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Federal Court recognizes the Crown's duty to consult on economic benefits linked to Aboriginal rights

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Authors: Sean Sutherland, Maeve O'Neill Sanger, Coleman Brinker

On July 19, 2021, Canada's Federal Court released its decision in *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 (the Decision). In the Decision, Justice Brown found that the Minister of Environment and Climate Change Canada (Minister) unlawfully failed to consult with Indigenous groups before designating the Vista Test Underground Mine (the VTUM) and Vista Phase II thermal coal projects of Coalspur Mines (Operations) Ltd. (Coalspur) under the *Impact Assessment Act* (the Designation). As a result, Justice Brown quashed the Designation.

The Decision expressly recognizes that the Crown must consult with Indigenous groups that hold economic benefits derived from, or closely related to, Aboriginal rights – including negotiated benefits that would be adversely affected by Crown conduct that may cause project delays or refusals. The Federal Court's recognition of the Crown's duty to consult on these economic effects has important implications for project proponents and Indigenous groups that enter into benefit agreements grounded in Aboriginal rights.

The Decision

Background

Ermineskin is a Treaty 6 signatory that exercises constitutionally protected Aboriginal rights in traditional territories near the VTUM and Vista Phase II.[1]

In 2013 and 2019, Ermineskin entered into benefit agreements with Coalspur respecting the potential impacts of the existing Vista Phase I and Vista Phase II on Ermineskin's Aboriginal rights. As recognized by Justice Brown, these agreements were entered into after consultation and provided "valuable economic, community and social benefits to Ermineskin", and were "intended to compensate Ermineskin for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Aboriginal rights within their Traditional Territory."[2]

Designation processes

The *Impact Assessment Act* applies to physical activities that either fall within a category of project within the project list established pursuant to regulation or are "designated" by the Minister on the basis that either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects, warrant the designation. Once a project is designated, the

proponent is prohibited from doing any acts or things connected with carrying out the projects that may have effects on federal jurisdiction until the federal assessment process is completed.

In December 2019, the Minister considered and refused requests to designate Vista Phase II for review under the federal *Impact Assessment Act*. This decision was consistent with advice the Minister received from the Impact Assessment Agency (the Agency), which was informed by input from 31 Indigenous groups, including Ermineskin.

A few months later, the Minister received requests from environmental groups and two Indigenous groups to designate Vista Phase II together with the VTUM. Unlike Vista Phase II, the VTUM falls entirely within the existing Vista Phase I footprint. Again, the Agency recommended against designation on the basis that, among other things, the VTUM would have, at most, "negligible" incremental impacts.

However, unlike the Vista Phase II review months earlier, neither the Agency nor the Minister consulted with Ermineskin, or other potentially impacted Indigenous groups. Instead, the Agency and the Minister heard only from two Indigenous groups that requested that Vista Phase II and the VTUM be designated. In July 2020, against the Agency's advice and without notifying or hearing from Ermineskin, the Minister did an "about face" and decided to designate both Vista Phase II and the VTUM.

By triggering the federal impact assessment process, the Minister created the potential for significant delays to Vista Phase II that could eliminate Ermineskin's economic interests in the project.

Both Ermineskin and Coalspur filed applications for judicial review challenging the Designation. In *Coalspur Mines (Operations) Ltd. v Canada (Environment and Climate Change)*, 2021 FC 759, issued the same day as the Decision, Justice Brown found Coalspur's challenge moot in light of his Decision to quash the Designation.

Key findings on the Crown's duty to consult

Justice Brown found that the Crown owed Ermineskin a duty to consult respecting the Designation's potential to adversely impact Ermineskin's economic rights. In this case, the duty to consult arose because Ermineskin's economic rights are closely related to, and derive from, its Aboriginal and Treaty rights.[3] In particular, the purpose of the benefit agreements is to obtain economic and community benefits in compensation for potential impacts to Aboriginal and Treaty rights.[4]

Since there was "no consultation at all", the Crown failed to fulfil its consultation duty.[5]

The Minister argued that lost economic benefits do not give rise to any duty to consult, in this case because the Designation will not adversely impact Aboriginal rights.[6]

Justice Brown rejected the Minister's position,[7] finding Ermineskin has valuable economic rights that may be adversely impacted by the Designation and, in fact, have already been adversely impacted by delays caused by the Designation.[8] Contrary to the Minister's position that economic benefits from Ermineskin's agreements with Coalspur were "speculative" or "indirect", and so insufficient to trigger a duty to consult,[9] Justice Brown held that a potential economic interest that may or may not materialize in the future (if Vista Phase II proceeds) is

sufficient to trigger the duty to consult.[10]

Justice Brown's reasons highlight the contemporary and evolving nature of Aboriginal rights and corresponding Crown duties, and the importance of recognizing Indigenous economic interests as part of reconciliation. Indeed, Justice Brown noted that the duty to consult accommodates "the reality that often Aboriginal peoples are involved in exploiting the resource" and "[t]his too is part of reconciliation."[11]

Significance for project proponents and Indigenous stakeholders

The Decision reflects a contemporary, purposive understanding of Aboriginal rights to encompass economic interests related to resource development impacting on those rights. It rejects a dualistic view of Aboriginal rights being necessarily in conflict with a proponent's interests.

In practical terms, the Decision confirms Indigenous stakeholders' entitlement to be consulted whenever Crown conduct may impact economic interests secured through agreements with proponents in recognition of potential impacts on Aboriginal and Treaty Rights. The Decision makes clear that a "one sided" consultation is inadequate. The Crown must consult with Indigenous groups that stand to gain from and support resource development, not only those groups that oppose it.

In the coming months, this Crown duty to consult respecting impacts on economic interests is expected to be central in Alberta Court of Appeal proceedings regarding the Alberta Energy Regulator (the AER) decision to refuse permits for the Grassy Mountain metallurgical coal project. In addition to the project proponent (Benga Mining Limited), two Indigenous groups with which Benga has entered into benefit agreements have applied for permission to appeal the AER decision on grounds analogous to those decided by Justice Brown.

The Decision's findings increase the value of Indigenous partnership to both proponents and Indigenous groups and should promote negotiation and economic benefit sharing between proponents and potentially affected Indigenous groups. The Crown's duty to consult in recognition of such agreements is a developing area of the law with profound implications for what reconciliation means.

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[1] Decision at para 4.

[2] Decision at paras 5 and 72.

[3] Decision at paras 8 and 9.

[4] Decision at para 110, citing *Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298 at paras 176-177.

[5] Decision at para 129.

[6] Decision at para 6.

[7] Decision at paras 7-10.

[8] Decision at para 106.

[9] Decision at para 113.

[10] Decision at para 114.

[11] Decision at para 87, citing *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34.