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ARTICLE

# Fort McKay v. Prosper boards, tribunals and the honour of the crown

## Introduction

The Alberta Court of Appeal recently held in *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163, that boards and tribunals are responsible for upholding the honour of the Crown where their decisions may affect an aboriginal right, regardless of whether it also assesses Crown-aboriginal consultations. The decision, while unique due to various promises made and documented by the Alberta government, expands the potential scope of considerations for boards and tribunals when adjudicating on questions where negotiations with First Nations or an aboriginal right hang in the balance.

## Background

The case was appealed by the Fort McKay First Nation (FMFN) to the Alberta Court of Appeal following the Alberta Energy Regulator's (AER) June 2018 approval of Prosper Petroleum Ltd.'s (Prosper) application to build its proposed 10,000 barrel per day Rigel oil sands bitumen recovery project (the Project) within five kilometres of FMFN Reserves.

For some years prior to the AER's decision, the Government of Alberta (Alberta) and the FMFN had been taking part in ongoing negotiations to develop the Moose Lake Access Management Plan (MLAMP) to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The FMFN began negotiations with Alberta in 2001 to develop a plan protecting its traditional lands in the form of the MLAMP. The MLAMP was to be subsumed into the Lower Athabasca Regional Plan (LARP), and become a legally binding document. The FMFN specifically sought a 10-kilometre buffer zone around their lands from oil sands development as it had already lost 70 per cent of its traditional lands to the development. Alberta initially denied this request. In 2014, however, Alberta's then Premier Jim Prentice, committed via a letter of intent to completing the MLAMP with provisions creating a 10-kilometre buffer zone under the LARP by September 30, 2015. This "Prentice Promise" was never further codified.

## AER decision

The principal question before the AER was whether the Project was in the public interest. The AER panel therefore addressed the Project's safety, efficiency and its effects on existing aboriginal rights. Given the 10-kilometre buffer zone, the FMFN took issue with the Project's proximity to its reserve lands.While the AER found that the Project would disrupt the First Nations' connection to the land, it held this was not an impact on a Treaty 8 right, and there was little real evidence to suggest infringement of an aboriginal right otherwise. Ultimately, the panel found the Project was in the public interest. In doing so, it declined to consider the MLAMP negotiations and "Prentice Promise" 10-kilometre buffer zone as the negotiations had not yet concluded. Further, the panel held that the Alberta Cabinet was required to assess the adequacy of project consultations and the honour of the Crown as it was statute-barred from doing so itself.

## Alberta Court of Appeal

FMFN appealed the decision, arguing the AER committed an error of law or jurisdiction by failing to consider the honour of the Crown and failing to delay approval of the Project until the FMFN's negotiations with Alberta about the MLAMP were completed.

The Alberta Court of Appeal allowed the appeal, finding that while the AER may be statute-barred from assessing the adequacy of Crown-aboriginal consultation, the AER was not relieved of its duty to assess the honour of the Crown. The Court held that, where empowered to consider questions of law, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise, without a clear demonstration that the legislature intended to exclude such jurisdiction. This is especially so where the board or tribunal is assessing the public interest.

The Court further held, in the context of projects that may affect aboriginal rights and, therefore touch on constitutional duties, a project clearly cannot be in the public interest if it breaches constitutionally-protected aboriginal rights. While the AER was statute-barred from assessing the adequacy of Crown consultation, it was by no means restricted from assessing the duty to uphold the honour of the Crown, which is a procedural, instead of substantive consideration, and therefore broader than consultation.

As the FMFN and Alberta agreed on the letter of intent which created the Prentice Promise, and MLAMP negotiations were underway, completing the Project in the zone that was subject to negotiations would serve to directly circumvent, and render ineffectual, the negotiations themselves. This was clearly at odds with the honour of the Crown.

Further, as the AER had deferred the assessment of the adequacy of consultation to the Cabinet, the Court also held the AER cannot avoid its statutory duty to assess the public interest by simply deferring to the Cabinet. The requirement of Cabinet approval does not immunize the AER from its requirement to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown.

The Court therefore held there was no basis by which to decline to address the MLAMP as a consideration in the public interest. The appeal was allowed, the AER decision vacated, and the case was remitted back to the AER to rehear the matter, considering the honour of the Crown and the MLAMP process.

## Takeaway

This decision requires boards and tribunals to consider and address the honour of the Crown when deliberating on the public interest. That consideration is even more poignant where some level of Crown-aboriginal negotiations are underway that touch on the subject matter of the hearing. Depending on the facts of the case before a board, the honour of the Crown may need to be assessed as a separate item to that of consultation alone. Project proponents and governments should note negotiations, governmental promises, letters of intent, or other similar indications may be understood as reflecting on the honour of the Crown in the regulatory context. Further, in some circumstances, this may strengthen governmental promises to the extent that they contemplate some form of action vis-à-vis a First Nation.

*The author would like to thank Jesse Vreeken, articling student, for his contribution.*

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