ACO to determine whether a duty to consult is triggered because the ACO, which was established by Crown policy, is a Crown servant or agent of the Crown;

b) the ACFN did not provide sufficient evidence to trigger the duty to consult and the ACO, acting for the Crown, made a reasonable decision that a duty to consult with the ACFN was not triggered;

c) procedural fairness and the honour of the Crown are engaged when the duty to consult has already been triggered but not in deciding whether it is triggered; and

d) even if the ACO made a wrong decision and a duty to consult was triggered, the duty fell at the low end of the spectrum and was fully satisfied on the facts of this case.

Preliminary Issue – Mootness

[37] This judicial review is novel because the ACFN seeks to quash the decision of the ACO that the duty to consult was not triggered, but does not challenge the AER's decision to approve the Project, does not ask that the matter be returned to the ACO to reconsider its decision and does not seek a direction that it be consulted further with respect to the Project.

[38] The ACFN does not seek any determination with respect to the content of a duty to consult nor whether the consultation that did occur was adequate. The ACFN took no position with respect to the adequacy of consultation.

[39] Essentially, the ACFN takes issue with the ACO's process and policies in deciding whether a duty to consult is triggered. It is especially concerned with the ACO's (and its predecessor ESRD's) reliance on a map to make this determination. The ACFN submits that the declarations are necessary to provide a framework for the process to determine whether a duty to consult is triggered in future cases. It submits that the declarations would identify what type of Crown conduct triggers the duty to consult and clarify the expectations and mutual obligations of the parties at the trigger stage.

[40] This judicial review, therefore, raises the issue of mootness and whether the Court should exercise its discretion to give bare declarations. The ACFN urges the Court to do so. It submits that they are necessary to guide the process for consultation between the Government of Alberta and all Treaty 8 First Nations, including the ACFN, in respect to future projects in treaty territory.

[41] The Crown asks the Court to exercise its discretion to decline the sought after declarations. It submits that this is an academic exercise that serves no useful purpose because the ACFN is not intending to take any steps with respect to the Project. It points out that while a decision of this Court would add to the body of law with respect to when a duty to consult is triggered, it will not be determinative of future cases, which will be determined on their own facts. Furthermore, it is not the court's role to create a consultation policy for future cases nor to direct the Crown to develop a particular consultation policy or process in the abstract. The map project, to which the ACFN takes objection, is an on-going policy initiative.

[42] Lastly, the Crown submits that it would be prejudicial to the ACO to issue declarations with respect to the fairness of the process and the honour of the Crown without also considering the adequacy issue.

Law on Declaratory Relief

[43] The granting of a declaration is discretionary. In ***Solosky v The Queen,*** [1980] 1 SCR 821, the Court summarized the principles guiding the exercise of jurisdiction to grant declarations. Where there is a good reason for doing so, a court may exercise its discretion to

make a declaration if there is a real, not a fictitious, academic or theoretical, issue raised by a party with an interest in raising it and someone with a true interest to oppose the declaration sought. Declarations with regard to the future must be approached with considerable reservation: ***Mellstrom v Garner***, [1970] 1 WLR 603, [1970] 2 All ER 9, Karminski LJ, cited in ***Solosky*****.**

[44] The leading case on mootness is ***Borowski v Canada (Attorney General),*** [1989] 1 SCR 342. As a general policy or practice, a court may decline to decide a case that raises merely a hypothetical or abstract question: "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case": ***Borowski*** at 353.

[45] The practical utility that will support granting a declaration is illustrated by ***Daniels v Canada (Indian Affairs and Northern Development),*** 2016 SCC 12. In that case, the Court granted a declaration because it ended a long-standing jurisdictional dispute whether the federal or provincial governments had legislative authority over non-status Indians and Metis, putting an end to a "jurisdictional wasteland with significant and obvious disadvantaging consequences" arising from the inability of the Metis and non-status Indians to hold anyone accountable for an inadequate status quo: ***Daniels*** at para 15. The Court held that a declaration deciding which government had jurisdiction would end a "jurisdictional tug of war" and would guarantee certainty and accountability: ***Daniels*** at para 15.

