**Case brief – Fort McKay First Nation v. Alberta (Minister of Environment and Sustainable Development), 2014 ABQB 393**

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In *Fort McKay,* the Alberta Court of Queen’s Bench reminds First Nations that they bear responsibility to carry their end of the consultation and do not have a veto over projects; and it reminds the Crown that it must err on the side of disclosure at all stages of the consultation process.

The case involved consultation between Prosper Petroleum Ltd. (“Prosper”) and the Fort McKay First Nation (“Fort McKay”) regarding Prosper’s oil sands exploration (“OSE”) project and seismic programs adjacent to Fort McKay reserve land.  Fort McKay is a beneficiary of Treaty No. 8 and has four reserves located north of Fort McMurray, Alberta. Alberta’s Ministry of Environment and Sustainable Resource Development (“ERSD”) delegated consultation to Prosper, who consulted with Fort McKay for six months before receiving approval for both the OSE project and the seismic program.

On the issue of whether the Crown fulfilled its duty to consult, the Court held that although ERSD assessed the scope of consultation to be on the low end of the *Haida* spectrum, its consultation was closer to a medium level: ERSD monitored the consultation process by reviewing Prosper’s records of consultation for adequacy, insisted on updates, and “sent Prosper back to the drawing board on more than one occasion to address further issues” [para. 107].

On the whole, the Court found this level of consultation to be adequate. Specifically, it found that Fort McKay’s waiver of a meeting with Prosper near the end of the six months of consultation, combined with its continued assertion that it required a buffer zone of 11,000km2 around its Reserve land, demonstrated that it did not have a specific basis to oppose the exploratory projects in question and that the Crown’s approval of these projects was consistent with “a different level of non-delegated consultation towards a more comprehensive solution to cumulative consequences” [para. 113]. The request for the buffer zone was deemed to be a separate, parallel consultation process, rather than a continuing part of consultation on the immediate Prosper exploratory projects. The Court took issue with Fort McKay’s gaps in communication, and cited *Mikisew Cree*, *Haida* and*Brokenhead Ojibway*, stating that “[t]his underscores the essential nature of consultation as being more than a one way communication” [para. 105]. Although it acknowledged that “a First Nation may be at times inundated, and have difficulty coping, with consultations relating to multiple individual projects” [para. 150],  it simply recommended that Fort McKay pursue a more comprehensive agreement with the Alberta Government to address those concerns.  The decision was “in no means intended to undermine the significance of those broader concerns”, as “[t]hey were simply not engaged by the scope of this judicial review” [para. 150].

A take-away point for the Crown in this case is to err on the side of disclosure during consultation.  Counsel for Prosper sent increasingly aggressive communications to the Crown as the consultation process went on, on which Fort McKay was not copied; at least one letter was characterized by the Court as “blunt and threatening”.  The Court determined that, as consultation went on, Prosper was under increasing pressure to complete the projects in the winter months – and it was this timing pressure which led to the tone of those messages. However, it is clear that “the failure to copy blunt messages, even if derived from best efforts to meet time constraints, cannot be condoned” [para. 127].