

Resource projects and the honour of the Crown: More than just consultation about a project's impacts

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- The Nova Scotia Supreme Court's decision in *Sipekne'katik v. Alton Natural Gas Storage LP*, issued March 24, 2020, finding that Nova Scotia's Minister of Environment improperly failed to consult on asserted Aboriginal rights and title beyond the scope of the physical impacts of the project under consideration
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Introduction

Canadian courts have recognized that the "honour of the Crown" is a constitutional principle that seeks to reconcile pre-existing Aboriginal interests with the assertion of Crown sovereignty. The honour of the Crown is always at stake in the Crown's dealings with Aboriginal people, but the principle does not give rise to an independent cause of action. Rather, the honour of the Crown speaks to how certain Crown obligations must be fulfilled. Specifically, courts have found that the honour of the Crown

- gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Indigenous interest;
- gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as yet unproven Indigenous interest;
- governs treaty-making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and
- requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Indigenous peoples.^[1]

While these four situations are the only areas where courts have found the honour of the Crown to arise to date, it is possible that the above list may be expanded in the future.

Until recently, the principle of the honour of the Crown has been raised in regulatory proceedings and litigation as an ancillary argument to complaints about Crown consultation and the Crown's adherence to treaty obligations. Two recent court decisions out of Alberta and Nova Scotia, however, highlight that this principle may itself form the basis for successful challenges to regulatory decisions and may expand what was previously understood to be required by regulators and governments:

- *Fort McKay First Nation v. Prosper Petroleum Ltd* [PDF] (*Fort McKay*), in which the Alberta Court of Appeal held that a regulator's mandate to consider the "public interest" includes an obligation to consider relevant issues of constitutional law, including the honour of the Crown separate from the duty to consult.
- *Sipekne'katik v. Alton Natural Gas Storage LP* [PDF] (*Sipekne'katik*), in which the Nova Scotia Supreme Court held that the honour of the Crown required consultation on asserted Aboriginal rights and title beyond the scope of the physical impacts of the project under consideration.

Fort McKay

Background

Fort McKay concerned Prosper Petroleum Ltd.'s Rigel Oil Sands Project (the Rigel Project) in Alberta and outstanding requests by Fort McKay First Nation (FMFN) for a Moose Lake Access Management Plan (an MLAMP). The Rigel Project has also been the subject of other recent litigation that we have commented on in our Osler Update, "[Alberta Court gives Cabinet 10 days to decide on oil sands project.](#)"

Since the early 2000s, FMFN has sought protection of a large area of land surrounding its "Moose Lake" Indian Reserves in northern Alberta through implementation of an MLAMP. Negotiations between the Government of Alberta and FMFN on an MLAMP have been intermittent, but included a Letter of Intent between former Premier of Alberta Jim Prentice and FMFN's Chief Boucher in 2015 to develop the plan within months. The content of the plan remains subject to negotiations and has still not been finalized as of the date of this Update.

The Rigel Project is proposed to be located within five kilometres of FMFN's Moose Lake Reserves, within the area proposed to be subject to the MLAMP. The project was applied for in 2013, shortly after the project area was designated as being available for oil sands development in Alberta's Lower Athabasca Regional Plan (LARP). The Rigel Project is also immediately adjacent to the Dover Commercial Project, a much larger oil sands project that was approved by the Alberta government in 2014 and is supported by FMFN.

In June 2018, after almost five years of regulatory review, the Alberta Energy Regulator (AER) found the Rigel Project to be in the public interest of Alberta and approved it subject to Cabinet authorization. In reaching its decision, the AER declined to consider whether the approval would frustrate negotiations between FMFN and Alberta related to the development of the MLAMP because, among other things, the AER has no jurisdiction to assess Crown consultation (by virtue of an express statutory provision), and Cabinet was best positioned to decide whether MLAMP should be finalized before the project is allowed to proceed.

The question on appeal was whether the AER improperly failed to consider the honour of the Crown and, as a result, failed to delay approval of the Rigel Project until the MLAMP negotiations were completed.

Decision

The Alberta Court of Appeal (the ABCA) held that the AER had an obligation to consider the honour of the Crown in relation to the MLAMP process and directed the AER to reconsider whether the Rigel Project is in the public interest after properly considering the honour of the Crown.