[46] In ***Borowski***, Justice Sopinka discussed three rationales with respect to mootness that a court should consider when deciding whether to exercise its discretion to hear a moot matter, at 358-363:

1. the adversarial nature of the case;
2. the concern for judicial economy; and
3. the need for the court to be sensitive to its adjudicative role and not intrude on the legislative branch of government.

[47] Justice Sopinka cautioned that a court should consider the practical effects on the rights of the parties and whether the case is one that is capable of repetition. Abstract pronouncements should be avoided if they not in the public interest or would not avoid future repetitious litigation. It is preferable to wait to determine the issue in a genuine adversarial context unless the dispute will always disappear before it is resolved. The need to settle uncertain jurisprudence can assume such practical importance that a court may nevertheless exercise its discretion to hear a moot appeal. A declaration is not of practical utility to future cases where those cases will depend on their own unique facts. In some cases, pronouncing law in a moot appeal in the absence of a real dispute may intrude on a task reserved for the legislative branch of government.

Analysis

[48] I find that the absence of an adversarial relationship is not of concern here as both the ACFN and the Crown have argued their case fully as if it were not moot. The main concern here is judicial economy.

[49] The ultimate question in a judicial review is whether the decision-making body's decision should be quashed and the matter remitted for further consideration. Where the Crown erred in its conclusion that there was no duty to consult, the matter is not remitted if the consultation that did occur was adequate. Although the ACFN asks the Court to declare that the ACO's decision

that there was no duty to consult was not only wrong, but was made in violation of the rules of fairness and honour of the Crown, the ACFN does not seek any further action by the ACO in respect of its decision on the Project. It does not ask that the matter be returned to the ACO to re-consider whether the duty to consult was triggered. It does not ask for further consultation. It does not ask that the Court determine the content of the duty to consult nor to assess whether the consultation that did occur was adequate. It does not seek to set aside the approval of the Project. The declarations the ACFN seeks will have no practical effect on the Project.

[50] As a result, I find a bare declaration regarding whether a duty to consult was triggered will not have the practical utility of the declarations in ***Solosky*** or ***Daniels.*** Whether a duty to consult is triggered, the content of that duty, if triggered, and whether that duty was met, depend on the specific facts in each case. I agree with the Crown that this is not a case where the Court should exercise its discretion to make a bare declaration. While a declaration by this Court would add to the body of law with respect to when a duty is triggered, a declaration based on the facts of this case will not avoid future litigation. Whether a duty is triggered in future cases will depend on their own specific facts and the application of well-established legal principles.

[51] Further, it would be inappropriate to decide whether the duty to consult was triggered without considering the content of that duty or whether that duty was met. Therefore, I decline to make any declarations relating to whether the duty to consult was triggered in this case.

[52] However, there are a few questions relating to the duty to consult analysis that are worth consideration. I agree with the ACFN that the following questions are live controversies that could benefit from the Court's guidance:

1. Does the ACO have the authority to determine whether the Crown's duty to consult is triggered?
2. Is the Crown's taking up of land in a treaty area adverse conduct sufficient to trigger the duty to consult?
3. Is the Crown allowed to exclusively rely on the Government of Alberta's GeoData Maps in determining whether a duty to consult is triggered?
4. Is procedural fairness engaged in the determination of whether a duty to consult arises?

Live Issues Relating to the Duty to Consult

Framework of the Duty to Consult

[53] The duty to consult is grounded in the honour of the Crown: ***Rio Tinto Alcan Inc v Carrier Sekani Tribal Council***, 2010 SCC 43 at para 32. It is derived from "the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right": ***Rio Tinto*** at para 33. The Crown has an implied duty "to consult and, where indicated, accommodate Aboriginal interests" in the spirit of reconciliation: ***Haida Nation v British Columbia (Minister of Forests)***, 2004 SCC 73 at paras 20, 25; ***Rio Tinto*** at para 32.

