Kainaiwa / Blood Tribe V. Alberta (Energy), 2017 ABQB 107, Alberta Court Of Queen's Bench (Jeffrey J.), 14 February 2017

May 18, 2017

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The Alberta Court of Queen's Bench quashed, and sent back for reconsideration, a decision of the Alberta Minister of Energy to refuse to transfer or sell subsurface rights to the Blood Indian Band. The Court held that the Minister's discretionary decision was unreasonable due to the deficiency in the intelligibility and rationality of the decision and reasons, and was exacerbated by a failure to consider the opportunity to promote the process of reconciliation between the Crown and the Band. The Court also held in *obiter* that the honour of the Crown "prima facie" requires reasons by decision makers in certain circumstances. The Court, however, denied the Band's request for *mandamus* on the grounds that Treaty 7, the Natural Resource Transfer Agreement, and the honour of the Crown did not entitle the Band to subsurface rights on certain lands sought by the Band to be added to its reserve.

Under the terms of Treaty 7, the Band acquired rights in lands known as the Blackfoot Crossing Reserve. Between 1880 and 1881, the Band was dissatisfied with the Blackfoot Crossing Reserve and agreed to surrender its rights in exchange for a new reserve which it currently occupies (the "Reserve"). The federal Crown later discovered that several pieces of land within the Reserve had been inadvertently sold to a non-Indian man, David Akers, living at the eastern extremity of the Reserve. Mr. Akers refused to relocate and the federal Crown had to obtain surrender of an area of approximately 444 acres (the "Claim Land") from the Band without compensation (the "Surrender"). In 1970 the federal crown reacquired and reincorporated 219 acres of the Claim Lands into the Reserve. Approximately 225 acres of the Claimed Land remained outstanding from the original Agreement.

In 1995, the Band submitted a claim alleging that it did not receive compensation for the Surrender, and that the Surrender was invalid. Negotiations resulted in two settlement Agreements, the first in 1997 (the 1st Akers Settlement) and the second in 2003 and 2004 (the "2nd Akers Settlement"). Under the 1st Akers Settlement, the Band received $2,346,000 and the option of purchasing 444 acres to be added to its reserve land, provided that the Band consulted with the provincial government and the relevant interest holders and resolved any concerns that may arise. Under the 2nd Akers

Settlement, in exchange for an absolute surrender of all of its interest in the Claim Land within the meaning of ss. 38 and 39 of the *Indian Act*, the Band received an additional $3,555,000 and the option of purchasing 225 acres of land adjacent to the Reserve, including the subsurface rights, on a willing buyer/seller basis to be added to the Reserve subject to meeting the concerns of the provincial government.

In 2009, the Band purchased surface rights to 664.8 acres (the "Purchased Lands"). The subsurface rights remained vested in the Alberta Crown, portions of which were subject to coal, ammonite, oil and gas leases. From October 2008 to January 2015, the Band sought a transfer or sale of the subsurface rights in the Purchased Lands from the Alberta Crown. Initially, the Band was advised that Alberta was not willing to transfer Crown mineral rights except where required by law. Over the next several years, the Band was advised that the subsurface rights would not be transferred until the natural gas well ceased production. Alberta wanted compensation for the sub-surface rights and lost royalties. The Band indicated that it would be willing to purchase the subsurface rights, as opposed to Alberta transferring the subsurface rights for free. Alberta's Minister of Aboriginal Relations advocated for the transfer of the subsurface rights to the Band while the Minister of Energy advocated against the transfer on the grounds that it would create a precedent for other First Nations purchasing land to seek similar concessions. In 2014, the Minister of Aboriginal Relations became the Minister of Energy. However, he changed his position and advised the Alberta Premier, who also served as the Minister of Aboriginal Relations, that Alberta would not be transferring the subsurface rights to the Band on the grounds that: (1) there were existing subsurface rights in the Purchased Lands that were presently being leased, (2) Alberta does not sell subsurface rights except in exceptional cases, (3) Alberta did not have a legal obligation to transfer the subsurface rights in this case and (4) selling subsurface rights where no legal obligation exists may lead other First Nations to purchase land and seek similar treatment. In January 2015, the Band received a letter from Alberta's Minister of Energy pursuant to the *Mines and Minerals Act*, R.S.A. 2000, c. M-17 communicating his decision refusing the transfer or sale of the subsurface rights. Reasons for the decision were not provided in the letter. The Band then commenced this application for *mandamus* and judicial review.

