Does Every Resource Permit Trigger a Duty to Consult?

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Are Crown consultations with First Nations required in all circumstances where the Crown issues a resource-related permit? There is some guidance to be found in the March, 2014 decision of Justice Currie of the Saskatchewan Court of Queen's Bench in *Buffalo River Dene Nation v. The Minister of Energy and Resources*.

In 2012, the Ministry held a sealed-bid auction of oil sands exploration permits. Two Oil Sands Special Exploratory Permits were issued to a successful bidder for Crown land within the area covered by Treaty 10, to which the Buffalo River Dene Nation is a party.

The Minister had not consulted with the Buffalo River Dene before conducting the sale or before issuing the permits. Believing that there was a consultation duty owed to them, the Buffalo River Dene brought a court application challenging the process and the permits.

In its decision, the Court focusses on whether issuing the permits had the potential to adversely affect an Aboriginal right or claim and also on whether the decision to have the sale of exploration permits constituted a type of "strategic, higher-level decision" that may have an impact on Aboriginal claims and rights. If either characterization applied, then the government decision might trigger the prior duty to consult.

The Judge looked closely at the rights granted under the Special Exploratory Permit. He noted that the underlying legislation specifically provided that neither the permit, nor any other Crown disposition of minerals, actually authorized the holder to enter on or use the surface of the Crown mineral lands. That required, at minimum, a further authorization from The Saskatchewan Ministry of Environment. The permits themselves contain a statement that reiterated that they did not include any right to enter or use the surface of the Crown mineral lands. The Court therefore characterized the permit as providing a bare right of exploration only and that other steps would have to be taken to secure entry for that purpose.

The Minister presented evidence from the Ministry of Environment that the additional permits required to access exploration lands were not automatically granted by that department. A separate application was required, and that application could trigger a consultation process.

The Buffalo River Dene pointed out that the regulations required the Special Exploratory Permit-holder to drill at least one well and conduct a certain dollar value of work annually in order to maintain the validity of the permit. They argued that those activities were potentially disruptive to hunting and fishing and damaging to the land itself. The Court pointed out, however, that further steps and approvals would be necessary before the permit-holder could carry out any of these activities. The Court noted, based on the evidence, that it was also fairly common for permit-holders to not do any work in their permit areas for economic reasons, and to simply let the permits expire.

Although the Court commented on the subject, it did not make any specific finding as to whether Crown consultation with the Buffalo River Dene would be required when the additional approvals were applied for.

The Court also considered whether the decision to hold the permit sale required consultation with the First Nation. The Buffalo River Dene argued that the decision to offer the Special Exploratory Permits was a strategic, higher-level planning decision that would irrevocably set a pattern of development that would affect their Aboriginal rights. Based on the evidence that permit sales were routinely conducted whenever exploration rights were requested, the Court held that the decision to hold the permit sale was purely administrative. It was performed with little information and that there was no long-term planning involved or resulting from the process. It was the Court's opinion that the decision to sell the permits was not a long-term planning decision that triggered a duty of consultation.

What does this mean for resource developers? Well first, it focuses attention on the need to consider whether and when a government decision may adversely affect an Aboriginal right or claim and require consultation. In this case, a right to explore that did not also give any rights of access was found not to have any potential impacts. Focus on what is authorized by the approval and whether this can give rise to an adverse impact on Aboriginal rights or claims. Second, it confirms that not all government decisions are "strategic", "higher-level" or of a long-term nature that would potentially affect Aboriginal rights or claims and therefore trigger a duty to consult.

If, at the end of the day, seeking, obtaining and acting upon the series of permits and approvals necessary to operate a project or development will have the potential effect of impacting Aboriginal rights or claims, then a duty of consultation will definitely be triggered at some point. The triggering event will be the application for the licence and approval that, if issued, will permit the holder to carryout activities that may impact those rights or claims.

Until there is more judicial guidance, developers may wish to encourage government to carry out some level of consultation as a preventative measure in order to avoid the prospect of litigation. Although the Minister was found to have acted appropriately in this case, the disagreement with the Buffalo River Dene cast a cloud over the validity of the permits until the Court made its decision.

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