[54] Consultation and accommodation are "part of a process of fair dealing and reconciliation . . . reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982"*: ***Haida Nation*** at para 32.

[55] Thus, the duty to consult "seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests": ***Rio Tinto*** at para 34.

[56] In the context of treaty rights specifically, the duty to consult was explored in ***Mikisew,*** another Treaty 8 case. The Supreme Court of Canada held that the duty to consult arises when the Crown exercises a treaty right to take up land, and adversely affects or interferes with the First Nations' treaty rights to hunt, fish and trap. Binnie J. addressed the nature of the right to consultation, and held that Treaty 8 gives to First Nation signatories procedural rights (consultation) as well as substantive rights (hunting, fishing and trapping rights): ***Mikisew*** at para 57. Where the Crown does not engage in adequate consultation, it violates its procedural obligations, which is distinct from whether or not the Crown has also breached its substantive treaty obligations: ***Mikisew*** at para 57.

[57] The threshold for the duty to consult is fairly low and requires only that the Crown conduct might affect the Aboriginal claim or right: ***Mikisew*** at para 34; ***Rio Tinto*** at para 40. There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from the development to engage the Crown's duty to consult: ***Brokenhead Ojibway Nation v Canada (Attorney General),*** 2009 FC 484 at para 34.

[58] The test for when a duty to consult is triggered has been well-articulated by the Supreme Court of Canada. A duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential or actual existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": ***Haida Nation*** at para 35. In ***Rio Tinto***, the Court broke this down into a three part test, at paras 40-50:

1. the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;
2. contemplated Crown conduct; and
3. the contemplated conduct may adversely affect an Aboriginal claim or right.

Issue 1 - Does the ACO have the authority to determine whether the Crown's duty to consult is triggered?

[59] The ACO's authority to decide whether a duty to consult is triggered has not been previously challenged. Determination of this issue is of practical utility to future cases as it addresses a fundamental issue that does not depend on specific facts.

[60] Whether the ACO had the authority to make the decision that consultation with the ACFN was not triggered raises an issue of true jurisdiction. This issue is reviewable on a standard of correctness: ***Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd***, 2016 SCC 47 at para 24; ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras 58-61.

[61] The ACFN submits that the ACO had no authority to make the decision there was no duty to consult because there is no statute giving ACO the power to do so. In this regard, it relies on ***Rio Tinto*** where the Court, addressing the jurisdiction of a statutorily-created tribunal, held

that the power to engage in consultation does not, on its own, give jurisdiction to determine whether a duty to consult exists: at para 60.

[62] The ACFN goes further. It submits that the Minister of Aboriginal Relations to whom the ACO is responsible has no statutory authority either to make decisions about the rights of citizens or to delegate such power to the ACO. Although the Lieutenant-Governor-in-Council has power to establish government departments and designate ministers to administer these departments under the *Government Organization Act*, RSA 2000, G-10, s 2(1), only the responsibility for various Aboriginal programs and Metis Settlement legislation were transferred to the Minister by the *Designation and Transfer of Responsibility Regulation,* Alta Reg 80/2012, ss 6(1.2), 10.1.

[63] I find the ACFN is not correct in its assertion that the ACO has no authority to make the determination whether there is a duty to consult.

[64] The Government of Alberta is the Crown or Her Majesty the Queen in Right of Alberta. It acts through its ministers and their departments: Peter Hogg, *Constitutional Law of Canada,* loose-leaf (updated 2016, release 1), (Toronto: Carswell, 2007), ch 10 at 10-3; *Interpretation Act,* RSA 2000, c I-8 s 28(1)(r). The Crown symbolizes and denotes executive power, that is, the powers of government: ***Clyde River (Hamlet) v Petroleum Geo-Services Inc,*** 2017 SCC 40 at para 28.

