Date: 20090424

Docket: A-464-07

Citation: 2009 FCA 124

CORAM: **EVANS J.A.**
PELLETIER J.A.
RYER J.A.

BETWEEN:

CHIEF DENTON GEORGE, ROSS ALLARY, ELVIS HENRY, AUDREY ISAAC, GERALD KENNY, PETRA BELANGER and LILA GEORGE, on behalf of THE OCHAPOWACE FIRST NATION (INDIAN BAND NO. 71) and CHIEF MURRAY IRONCHILD, M. BRENDA KAISWATUM, JOHN ROCKTHUNDER, WILLIAM LAVALLEE, NELSON WATETCH, DELBERT KAISWATUM, VALERIE IRONCHILD, JASON WESAQUATE ALPHONSE OBEY, HAROLD KAISWATUM, WAYNE PRATT, DENNIS WESAQUATE and KEITH FRANCIS on behalf of THE PIAPOT FIRST NATION (INDIAN BAND NO. 75), being MEMBER FIRST NATIONS OF THE QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY (QVIDA)

Appellants

and

ATTORNEY GENERAL OF CANADA and the ROYAL CANADIAN MOUNTED POLICE

Respondents

Heard at Regina, Saskatchewan, on March 5, 2009.

Judgment delivered at Ottawa, Ontario, on April 24, 2009.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: EVANS J.A.
RYER J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] This is an appeal from the decision of Mr. Justice de Montigny (the application judge), reported as *Ochapowace First Nation (Indian Band No. 71) v. Canada (Attorney General)*, 2007 FC

920, 316 F.T.R. 19 (Reasons), dismissing the appellants' application for judicial review of the decision of the Royal Canadian Mounted Police (RCMP) not to lay charges against the Prairie Farm Rehabilitation Administration (PFRA) and the Saskatchewan Watershed Authority (SWA), as a result of the flooding of the appellants' lands. The issue in this case is the reviewability of the exercise of police discretion, and the extent to which that question is affected by the appellants' invocation of the honour of the Crown in support of their claims.

FACTS

[2] The factual nexus underlying this appeal is fairly complex. However, given the nature of the appellants' claims, it is important to understand the role played by the police in the events leading to the appellants' notice of application. For that reason, I propose to set out the facts in some detail.

[3] The appellants are members of two First Nations occupying reserves in the Qu'Appelle Valley in southern Saskatchewan. The PFRA was established in response to the drought that devastated the Prairie Provinces in the 1930s. Its mandate is to assist in the rehabilitation of prairie soil and water resources through a variety of means, including the construction of dams and water control structures. The SWA is an agency of the Province of Saskatchewan whose statutory mandate is, among other things, "to manage, administer, develop, control and protect the water, watersheds and related land resources of Saskatchewan": *The Saskatchewan Watershed Authority Act, 2005*, S.S. 2005, c. S-35.03, s. 5(*a*).

[4] In the 1940s, the PFRA constructed works in the Qu'Appelle Valley, as a result of which reserve lands were flooded and the flow of the watercourses impeded. This gave rise to numerous issues, as summarized in the reasons of the application judge:

> … there is much disagreement on the extent of these damages, on the consultation that took place with the First Nations before these structures were constructed, on the compensation agreed on and paid, on the contamination and pollution of the Qu'Appelle River that would have occurred because of the flooding, on the alleged admission of unlawful conduct by the Crown and on the negotiations that took place to secure First Nations' consent for the flooding of their lands, on the actual trespass by individual members of PFRA and on the question as to whether water is still encroaching on reserve land and whether this encroachment constitutes a trespass under the Band By-laws, *Criminal Code* or common law.
>
> [Reasons, at para. 5.]

[5] The following summary of relevant events is taken from the application judge's reasons:

> 27 In 1994, QVIDA [Qu'Appelle Valley Indian Development Authority] asked the Indian Claims Commission (the ICC) [to] conduct an inquiry into the wrongful flooding of First Nation lands. As a result of that inquiry, the ICC found that the use and occupation of the reserve land for flooding could not be authorized under the Indian Act and that it had occurred without Band consent. Canada validated the QVIDA Flood Claim based on the recommendation of the ICC, and a Protocol Accord was signed in August of 2000 to be used for the flood claim negotiations. But in 2003, negotiations broke down when the First Nations indicated that they would no longer allow the operation of the structures without annual compensation being paid. In the following months, a number of the First Nations broke away from the formal negotiation group and continued negotiations on their own accord. The respondents claim that the structure located on the Ochapowace First Nation lands has not operated since that time and that the Piapot First Nation has no structure that impacts it directly.
>
> 28 From that point forward, the QVIDA negotiation group consisted of three Bands, two of which are the applicant First Nations of Piapot and Ochapowace. In 2005, it appears that negotiations resumed with this QVIDA negotiation group involving INAC (Indian and Northern Affairs Canada), PFRA and SWA, but have yet to result in a resolution.
>
> 29 In March and May of 2005, the applicants Piapot First Nation and Ochapowace First Nation passed Band Council By-laws that create offences of trespass for the interference of the use of reserve land, including the flooding of land from external sources. The applicants alleged that the activities of the PFRA and the SWA are in contravention of these By-laws and of the Criminal Code.

