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Métis Nation of Alberta Region 1 v. Alberta (Joint Review Panel)

The Métis Nation of Alberta Region 1, Fort Chipewyan Métis Local 125, Bill Loutitt, Frank Lacaille, Harvey Sykes, John Grant, Edward Cooper, Mike Guertin, Joe Hamelin, Kurtis Gerard, Fred (Jumbo) Fraser, Applicants (Appellants) and The Joint Review Panel Established To Review the Jackpine Mine Expansion Project, the Attorney General of Alberta and Shell Canada Energy, Respondents (Respondents)

Athabasca Chipewyan First Nation, Applicant and The Energy Resources Conservation Board acting in its capacity as part of the Joint Review Panel, Joint Review Panel, Shell Canada Limited, the Minister of Justice and the Attorney General of Alberta and Attorney General of Canada, Respondents

Alberta Court of Appeal

Frans Slatter J.A.

Heard: November 9, 2012
Judgment: November 26, 2012
Docket: Edmonton Appeal 1203-0249-AC, 1203-0251-AC

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Subject: Environmental; Natural Resources; Public

Aboriginal law

Environmental law

Natural resources

Public law

***Frans Slatter J.A.*:**

1 These are applications for leave to appeal an interlocutory decision of the Joint Review Panel created to review the application for the Jackpine Mine Expansion Project. In that decision the Joint Review Panel concluded that it did not have jurisdiction to consider whether the Crown had complied with its obligation to consult with aboriginal peoples.

2 One set of applicants are the Métis Nation of Alberta Region 1, and others, representing the interests of various Métis people who live near the Jackpine mine. The other applicant is the Athabasca Chipewyan First Nation, an aboriginal community which is a successor to one that signed Treaty 8.

Facts

3 Shell Canada presently operates the Jackpine oil sands mine and related processing facilities near Fort McMurray. It has applied to amend its licence to expand the mine to include adjacent property, and to increase the capacity of the facility. Such an amendment requires regulatory approval under a number of different statutes, from several different government agencies.

4 In particular, Shell requires approval from the Energy Resources Conservation Board and the Canadian Environmental Assessment Agency. In order to reduce the duplication of regulatory review, the governments of Alberta and Canada have enacted provisions that allow for the joint review of projects by federal and provincial agencies. This is done by entering into an agreement creating a joint review panel under s. 22(3) of the *Energy Resources Conservation Act*, RSA 2000, c. E-10 and s. 40 of the *Canadian Environmental Assessment Act*, 2012, SC 2012, c. 19. The decision of such a Joint Review Panel is, *inter alia*, a decision of the Energy Resources Conservation Board on the particular issue referred to it.

5 The Minister of the Environment, Canada and the Energy Resources Conservation Board entered into such an Agreement in September, 2011. The Agreement sets out the mandate of the Joint Review Panel, and provides generally that it must "discharge the responsibilities of the ERCB under the *Energy Resources Conservation Act* ". That would include the responsibility under ss. 10 and 11 of the *Oil Sands Conservation Act*, RSA 2000, c. O-7, to determine if the project is in the "public interest", and under s. 3 of the *Energy Resources Conservation Act* to decide if it is "in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment."

6 The Agreement specifically deals with the scope of the Joint Review Panel's mandate respecting aboriginal issues:

> **6. Aboriginal Rights and Interests**
>
> 6.1 The Joint Review Panel may receive information from Aboriginal groups related to the nature and scope

of asserted or established Aboriginal and treaty rights in the area of the project, as well as information on the potential adverse environmental effects that the project may have on asserted or established Aboriginal and treaty rights. The Joint Review Panel may also receive information provided in this regard by other participants, federal authorities or government, and provincial departments or government.

6.2 The Joint Review Panel shall reference in its report:

a. the information provided by participants regarding the manner in which the project may adversely affect asserted or established Aboriginal and treaty rights; and

b. the information provided by participants regarding the strength of claim in respect of Aboriginal and treaty rights asserted by a participant, including information about the location, extent, bases and exercise of those asserted Aboriginal and treaty rights in the area of the project.

For the purposes of its report, the Joint Review Panel shall document claims of Aboriginal and treaty rights as presented by participants and consider the effects of the project on the Aboriginal and treaty rights so presented. The Joint Review Panel may use this information to make recommendations that relate to the manner in which the project may adversely affect the Aboriginal and treaty rights asserted by participants.