[65] The Crown's duty to consult arises from the treaties and section 35(1) of the *Constitution Act, 1982*. The ultimate responsibility for consultation rests with the Crown. The Crown is the government. It acts through ministers and their departments, here the ACO. Governments may set up administrative schemes or policies to discharge the Crown's duty to consult: ***Haida Nation*** at para 51. The ACO's role in discharging the Crown's obligation to consult was mentioned by the Alberta Court of Appeal in ***O'Chiese First Nation v Alberta Energy Regulator et al***, 2015 ABCA 348 at para 41, leave to appeal to the SCC dismissed, [2016] SCCA No 9.

[66] ***Rio Tinto*** does not assist the ACFN. The ACO is a department of the government, not a statutorily-created tribunal. No statutory authority is required for the ACO to make the decision respecting the duty to consult. The ACO was established by the Crown. It is an office that was established in 2013 under the Alberta Ministry of Aboriginal Relations (now Indigenous Relations). It exercises its authority under the direction of the Minister of this government department, and was established under the Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management.

[67] The ACO may delegate some procedural aspects of consultation to project proponents in accordance with "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management July 28, 2014" ("Guidelines on Consultation"). However, under the Guidelines on Consultation, the ACO retained responsibility for all substantive aspects of consultation, including deciding whether the duty to consult is triggered and its adequacy.

[68] The ACO is administered directly by the Minister of Indigenous Relations and carries out matters under the Minister's administration. Thus, no delegation from the Minister to the ACO is required. Simply put, the ACO is a Crown servant or agent and acts for the Crown in discharging the Crown's obligations to consult with First Nations. The ACO does not need a statute formally empowering it to discharge the Crown's duty to consult. The legislative branch is entitled to

proceed “on the basis that its enactments ‘will be applied constitutionally’ by the public service”: ***Little Sisters Book and Art Emporium v Canada (Minister of Justice),*** 2000 SCC 69 at para 71.

[69] Therefore, I conclude that the ACO has the authority to determine whether the Crown’s duty to consult is triggered.

Issue 2 – When is a duty to consult triggered?

[70] The ACFN poses two questions relating to the triggering of the duty to consult. The first is whether the duty is triggered once there is a taking up of land in the treaty area. The second is whether the Crown can rely exclusively on government consultation maps when determining whether the duty is triggered.

[71] First, I find that the ACFN is incorrect in asserting that a duty to consult arises solely as a result of the taking up of land in the treaty area.

[72] As was explained in ***Mikisew***, Treaty 8 was designed to open up the Canadian west and northwest to settlement and development. The Treaty covered a large area of 840,000 square kilometres across what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. While Treaty 8 provided the First Nations with rights to hunt, fish, and trap, it also subjected those rights to the Crown’s right to exclude tracts of land “as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes": ***Mikisew*** at para 24. Therefore, the signatories to Treaty 8 contemplated that portions of the surrendered land would be “taken up” by the Crown resulting in the First Nations no longer have treaty rights to hunt, fish, and trap on portions of the lands: ***Mikisew*** at para 30. When the “taking up” process occurs, such as with a pipeline development, the question is whether the taking up may adversely impact a First Nation’s exercise of its treaty rights in that particular area. If so, a duty to consult will arise. If there is no potential impact, the duty to consult is not engaged.

[73] Thus, the taking up of land in Treaty 8, on its own, does not engage the duty to consult. This was explained by the Court in ***Mikisew*** at para 55:

> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (Delgamuukw, at para. 168). <u>This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.</u> ... [Emphasis added]

[74] Therefore, contrary to the ACFN’s submission, there is no “at large duty to consult” whenever development is proposed in treaty territory.

[75] I do agree with the ACFN, however, on their second submission: that a consultation map will not necessarily be determinative of whether a duty to consult is triggered. The Crown conceded this point in argument as well.

[76] Before addressing this further, it is helpful to review the GeoData Mapping Project and some of the interactions that occurred between the ACFN and the Government of Alberta relating to the map for the ACFN.

[77] As noted, the GeoData Mapping Project was established in 2010 as a cross-ministry undertaking to assist the government in its obligation to consult First Nations, with the goal being standardized maps created and updated by the Government of Alberta with First Nations' input to help guide decisions during the consultation process.

