IBA Economic Value an Aboriginal Right Entitled to Protection through Honour of the Crown

By Julie Abouchar, Partner and Certified Specialist in Indigenous Legal Issues, and Environmental Law Charles J. Birchall, Partner and Certified Specialist in Environmental Law, with the assistance of Sydney Smith, Summer Law Student.

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Introduction

On July 19, 2021, the Federal Court of Canada released its decision in *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021.[1] This decision is significant as it holds that economic benefits stemming from an Impact Benefit Agreement ("IBA") are Aboriginal rights which must be considered by the Crown when meeting its duty to consult obligations.

The Court found the federal government was required to consult Ermineskin Cree Nation ("Ermineskin") prior to its decision to designate the Vista Coal Mine Phase II Expansion Project and the Underground Test Mine ("the Project"). The key impact on Aboriginal rights was the potential loss of valuable economic, community and social benefits from the Project due to the delay associated with the Designation Order. The Court held that the federal government did not fulfill its duty to consult and quashed the Designation Order.[2]

Brief Overview

Ermineskin is a band under the *Indian Act* with traditional territory of approximately 25,000 acres. Ermineskin is a signatory to Treaty 6 and a member of the Four Nations of Maskwacis.[3]

Phase I of the Vista Coal Mine was approved in 2014. Coalspur Mines (Operations) Ltd. ("Coalspur") and Ermineskin entered into an IBA in 2013 regarding Phase I. In 2019, Coalspur and Ermineskin entered into a second IBA in relation to Phase II of the Project. The two IBAs are intended to provide economic, community and social benefits.[4] In addition, the IBAs compensate for the potential impacts caused by the Project on the

1 2021 FC 758.
2 *Ibid* at para 132.
3 *Ibid* at para 3.
4 *Ibid* at para 5.

ability of Ermineskin members to exercise their Aboriginal and Treaty rights on their traditional territory. Phases I and II (collectively "the Projects") take place entirely on the traditional territory of Ermineskin and entail a taking up of lands covered by Treaty 6.[5]

In 2019, the Minister of Environment and Climate Change Canada (the "Minister") determined the Vista Coal Mine Phase II Expansion Project did not require federal designation. However, seven months later, the Minister reversed this decision and designated the Project for impact assessment ("Designation Order").[6] Ermineskin sought judicial review of the Designation Order.

Ermineskin submitted that the delay caused by the Designation Order adversely impacted their economic opportunities in relation to the Project and the 2019 IBA, and therefore adversely impacted their Aboriginal and Treaty rights.[7] As a result, the Crown owed a duty to consult before issuing the Designation Order. Ermineskin submitted the duty to consult was not fulfilled.

The Minister argued that loss of economic, social and community benefits are not adverse impacts that relate to Aboriginal or Treaty rights. Consequently, there was no duty to consult.[8]

This proceeding is one of two concerning the Designation Order. The other is brought by Coalspur, who seeks the same relief as Ermineskin – an Order quashing the Designation Order.[9]

The Decision

The Court held that the 2019 IBA contains valuable economic rights and benefits that are closely related to and derivative from Aboriginal rights. These Aboriginal rights deserved protection through the honour of the Crown and its concomitant duty to consult.[10]

The duty to consult was breached because Ermineskin was not consulted nor given notice or the opportunity to comment on the Designation Order or the review that resulted in the Designation Order being made. The application for judicial review was granted, the Designation Order set aside, and the matter has been remanded for reconsideration.[11]

Designation Process

In 2019, the federal government enacted the *Impact Assessment Act* ("*IAA*").[12] The *IAA* allows for the possibility of federal impact assessments on designated projects, regardless

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5 *Ibid* at para 14.
6 *Ibid* at para 19.
7 *Ìbid* at para 6.
8 *Ibid.*
9 *Ibid* at para 2.
10 *Ibid* at para 110.
11 *Ibid* at para 132.
12 *Ibid* at para 49.

of whether they are subject to provincial environmental assessment.[13] Projects can become designated in two ways: (1) the physical activity meets the threshold for area and volume of coal production as set out under the Physical Activities Regulations, or (2) the Minister issues an order under subsection 9(1) of the *IAA*.[14] Coalspur's Phase II Project could only be designated by way of order under subsection 9(1).[15] The designation process under subsection 9(1) can be initiated at the request of third parties.[16]

On December 20, 2019, after an extensive review process, the Minster determined that the Phase II Project did not warrant designation.[17] The process used for this determination was the same process used for Phase I of the Project. Seven months later, the Minister reversed this decision and issued the Designation Order.[18]

The Minister decided to reopen his initial decision after receiving letters requesting a Designation Order from two First Nations and three concerned parties.[19] These requests came after Coalspur proposed the addition of the Underground Test Mine, a 2km development situated on the existing footprint of the Phase I development. After review, the Minister reversed his initial decision saying the two developments taken together would have greater impacts than what was previously considered.[20]