6.3 Notwithstanding articles 6.1 and 6.2, the Joint Review Panel is not required by this agreement to make any determinations as to:

a. the validity of Aboriginal or treaty rights asserted by a participant or the strength of such claims;

b. the scope of the Crown's duty to consult an Aboriginal group; or

c. whether the Crown has met its respective duties to consult or accommodate in respect of rights recognized and affirmed by section 35 of the *Constitution Act*, 1982.

6.4 Nothing in this article 6 limits the application of Part 2 of the *Administrative Procedures and Jurisdiction Act* to the ERCB, and the Joint Review Panel (in its capacity as a division of the ERCB) remains at all times subject to the requirements of, and entitled to exercise the powers under Part 2 of the *Administrative Procedures and Jurisdiction Act*, including but not limited to section 13 thereof.

(Emphasis added)

7 It is clear that the Joint Review Panel is to consider aboriginal issues as a part of its mandate. In addition to the provisions just quoted, the "Scope of the factors" that make up the mandate of the Joint Review Panel include:

Aboriginal Rights and Interests

The Joint Review Panel shall consider:

• Evidence concerning any potential project effects to asserted or established Aboriginal and treaty rights presented by participants, such as:

• Any potential effects on uses of lands and resources by Aboriginal groups for traditional purposes;

- Any effects (including the effects related to increased access and fragmentation of habitat) on hunting, fishing, trapping, cultural and other traditional uses of the land (e.g. collection of medicinal plants, use of sacred sites), as well as related effects on lifestyle, culture, health and quality of life of Aboriginal persons;

- Any effects of alterations to access into areas used by Aboriginal persons for traditional uses;

- Any adverse effects of the project on the ability of future generations to pursue traditional activities or lifestyle;

- Any effects of the project on heritage and archaeological resources in the project area that are of importance or concern to Aboriginal groups;

- The methods and measures proposed to manage, mitigate and compensate to an acceptable level, any identified effects on asserted or established Aboriginal rights and interests.

The Joint Review Panel has confirmed that it will in fact receive evidence on all of these issues.

Proceedings of the Joint Review Panel

8 The Joint Review Panel scheduled hearings on Shell's application in October, 2012. As part of the hearing process, the Joint Review Panel invited interested parties to give notice of any constitutional questions they proposed to raise. Both the Athabasca Chipewyan First Nation and the Métis Nation filed Notices of Questions of Constitutional Law. On application by Alberta, the Joint Review Panel agreed to have a preliminary hearing to consider the scope of constitutional issues that would be considered at the main hearing.

9 The constitutional issues submitted related to whether the federal and provincial Crowns had discharged their constitutional obligations to consult with aboriginal groups. On October 26, 2012 the Joint Review Panel issued the decision which is the subject of the present application, declining to consider these constitutional questions. The Joint Review Panel gave a number of reasons for its decision:

(a) On its general jurisdiction it concluded that: "The Panel [under the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3] finds that it has jurisdiction to decide the questions of constitutional law raised in the NQCLs if the questions relate to matters that are properly before the Panel or are related to the Panel's statutory mandate." (p. 7)

(b) The ERCB is not the Crown, and therefore does not itself have a duty to consult. (p. 8)

(c) The Joint Review Panel's decision-making authority was limited to approval of the Project. Neither level of government was before the Joint Review Panel, and neither was any conduct relating to consultation. "The Panel does not have an express grant of statutory authority to consider the adequacy of Crown consultation in relation to the Project. Although the Panel is empowered by statute to consider questions of constitutional law relating to the matters before it in this proceeding or arising from its statutory mandate, the questions presented in the NQCL's do not arise from either." (pp. 1-2, 11)

(d) The terms of the Agreement establishing the Joint Review Panel confirmed that it was not obliged to consider the scope of the Crown's duty to consult. In any event, the Agreement could not be a source of jur-

isdiction; jurisdiction had to be rooted in the statute. (pp. 13-4)

(e) It was not necessary to conduct a discrete analysis on whether the Crown had discharged its obligation to consult as part of a determination of the "public interest". What was important was that legitimate aboriginal concerns were dealt with as a part of the project approval. (pp. 11-2)

(f) In any event, the constitutional question as framed by the Métis Nation was unacceptably broad. (p. 13)