[78] The Frequently Asked Questions ("FAQ") on the GeoData Mapping Project indicate that the maps "are intended to be advisory only (one tool among others): Alberta may still require consultation outside these areas where a project has the potential to impact First Nations' Rights and Traditional Uses, and may make these determinations, as it is the Crown's duty to consult and ensure meaningful consultation is carried out."

[79] The FAQ also indicate that no information in a geographic area does not necessarily mean that consulting the First Nation in that geographical area should be ruled out. Similarly, the presence of information does not mean that consultation should necessarily occur. The map is available to Government staff for use in consultation matters, but is subject to change in light of new information from the First Nation or other sources.

[80] The GeoData Project has been a work-in-progress. The Government of Alberta anticipated that the initial engagement with each First Nation would be completed by 2012 with the maps updated on a continual basis as new information became available. Phase III started in 2014. The FAQ indicate that "each First Nation is always welcome to provide new or updated written information for Alberta's consideration in revising the maps".

[81] The ACFN's engagement in this project began at the end of 2010, when the Government wrote to the ACFN to arrange a meeting in order to establish a map for the purpose of directing consultation. The letter was accompanied by an update on the GeoData Mapping Project and the FAQ referenced above.

[82] The parties met in January 2011and reviewed a preliminary map together. In a PowerPoint presentation the Government reiterated that "[the] First Nations GeoData map will be one of several information sources available to Alberta staff to determine (case by case) if proposed projects or initiatives have the potential to adversely impact First Nations Rights and Traditional Uses." The ACFN expressed a number of concerns both at that meeting and in a February 2011 letter to three Ministers about the mapping project, including that the data collection was inadequate and that the approach to assessing its land use and exercise of treaty rights was "incredibly narrow". The ACFN asked the Government to look at various submissions the ACFN had made in the past documenting its land use.

[83] In April 2011, the Minister of Aboriginal Relations replied to the February 2011 letter and advised that he took note of ACFN's concerns and that the map would only be one advisory tool, amongst others, in its selection of which First Nations to consult on a given project. He invited the ACFN to provide further information to fill in gaps. Later that same month, a GeoData Project representative sent the ACFN two documents he had in relation to ACFN's traditional land use areas and asked if there were other documents he should look at. It appears that this was the end of communications between the parties on the mapping project until 2014.

[84] The Government made an internal determination of a map for the ACFN in March 2012. It appears that this map was referred to when the ESRD and ACO considered whether the ACFN needed to be consulted on the Grand Rapids Project.

[85] As noted, TransCanada engaged in consultation with ACFN about the Grand Rapids Project on its own initiative. At some point in this process, TransCanada advised ACFN that the Government of Alberta had not directed consultation with the ACFN for the Project.

[86] In March 2014, the ACFN sent an email to ACO staff asking for the consultation map it uses when asking proponents to consult with the ACFN. The ACO staff member sent the map in April 2014 and advised that if ACFN wanted to modify the map it should do so through the GeoData Mapping Project team. In May 2014, the ACFN sent a different map to the ACO staff member advising that the ACO should use this map instead. The ACO staff member sent the map onto the GeoData Mapping Project team and asked them to follow up with ACFN.

[87] Around this same time, the GeoData Mapping Project wrote to the ACFN advising that the mapping project was moving into Phase III and the team wanted to work with each First Nation in arriving at a better consultation mapping area and filling in information gaps.

[88] Based on these facts, it is clear that the GeoData Mapping Project is an on-going policy initiative that is meant to assist the Government of Alberta in discharging its duty to consult. I agree with the parties that the Government of Alberta's internal mapping should only be one tool used by the Government in determining whether a duty to consult is triggered.

[89] It appears that although the Government initially advised the ACFN that the consultation map would only be one resource or tool used in determining if there is a duty to consult, in effect the map was the only tool used in the pre-consultation assessment directing which First Nations to consult.

[90] It is understandable that the ACFN was therefore upset when it learned that the mapping alone had been used to assess consultation obligations. It may have also been premature for the Government to use the consultation map in the pre-consultation assessment stage when there were known information gaps.