During the first review process Ermineskin was given notice and the opportunity to provide submissions. However, Ermineskin was not consulted or notified in any way during the process that lead to the reversal of the Minister's initial decision.[21] The only Indigenous groups consulted on the second review were the ones requesting the Designation Order.[22]

The Designation Order, by operation of the *IAA*, brought the Phase II Project to an immediate halt.[23] This resulted is a delay of over a year.[24] A Designation Order does not mean a federal impact assessment is required, only that the government is allowed time to make that determination. If the Phase II Project was determined to be subject to a full federal impact assessment, the Court found that this could result in an additional delay of four and a half more years, or alternatively, the Project could be lost entirely. Consequently, the Designation Order had already delayed, and could potentially further delay or end completely, the valuable economic, community and social benefits Ermineskin was set to receive under the 2019 IBA.[25]

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13 *Ibid* at para 50.
14 *Ibid* at paras 54, 55.
15 *Ibid* at para 56.
16 *Ibid* at para 58.
17 *Ibid* at para 23.
18 *Ibid* at para 19.
19 *Ibid* at para 32.
20 *Ibid* at para 75.
21 *Ibid* at para 24.
22 *Ibid* at paras 10, 25.
23 *Ibid* at para 16.
24 *Ibid* at para 17.
25 *Ibid* at para 18.

Duty to Consult

The Court summarised the settled law relating to the duty to consult, including that the Crown must consult Indigenous communities when contemplated Crown conduct has the ability to impinge on an Aboriginal right.[26] And, "the duty to consult is ongoing and may be triggered when a decision maker reconsiders an earlier decision in light of new information or submissions".[27]

The key issue in this case was whether the Crown was required to consult when considering the designation requests and during the process leading to the Designation Order.[28]

The duty to consult is trigged when three elements are met: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right, (2) the existence of contemplated Crown conduct, and (3) there is potential for that contemplated conduct to adversely affect an Aboriginal claim or right.[29]

The first element was satisfied as there is a treaty right involved. The Crown always has notice of treaties to which it is a party.[30] The second element was satisfied as the Minister's consideration of a Designation Order constituted Crown conduct.[31]

For the third element, while Canada argued that the Designation Order did not have the potential to adversely affect an Aboriginal right, the Court disagreed, finding that Canada's approach was too narrow.

The Court held that the third element was met and the duty to consult was triggered because the 2019 IBA created an economic interest that is closely related to, and derivative from, Aboriginal and Treaty rights.[32] The Court noted that consultation is engaged in a consideration of broader economic rights, not just in connection with the right to hunt, fish and gather. The Court also noted that the IBA was intended to compensate for potential impacts on Aboriginal rights when land was taken up for the Project but did not negate such rights or replace the duty to consult. As a result, the contemplated Designation Order was held to have the potential to adversely affect an Aboriginal claim or right.[33]

Significance of Decision

This decision is significant for the continued evolution of the duty to consult and for the future of IBAs.

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26 *Ibid* at para 86.
27 *Ibid* at para 93.
28 *Ibid* at para 94.
29 *Ibid* at para 94.
30 *Ibid* at para 95.
31 *Ibid* at para 99.
32 *Ibid* at para 107.
33 *Ibid* at paras 104, 106.

For the first time a court has held that the economic, community and social benefits from IBAs are an economic interest so closely related to Aboriginal rights that they are entitled to protection through the duty to consult, even where the conduct of the federal government may only result in a delay of those benefits.

Further, an economic interest, that may or may not materialize in the future, is sufficient to trigger the duty to consult.[34] The Court states that even if benefits have not yet started to flow to a First Nation, that fact does not negate their value.[35]

Equally important, this decision emphasises the need to consult Indigenous groups who are both opposed to and in support of the development. It is important to recognize that not proceeding with a development does not mean there will be no adverse impacts.

The Court states that the Crown should consider the goals of reconciliation when contemplating a decision that will negatively impact or negate benefits under an IBA.[36] The Crown must be aware of and consider such agreements when making decisions. It remains to be seen whether the Crown will appeal the Federal Court decision.

Julie Abouchar is a Partner at Willms & Shier Environmental Lawyers LLP in Toronto and certified as a Specialist in Environmental Law and in Indigenous Legal Issues by the Law Society of Ontario. Julie may be reached at 416-862-4836 or by e-mail at jabouchar@willmsshier.com.

Charles J. Birchall is a Partner at Willms & Shier Environmental Lawyers LLP in Ottawa and certified as a Specialist in Environmental Law by the Law Society of Ontario. Charles may be reached at 613-761-2424 or by e-mail at cbirchall@willmsshier.com.

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[34] *Ibid* at para 114.
[35] *Ibid* at para 116.
[36] *Ibid*.