(g) Even if the Panel had jurisdiction to consider if the Crown had complied with its duty to consult, it would be premature to make a finding on that issue, because Crown consultation was still underway. The Panel's report would be a part of the consultation process. (pp. 2, 11)

(h) Even though the Panel would not consider the constitutional questions that had been submitted, it would still "consider all the evidence and argument relating to the potential effects of the Project on Aboriginal groups" in accordance with its mandate. (p. 2)

The present applicants were dissatisfied with this decision, and indicated that they would apply for leave to appeal to the Court of Appeal. They applied to the Joint Review Panel to adjourn the hearing until the application for leave to appeal could be heard, but in a decision made October 30, 2012, the Joint Review Panel indicated that the hearing would continue as scheduled.

10 Insofar as the Joint Review Panel is a manifestation of the Energy Resources Conservation Board, an appeal lies to this Court, with leave. The applicants applied for leave to appeal on the following issues:

Métis Nation et al Proposed Questions

a. The Joint Review Panel ("JRP") misinterpreted its statutory jurisdiction, or erred in law, or both in its interpretation of the *Energy Resources Conservation Act* R.S.A. 2000, c. E-10 ("ERCA") and the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c. A-3 (the "APJA") and Schedule 1 of the *APJA* Regulation by:

i. Deciding that the JRP has jurisdiction to determine some questions of constitutional law but not the question raised in the submissions of the Applicants despite the fact that the Alberta Legislature expressly conferred upon the ERCB (in this case the JRP) the jurisdiction to determine "all questions of constitutional law.";

ii. Deciding that s. 35 of the *Constitution Act*, 1982 does not apply because the statutory approval is not government action because the Applicant is Shell Canada Energy and not Alberta; and

iii. Making a finding that further consultation will occur in the absence of any evidence being presented by Alberta and ignoring evidence to the contrary on the record that Alberta had "rejected" all Statements of Concern filed by the Applicants.

b. The JRP created a reasonable expectation that the Applicants would be able to bring their evidence to the hearing and the constitutional questions would be decided; and

c. The JRP's decision is incorrect, unreasonable, not in the public interest and the process employed violates the principles of natural justice.

Athabasca Chipewyan First Nation Proposed Questions

a) Did the Panel err in determining that it does not have jurisdiction to determine whether the Crown in Right of Alberta and Canada ("Alberta" and "Canada" or collectively the "Crown") discharged their duties to consult and accommodate Athabasca Chipewyan First Nation ("ACFN") with respect to the adverse impacts arising from the Shell Jackpine Mine Expansion Project (the "Project") on ACFN's Treaty Rights, as guaranteed by Treaty 8, modified by the Natural Resources Transfer Agreement, 1930 (enacted by the Constitution Act, 1930 (U.K.) 20-21 George V, c. 26) and as protected by section 35 of the Constitution Act, 1982?

b) Did the Panel err in deciding that, even if it had jurisdiction over the ACFN's questions of constitutional law, it would be premature for the Panel to make a finding on the adequacy of Crown consultation?

Status of the Review Panel

11 An initial question was raised about whether the Joint Review Panel is a suitable respondent, because it is not a suable entity. Administrative law has never been overly concerned about the legal personality of the respondent. Judicial review is available to supervise the exercise of statutory powers. If Parliament has seen fit to grant statutory powers to an entity that is not a legal person, that fact alone does not preclude the superior court from supervising the exercise of that statutory power: *Northern Pipeline Agency v Perehinec*, [1983] 2 SCR 513 at p. 539, affm'g (1980), 25 AR 605 at paras. 13-4, [1981] 2 WWR 566 (CA); *Westlake v The Queen in right of the Province of Ontario* (1971), 21 DLR (3d) 129 at p. 134. Given that there is an appeal to this Court from the decisions of the Joint Review Panel, it has sufficient existence to be a respondent.

Leave to Appeal

12 The test for leave to appeal under the *Energy Resources Conservation Act* has been stated in a number of cases, and was conveniently summarized in *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158 at para. 2:

(a) Is the proposed issue a question of law or jurisdiction? This is a condition precedent to the granting of leave under the *Act*.

(b) Is the issue of general importance, in that the issue is of interest to more than the immediate parties, and has a wider relevance?

(c) Is the point raised of significance to the action itself? If the issue is merely interlocutory or collateral, or tangential to the action, leave may not be granted, particularly if a determination of the issue will not affect the ultimate outcome of the proceedings.

