Métis Nation of Alberta File Notice of Constitutional Question Too Late for Consideration by Energy Resources Conservation Board

On June 13, 2008, the Energy and Resources Conservation Board (ERCB) was given Notice of a Constitutional Question filed by the Métis Nation of Alberta ("MNA").[1] The question was raised pursuant to Section 12 of the *Administrative Procedures and Jurisdiction Act* ("*APJA*")[2] and was stated in the following terms:

> *Has the Crown discharged its duty to consult the MNA with respect to potential infringements of Aboriginal rights protected under section 35(1) of the Constitution Act, 1982[3] which may arise if Application No. 1490956 to the ERCB is granted approval for construction and operation of the proposed Fort Hills Sturgeon Upgrader and associated infrastructure in Sturgeon County?*

Alberta Justice advised the ERCB that it would be challenging the Board's jurisdiction to consider the constitutional question provided by the MNA at the public hearing in June of 2008. Alberta Justice argued that the Board's jurisdiction over the matter was ousted when the MNA failed to comply with the 14-day notice requirements provided in the *APJA*. The MNA argued that the Board was not being asked to make a determination on Aboriginal rights or on whether a constitutional "duty to consult" exists. Rather, the group wished to defer proceedings on the proposal by Petro-Canada Oil Sands Inc. (PCOSI) until appropriate consultation could be engaged in and their status as interveners determined. The MNA asserted that the notice provisions within the *APJA* are discretionary when the question does not challenge the constitutional validity of legislation.

In order to support its assertion that notice requirements may be waived, the MNA referred to case law dealing with the notice provisions in the *Judicature Act*.[4] Alberta Justice rebutted the evidence presented by the MNA by stating that the requirements in the *APJA* are broader than the provisions in the *Judicature Act*.Section 10(d) of the *APJA* states that, "Notice of Constitutional Question means 'any determination of any right under the Constitution of Canada or the Alberta Bill of Rights.'" Alberta Justice also found this language to be mandatory rather than discretionary in nature.

The company making the application, PCOSI, agreed that the Board lacked jurisdiction. The company did not, however, wish to bar the participation of the MNA in proceedings altogether. PCOSI welcomed the MNA's presence, as long as it did not raise questions of constitutional law.

The MNA also argued that some of its members would be entitled to participate in the proceeding because they were landowners living near the project. The MNA suggested that section 7 of the *Charter of Rights and Freedoms*[5] would be implicated in some of their claims. The Board noted that not enough information was provided explaining which rights would be asserted and how the members would be affected. Standing, the Board ruled, could not be determined on the basis of such limited information.

The Board found that it did not have jurisdiction because the MNA failed to administer proper notice. It did, however, allow the MNA to participate as a "discretionary participant" and to make a short submission following the arguments made by PCOSI and the registered interveners.

---

[1] Energy Resources Conservation Board, "Petro-Canada Oil Sands Inc. Application to Construct and Operate an Oil Sands Upgrader in Sturgeon County" (January 20, 2009), online.
[2] R.S.A. 2000, c. A-3.
[3]*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to theCanada Act 1982 (U.K.), 1982, c. 11.*
[4] R.S.A. 2000, c. J-2.
[5] *Supra* note 3.