[91] Whether or not the duty to consult is triggered depends on the legal test identified in ***Haida Nation*** and ***Rio Tinto*** applied to the facts in each case, not on what the Government's internal maps indicate.

[92] The Government of Alberta is permitted to create policies for consultation so long as they are carried out in a manner consistent with the Constitution: ***Haida Nation*** at para 51**;** ***L'Hirondelle v Alberta (Minister of Sustainable Resources Development),*** 2013 ABCA 12 at paras 23-27, leave to appeal to SCC refused, [2013] SCCA No 110; ***Little Sisters*** at paras 71-82, 138-139. Consultation maps are an advisory tool to assist the Government in discharging its duty to consult, but reliance solely on the map without consideration of the specific circumstances of a given project and its potential effects would be inappropriate, especially once the Government of Alberta has been notified that a First Nation believes there is a duty to consult.

[93] However, despite the ACFN's assertions, in this case I find the ACO did not rely exclusively on the consultation map in making its ultimate Decision. The Record shows the ACO considered the mapping, the Statements of Concern, and the ACFN's hearing materials and submissions to the AER in coming to its Decision on July 17, 2014.

[94] Unfortunately, the fact that submissions beyond the map were considered by the ACO was not articulated to the ACFN in the ACO's reasons, nor did the ACO engage the ACFN once it knew there was a dispute over whether a duty to consult was triggered to discuss what evidence ACO required and what procedure it would follow. It is also unfortunate that although ACFN filed its Statement of Concern and witness statements in early December 2013, those materials were not fully passed on to the ACO until late May 2014.

[95] Ultimately, because the ACFN and the Government of Alberta agree that the map is only one tool to be used in determining if there is a duty to consult I do not believe a declaration on the matter is necessary. A declaration could thwart the years of work that have been put in to date. The mapping project is an attempt by the Government to be pro-active in addressing its consultation obligations and is a step towards reconciliation. The project is going through various phases which are meant to improve the accuracy of the mapping with First Nations' input. It is a project aimed at assisting both the Government and the First Nations with what can be onerous requirements relating to consultation.

[96] As I will discuss in the next section however, when the use of the map results in a dispute between the Government and a First Nation over the duty to consult on a project, the ACO must engage the First Nation to assess its claim independently of the map.

Issue 3 - Is procedural fairness engaged when the Crown decides if a duty to consult is triggered?

[97] The ACFN submits that in making the decision whether a duty to consult was triggered, the ACO breached a duty of procedural fairness and violated the honour of the Crown.

[98] The ACFN complains that the ACO failed to follow the principles of procedural fairness set out by the Supreme Court of Canada in ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, that govern administrative decisions. It submits that the Crown failed to uphold its honour because it ignored facts and arguments submitted to the ACO regarding potential impacts of the Project on its rights and failed to communicate with ACFN about the Project.

[99] The particular procedural complaints of the ACFN are that the ACO failed to give notice that it was making a final determination with respect whether the ACFN was entitled to be consulted; failed to provide the ACFN with notice about the case it was required to meet; failed to consider evidence; and failed to allow the ACFN to adequately participate in the decision of whether a duty to consult was triggered.

[100] The Crown submits that the principles of procedural fairness and the honour of the Crown do not apply to the ACO's decision and are not engaged at the trigger stage, but only after the duty to consult is triggered. It submits that the honour of the Crown speaks to how obligations are fulfilled. Further, it submits that the test for triggering the duty to consult is well-established as are the reciprocal obligations of First Nations. The ACFN participated in the Geodata Mapping Project, was consulted by TransCanada and participated in the AER regulatory process. Furthermore, the ACO considered all of the ACFN's information and remained open throughout to receiving further information from the ACFN.

[101] As previously stated, the ACFN seeks to have the decision that there was no duty to consult it quashed, but does not ask that the matter be remitted to the ACO for further consideration of whether the duty to consult was triggered, nor does it seek further consultation

in the event there was a duty to consult. As with the declaration with respect to whether the duty to consult was triggered, a declaration with respect to the manner in which the Crown made its decision will have no effect on the Project**.** For that reason, I decline to consider whether a duty of procedural fairness was breached in this case. Despite this, I recognize that the broader question of whether such a duty exists is an area of disagreement between the parties which would benefit from some clarity to help in future cases of this nature.