(d) Does the appeal have arguable merit? Leave is less likely to be granted when the appeal appears to have little chance of success. This factor is balanced with the importance of the issue. If the issue is of lesser importance, a more compelling argument must be shown than if the issue is of great public importance.

(e) What standard of review is likely to be applied? This factor is a corollary of whether there is a good arguable case. There is no point in granting leave if the standard of review that the Court of Appeal will apply

is highly deferential, such that the Court is unlikely to engage the issue upon which leave is sought. Such issues do not have "arguable merit".

(f) Will the appeal unduly hinder the progress of the action? This factor assumes that the hearing is still ongoing, and has been or will be delayed by any appeal.

Question of Law

13 It was not disputed that the questions about the jurisdiction of the Joint Review Panel are questions of law. On the other hand, whether it was premature for this issue to be considered was a discretionary decision for the Joint Review Panel. The related question (the second question posed by the Athabasca Chipewyan First Nation) is not a question of law. Issues of natural justice are issues of law.

Issues of General Importance

14 The scope of the Crown's duty to consult, and the jurisdiction of the Joint Review Panel to consider related issues is of general importance: *Cold Lake First Nations v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304 at para. 5. This is not an issue that is merely of importance to the particular applicants presently before the court. It is of interest to a wider audience of aboriginal peoples, as well as many participants in the resource extraction industry.

Arguable Merit and Significance to the Hearing

15 The respondents submit that there is no arguable merit in the proposed appeal, because this Court has previously ruled that a panel like the Joint Review Panel has no jurisdiction over the Crown's duty to consult: *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 at para. 28, 45 Alta LR (4th) 213, 363 AR 234. The applicants counter that this comment is obiter, it has effectively been overruled by amendments to the *Administrative Procedures and Jurisdiction Act*, it is inconsistent with the later decision in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, and that it does not govern this case. Whichever view is correct, there is sufficient arguable merit to warrant further consideration by this Court.

16 The statement by the Joint Review Panel that all of its jurisdiction has to arise from statute also raises an issue of arguable merit. All of the Joint Review Panel's jurisdiction, including its jurisdiction to approve the Jackpine Mine Expansion, arises through the Agreement creating the Joint Review Panel. If that Agreement is sufficient to vest the Joint Review Panel with jurisdiction to approve the project, it is not obvious why the Agreement is not also sufficient to confer jurisdiction to consider all constitutional issues related to it. All aspects of the Joint Review Panel's jurisdiction arguably are rooted in the statute, but flow through to the Joint Review Panel via the Agreement. The Joint Review Panel is to "discharge the responsibilities of the ERCB", and it is not obvious that the Board's ability to consider constitutional issues is limited. It is arguable that the applicants' position is supported by *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at paras. 38-9, [2003] 2 SCR 585. There is an arguable issue that the Joint Review Panel's decision involves an overreading of *Carrier Sekani* at para. 60, which arguably only requires an express statutory mandate to engage in consultation itself, but not to consider the scope and adequacy of consultation by the Crown. It was not disputed that the Joint Review Panel does have jurisdiction to consider constitutional questions that arise within its mandate. The extent to which there are any limitations on that general jurisdiction raises arguable questions.

17 On the other hand, the determination of the proposed questions will not have any effect on the outcome of the hearing. Even if it is determined that the Agreement creating the Joint Review Panel is sufficient to transmit to the Joint Review Panel statutory jurisdiction to consider all constitutional questions, that will not change the outcome. It is clear from the Agreement that the Joint Review Panel "... is not required ..." to decide "whether the Crown has met its respective duties to consult". Even if the Joint Review Panel does have the jurisdiction to consider constitutional questions, that jurisdiction must be concurrent with its general mandate; no one suggested that it had jurisdiction to consider constitutional questions unrelated to the Jackpine mine. Likewise, if the consideration of any issue is discretionary, the consideration of any related constitutional issue must also be discretionary. Since the Agreement clearly provides that the Joint Review Panel is not required to consider the Crown's duty to consult in determining the "public interest", it cannot be argued that the Joint Review Panel is nevertheless compelled to consider any related constitutional arguments.