On the issue of whether *mandamus* lay against the Minister of Energy, the Court held that neither Treaty 7, the NRTA, nor the honour of the Crown entitled the Band to the subsurface rights underlying the Purchased Lands; therefore the Minister was not under any legal obligation, and could not be compelled by *mandamus* to transfer or sell the subsurface rights to the Band. The Court reasoned that while Treaty 7 is constitutionally protected by section 35 of the *Constitution Act, 1982*, and the NRTA transferred land from the federal Crown to Alberta subject to any existing trusts, the Purchased Lands was never part of reserve land subject to these protections. Alberta received those subsurface rights from the federal Crown unencumbered by any obligation to the Band. The Court confirmed that the honour of the Crown is not a cause of action in itself, but speaks to how obligations that attract it must be fulfilled. Therefore in the absence of a legal obligation, the honour of the Crown could not compel Alberta to transfer the subsurface rights to the Band. The Court also found that the Band's absolute surrender of all of its interest in the Claim Lands under the 2nd Akers Settlement fulfilled Canada's treaty obligations, extinguished the Band's claim, and completely bars *mandamus*.

In regards to the appropriate standard of review, the Court held that insofar as the Minister's decision entails extricable questions of constitutional interpretation, of an

enactment (the NRTA) or an agreement (Treaty 7), or determining the scope of what is entailed by the honour of the Crown, the standard of review is correctness. However, the Minister's discretionary decision, pursuant to the *Mines and Minerals Act* , to transfer or sell the subsurface rights owned by the Alberta Crown is subject to review on a reasonableness standard.

The Court held that the Minister of Energy was correct that there was no legal obligation on Alberta, pursuant to Treaty 7, the NRTA or the honour of the Crown, to sell or transfer the subsurface rights to the Band. However, the Court held the Minister's refusal to transfer or sell was unreasonable due to the combination of (1) the diminished intelligibility and rationality of the decision and reasons and (2) his failure to consider how his decision might affect the process of reconciliation between the Crown and Aboriginal peoples.

Given the absence of reasons in the decision letter, which made the task of determining the justification and intelligibility of the decision more challenging, the Court assessed reasonableness of the Minister's decision from the record. The Court found the reasons in the 2014 advice to the Premier from the Department of Energy. The Court held that the deficiencies in those reasons materially undermined a finding of the requisite intelligibility of the decision and its reasons, and sufficient rational connection between the reasons given and the outcome. The Court also confirmed that consideration of opportunities by decision makers to advance and promote the process of reconciliation between Aboriginal peoples and the Crown is constitutionally mandated by section 35 of the *Constitution Act, 1982*. In this case, the Constitution required the Minister to consider whether, and if so how, his decision may advance or impair the ongoing process of reconciliation with the Band. The Court found that the Minister failed to undertake this mandatory consideration.

While the Court did not decide whether the honour of the Crown required reasons in this case, since it was not argued, the Court held in *obiter* that the honour of the Crown "prima facie" requires reasons in such circumstances where the Band perceived an injustice was done to them over a century ago, followed by its decades-long struggle for a remedy. Further, the fact that the Band's historic claim had some legitimacy given the magnitude of the federal Crown's payment in settlement, and the Minister's previous position in favour of the Band's request while he was the Minister of Aboriginal Relations "all militate strongly in favour of the honour of the Crown obliging the Minister himself to explain his one sentence denial to the Band".

The Court therefore quashed the Minister's decision and ordered that the Band's request be returned to the Minister for reconsideration.

https://www.canlii.org/en/ab/abqb/doc/2017/2017abqb107/2017abqb107.html

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By

Tory Hibbitt, Sandi Shannon

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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