[102] In support of the AFCN's contention that the Crown owed it a duty of fairness in making the trigger decision, the ACFN relies on ***Fort Chipewyan Metis Nation of Alberta Local #125 v Alberta,*** 2017 ABQB 713 [***Fort Chipewyan***] and ***Metis Nation of Alberta Association Fort McMurray Local 1935 v Alberta,*** 2016 ABQB 712 [***Metis Nation***]**.** At issue in these cases was whether the Crown had a duty to consult two Metis societies incorporated under the *Societies Act*, RSA 2000 c S-14. In both cases, the ACO was involved in determining if the duty was triggered, and found that it was not. Our Court held that the ACO was bound by a duty of procedural fairness in coming to a determination on the trigger issue in those cases.

[103] The issue was explored most thoroughly in the ***Metis Nation*** case. The Court quoted from ***Baker*** noting the duty of procedural fairness is "to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": ***Baker*** at para 22, as quoted in ***Metis Nation*** at para 157.

[104] The Court then used the analytical factors articulated in ***Baker*** and applied them to the facts of the case, determining that the ACO owed a high level of procedural fairness to the Metis society: ***Metis Nation*** at para 177. Further, the ACO had breached its duty by giving short and inflexible deadlines, giving unclear deadlines, not providing the society with enough time to respond to requests for information, and for failing to show that it fairly and fully considered the information and evidence submitted by the society. The Court quashed the ACO's decisions and remitted consideration of whether the duty to consult was triggered back to the ACO.

[105] I agree with the conclusion in ***Metis Nation*** that a duty of procedural fairness is engaged when a branch of the Crown, such as the ACO, determines if a duty to consult is triggered. In ***Baker***, Justice L'Heureux-Dubé held that the "fact that a decision is administrative and affects the 'rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness": at para 20. The decision-makers at the ACO are agents of the Crown, and are making an administrative decision on whether an aboriginal group's rights under section 35 are engaged in a particular context or not.

[106] The ACO makes the final determination on whether the duty to consult is triggered. The purpose of the decision is to identify, in advance, possible Crown interference with existing treaty rights, while balancing countervailing Crown interests. From a practical point of view, the ACO decides the obligations of project proponents and whether they are required to start engagement with First Nations.

[107] ***Haida Nation*** acknowledged that while discharging the duty to consult, there is concern for principles of fairness from administrative law: at para 41. I can see no reason to deny procedural rights of fairness to the trigger decision simply because the duty to consult has not yet been proven. Once the duty to consult is proven, procedural rights will follow that fall on a spectrum depending on the adverse impacts, and can include accommodation. It is precisely

because the triggering decision is the gateway to this spectrum of rights that it attracts procedural fairness.

[108] The Crown's position is also contrary to the Supreme Court's decision in ***Beckman*** where the Court refused to draw a bright line between duty to consult principles and administrative law principles such as procedural fairness. The Court quoted with approval Lamer J.'s comments in ***R v Van der Peet***, [1996] 2 SCR 507, that "aboriginal rights exist within the general legal system of Canada": ***Beckman*** at para 45. The Court then went on to confirm that procedural fairness is equally relevant to administrative decisions affecting individuals and communities regardless of whether they are Aboriginal or not, stating at para 47:

> Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

[109] Therefore, the decision of whether a duty to consult is triggered does attract a duty of fairness.

[110] That being said, consultation itself is a procedural right: ***Mikisew*** at para 57. For that reason, I have some hesitancy in applying the analytical framework in ***Baker*** too strictly to duty to consult cases and procedural requirements relating to the trigger decision. This is an area of law that has developed somewhat in a *sui generis* fashion. The ultimate goal of the duty to consult is reconciliation between the parties, and the trigger question is often one step towards that goal. It could ultimately derail the conciliatory approach that should occur between the Crown and First Nations if the decision on whether a duty is triggered or not turns into a process similar to the trial model of adjudicating rights.