18 The Joint Review Panel held that even if it did have jurisdiction to consider whether the Crown had discharged its duty to consult, it would be premature to consider that question at this stage. The Joint Review Panel agreed with the submissions of Alberta and Canada that the hearing on the Jackpine mine was itself a part of the duty to consult. Both levels of government were counting on the Joint Review Panel to make recommendations about the accommodation of aboriginal interests that would enable the Crown to discharge its obligation to consult. As counsel for Shell put it, with respect to the stay application, the applicants' argument was essentially "stop the consultation, because there hasn't been enough consultation". Even if this Court was to conclude that the Joint Review Panel did have jurisdiction to consider the proposed constitutional questions, it is clear that the Joint Review Panel has decided not to do so at this stage.

19 The Métis Nation argued that even if the Joint Review Panel decided not to address the constitutional issue itself, it was compelled to refer the issue to the Court of Queen's Bench under s. 13 of the *Administrative Procedures and Jurisdiction Act*. That section permits the Joint Review Panel to state a case of constitutional law for that Court to determine. The Métis Nation argues that s. 6.4 of the Agreement effectively overrides s. 6.3; if the Joint Review Panel decides not to consider the sufficiency of Crown consultation, it is nevertheless compelled to refer the issue to the Court. That is not an interpretation that the Agreement can reasonably bear, and this argument raises no issue of arguable merit. The suggested interpretation would render s. 6.3 essentially meaningless, because it would mean that issues the Agreement expressly states "are not required" to be considered, would indeed have to be considered.

20 The Joint Review Panel's determination that it is premature to consider the proposed constitutional question at this time is not a question of law, and is not subject to appeal. It is, in any event, entitled to great deference. There would be no point in considering whether the Crown has complied with its duty to consult, when the Crown itself acknowledges that it has not done so, and the Joint Review Panel has concluded that the consultation process is continuing, and that the hearing itself is part of that process.

Effect of an Appeal on the Hearing

21 The last factor that needs to be considered is the effect that granting leave to appeal would have on the hearing. This Court has on many occasions indicated that it is generally inappropriate to grant leave to appeal on interlocutory issues: *Big Loop Cattle Co. Ltd. v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302 at para. 6; *Devon Canada Corp. v Alberta (Energy & Utilities Board)*, 2003 ABCA 167 at para. 26, 3 Admin LR (4th) 154. It is generally preferable to wait until the tribunal has completely finished its work, and then consider whether leave to appeal should be granted on any issues. If there are issues to be appealed, it is much

better that they be appealed all at once, and in the context of a specific decision or result. This is desirable for no other reason than that the end result might turn out to be acceptable to the applicants for leave to appeal. The Crown pointed out that issues of the adequacy of consultation have rarely arisen, because in the end it has almost always been possible to satisfy all of the outstanding aboriginal issues during the approval process.

22 The applicants also argued that the decision of the Joint Review Panel is essentially final, and once it reports the opportunity to consult will be lost. But if the Jackpine Expansion is ever set to proceeed before there has been the required consultation, the applicants can seek their remedies against the Crown. The issuance of a permit for the Jackpine Mine Expansion by the Energy Resources Conservation Board does not have the effect of extinguishing the Crown's duty to consult.

23 The applicants also argued that the underlying issues about the scope of the Crown's duty to consult should be decided, even if they are moot or premature, because there is no other effective remedy for them. The applicants are, however, entitled to address any justiciable issues in the Court of Queen's Bench of Alberta.

Other Issues

24 The final two issues raised by the Métis Nation are not of sufficient importance to warrant an appeal. Given that the applicants were afforded an opportunity to argue about the scope of the constitutional debate before the Joint Review Panel, any reasonable expectations were met. The final question is too general to warrant leave to appeal.

25 The Athabasca Chipewyan First Nation asked for a stay of the hearing pending determination of the appeal, but that issue is moot. So too is the request by the Métis Nation for interim funding.

Conclusion

26 While the jurisdictional issues raised by the applicants are interesting in the abstract, it is not appropriate to grant leave to appeal as the answers to those questions would not affect the outcome of this hearing. The Joint Review Panel "... *is not required* ... to make any determination as to ... whether the Crown has met its respective duties to consult ...". The Joint Review Panel has clearly decided not to engage this issue, at least at this stage of its proceedings. It is entitled to do that.

27 It would also be inappropriate to review this interlocutory decision prior to completion of the hearing. The applications for leave to appeal are dismissed.

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