The ABCA determined that the AER's mandate to consider the "public interest" includes an obligation to consider relevant issues of constitutional law, such as the honour of the Crown (which the Court found was separate from the AER's lack of jurisdiction to consider the adequacy of Crown consultation). According to the Court, the matters that FMFN sought to put before the AER in relation to the MLAMP negotiations were "not limited to the adequacy of Crown consultation on this Project, but raised broader concerns including the Crown's relationship with the FMFN and matters of reconciliation [which] engage the public interest." The Court found that these broader matters had not been removed from the AER's jurisdiction and were relevant to determining if the project is in the public interest. Further, even if matters related to MLAMP could be better addressed by the Cabinet, the Court held that the AER is not entitled to decline to address matters that fall within the scope of the "public interest."

Sipekne'katik

Background

Sipekne'katik concerned the Alton Natural Gas Storage LP Project (the Alton Gas Project) in Nova Scotia and an appeal of the industrial approval for the project's brine storage and discharge facility under Nova Scotia's *Environment Act*. Nova Scotia's Minister of Environment (the Minister) dismissed *Sipekne'katik*'s ministerial appeal of the industrial approval after concluding that consultations with the Band had been sufficient. The question on appeal was whether the Minister made a "palpable and overriding error" when she concluded that the level of consultation was sufficient.

Decision

The Nova Scotia Supreme Court (the NSSC) held that the Minister's decision was not supported by the evidence and the Minister therefore committed a palpable and overriding error when she concluded that the level of consultation with *Sipekne'katik* was sufficient. As a result, the Court reversed the Minister's decision and directed the parties to resume consultations for 120 days.

The NSSC determined that consultation must focus on asserted rights and/or title and not on environmental impacts of a project *per se*.^[2] While *Sipekne'katik*'s asserted claims (including Aboriginal title) had not been proven or accepted by the government, the NSSC found that the honour of the Crown requires consultation on those claims so long as they are "factually credible." The NSSC concluded that consultation on the Alton Gas Project was flawed because the province never specifically engaged in a discussion of the asserted Aboriginal title claim or treaty rights during the consultation process. Rather, the consultation process focused exclusively on assessing, investigating and mitigating the potential environmental impacts of the Alton Gas Project. The Court found that the province should have completed a preliminary assessment of the strength of the Band's claim and potential impacts of the Alton Gas Project on that claim, and then given the Band the opportunity to review and comment on that assessment. The province's failure to consult on the "core issue" of the *Sipekne'katik*'s

title claim meant that the province precluded discussion of the full range of possible accommodation measures. The NSSC found that these flaws could not support a finding that the province's consultation had been meaningful, deep or sufficient.

Implications for regulatory processes

Fort McKay and *Sipekne'katik* both suggest that when Aboriginal groups raise concerns during the regulatory process that are beyond the scope of the project in question (such as regional land use plans and Aboriginal title claims), regulators and governments may need to conduct assessments into the credibility of those concerns and factor those concerns into their decisions and consultations on the specific project. This may significantly expand the role of public interest regulators from technical experts assessing a specific project's merits to supervisors of Crown conduct and treaty implementation. Governments may now also have to conduct preliminary strength of claim assessments whenever Aboriginal groups assert title (as they more and more frequently do) and consult on that specific issue in the content of every project's consultations. If widely implemented, these changes could fundamentally expand the obligations on regulators and governments across Canada and create new avenues for Aboriginal groups to legally challenge project approvals.

We note that *Fort McKay* and *Sipekne'katik* involved unique facts where the provincial government in question had been made aware of an Aboriginal group's concern for years and had taken limited, if any, steps to address that concern. Courts have demonstrated an increasing willingness to intervene in these types of circumstances to ensure that the honour of the Crown is upheld. It is unclear whether *Fort McKay* and *Sipekne'katik* represent a significant evolution in Aboriginal law in Canada, or whether those cases are limited in application to their unique facts. We recommend that project proponents, regulators and governments closely monitor how these cases are interpreted and applied by courts in the coming months to ensure each party's obligations in Crown consultation and treaty implementation are well understood and that Aboriginal risks on projects are appropriately mitigated.

[1] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73.

[2] The NSSC cited *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, in which the Supreme Court of Canada (SCC) indicated that during consultation constitutionally protected rights must be "considered as rights, rather than as an afterthought to the assessment of environmental concerns" (para. 51). In that case, the SCC found that the National Energy Board's inquiry improperly focused on environmental concerns rather than on rights (para. 45).