[111] In fact, it must be remembered that the ACO itself is not a tribunal. It is department created by the Government in recognition of the importance of its duty to consult.

[112] Ultimately, procedural fairness aims to provide individuals with a fair opportunity to influence the outcome of a decision and be treated with dignity, concern and respect: Guy Régimbald, *Canadian Administrative Law,* 2ed (Markham: LexisNexis Canada), at 261. The question in every case is whether the procedure used in making the decision was fair, impartial and open: at 278. As was noted in ***Baker*** "the duty of fairness recognizes that meaningful participation can occur in different ways in different situations": at para 33.

[113] In this vein, I find that in the context of the ACO, the duty of procedural fairness requires there to be communication between the ACO and the First Nation when a contested triggering decision arises. A contested triggering decision will arise when it is apparent that the ACO and a First Nation disagree over whether the duty to consult is triggered. The ACO will then be required to make a determinative decision on whether the duty is triggered.

[114] In those circumstances, I agree with the conclusion in ***Metis Nation*** that the question of whether a duty to consult is triggered requires a "full and fair consideration of the issues, and the claimant ... whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered": at para 178, quoting from ***Baker*** at para 32.

[115] It is not the Court's role to dictate procedure; however, in the circumstances that unfolded in this case, it would be expected that once the ACO received the ACFN's Statement of Concern from the AER, and understood that, contrary to the ACO's preliminary determination, the ACFN believed there *was* a duty to consult, the ACO should have provided notice to the ACFN that the ACO would be making a final determination on the issue.

[116] The duty of procedural fairness would also require the ACO to outline what procedure it would undertake in making its determination, what evidence is required to meet the trigger test, as well as to convey the deadlines applying to the ACO's procedure: ***Metis Nation; Fort Chipewyan***. Responsibility would then lie with the First Nation to bring forward evidence to establish that the trigger test is met: ***Rio Tinto*** at 45-46; ***Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)***, 2015 SKCA 31 at para 91.

[117] Finally, once the ACO has made its decision, the ACO would be expected to provide reasons for its decision that show it fully and fairly considered the information and evidence submitted by the First Nation: ***Metis Nation*** at para 215.

[118] These steps that I have outlined were not done in this case and left the ACFN feeling that the Decision was made without their input.

[119] I do not believe that these procedural fairness requirements place an overly high burden on the ACO, in fact the decision in ***Fort Chipewyan***, which found the duty of procedural fairness had been met by the ACO, demonstrates the type of communication between the parties that is necessary, and was not overly burdensome. I also wish to make it clear that this type of procedure would not be required in every case where the ACO is considering whether a duty to consult is triggered, but only when a difference of opinion emerges between the First Nation and the ACO.

[120] This clarity surrounding the duty of procedural fairness should assist the parties moving forward. It is most desirable to avoid the adversarial process when the end goal is reconciliation and ensuring adequate consultation occurs. As recently stated by the Supreme Court in ***Clyde River*** at para 24:

> ... judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. ... No one benefits -- not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities -- when projects are prematurely approved only to be subjected to litigation.

Conclusion

[121] In conclusion, this Court declines to exercise its discretion to make a bare declaration with respect to whether the duty to consult the ACFN was triggered or what evidence was needed to trigger it.

[122] The Court grants the following declarations:

1. The Aboriginal Consultation Office (ACO) has the authority to decide whether the duty to consult is triggered.

2. The mere act of taking up of land by the Crown in a treaty area is not adverse conduct sufficient to trigger the duty to consult.
3. Procedural fairness is engaged in the determination of whether a duty to consult is triggered.

[123] If the parties are unable to agree on costs they may be spoken to within 90 days.

Heard between the 8th and 10th day of November, 2016
Dated at the City of Calgary, Alberta this 5th day of April, 2018.

K.D. Nixon
J.C.Q.B.A.

Appearances:

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