[6] Concurrently, the appellants were consulting with the RCMP with respect to the unauthorized presence of PFRA employees on reserve lands while accessing certain control structures. In October 2002, Superintendent McFadyen advised the appellants that officials of the PFRA had assured him that there would be no attempt to access structures located on reserve lands without Band authorization or a court order (Exhibit BD2 to the Affidavit of Ross Allary, A.B., at p. 1731).

[7] Discussions between the RCMP and the affected Indian Bands continued over the following months. In response to an inquiry about the enforcement of section 30 of the *Indian Act*, R.S.C. 1985, c. I-5, which creates the offence of trespassing on a reserve, Supt. McFadyen wrote to counsel for the appellants on May 6, 2004 stating that the issue had been discussed with officials within the Federal Department of Justice, whose advice was to the following effect:

> The authority of the Band (Chief and Council) must notify the person(s) that they are not welcome. They must then be provided with a reasonable time to vacate. Should the person(s) return, charges will then be appropriate and subject removed.
>
> [Exhibit CS1 to the Affidavit of Ross Allary, A.B., at p. 2450.]

[8] In July 2005, the appellant Bands met with the RCMP to discuss enforcement of by-laws that the Bands had passed with respect to trespass. Each Band's by-law was identical to that of the other Band save as to the name of the reserve in question. The by-laws are entitled "Ochapowace First Nation Removal of Trespassers By-law" and "Piapot First Nation Removal of Trespassers By-Law". Each by-law begins with an interpretation section; among the terms defined are the following:

> "Trespass" means the entry onto, or the presence on, or actions by a person(s) causing interference without lawful justification, the use of the […] First Nation reserve land.
> "Officer" means any police officer, police constable or other person charted [*sic*] with the duty to preserve and maintain the public peace, and any person appointed by the Council for the purpose of maintaining law and order on the reserve.
>
> [Exhibit CU2 to the Affidavit of Ross Allary, at p. 2458 and 2465.]

[9] Section 3 of each by-law then identifies certain acts as "prohibited purposes", among them the following:

> (e) watercourse flooding by flooding or diversion on [*sic*] natural flows of water onto the reserve from sources external to or unto the reserve;
>
> (f) the passing down the Qu'Appelle River other than normal natural run-off;
>
> …
>
> (l) construction and regulation of water in the Qu'Appelle River resulting in detrimental effects.
>
> [Exhibit CU2 to the Affidavit of Ross Allary, at p. 2458-2459, and at p. 2465-2466.]

[10] Section 4 of each by-law is the operative section and provides as follows:

> 4(1) An officer may order any person who trespasses on the reserve or who frequents the reserve for a prohibited purpose to leave the reserve immediately and stop the action causing the trespass.
>
> (2) Where a person who has been ordered to leave the reserve fails or refuses to do so, an officer may take such reasonable measures as may be necessary to remove the person from the reserve and stop the action causing trespass.
>
> (3) A person who fails or refuses to comply with an order made under subsection 4(1) to leave the reserve, or shall resist or interfere with an officer acting under subsection (2) commits an offence.
> [Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2458-2459 and at p. 2466.]

[11] Section 5 is the penalty section and provides that a violation of the by-law is an offence punishable upon summary conviction by a fine not exceeding $1,000 for each day that the offence

continues or by imprisonment for a term not exceeding 30 days, or both (Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2459 and 2466).

[12] The by-laws were reviewed by an official of Indian and Northern Affairs Canada (INAC) who commented that the portions of the by-laws which purported to deal with off-reserve conduct had no effect beyond the boundaries of the reserves (Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2473 and 2476). This position was communicated to the appellants by letters dated May 15, 2005 and May 17, 2005 (Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2472 and 2476).

[13] In late June 2005, the appellants forwarded a "Notice of Violation" to the PFRA and the SWA. The following is the text of the letter forwarded by the Ochapowace Band to the SWA on June 29, 2005:

> Please find attached a copy of the Ochapowace First Nation above mentioned By-law which came into force May 16, 2005, as advised by Christine Aubin, A/Director Band Governance of Indian and Northern Affairs Canada on May 15, 2005 letter attached.
>
> This letter serves as a "Notice of Violation" to which your corporation, namely the Saskatchewan Watershed Authority, by increase of waters upon the Ochapowace First Nation, constitutes a trespass pursuant to, noted By-law. If diversions of water levels by Qu'Appelle Dam and associated water management structures, which increase water above natural levels, are not unilaterally terminated, enforcement action will follow and involve further enforcement to be implemented as per the Chief and Council's direction for the protection of our Ochapowace First Nation membership and Ochapowace First Nation lands.
>
> Yours truly,
>
> Ochapowace First Nation Chief and Council
>
> [Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2482.]

[14] Letters containing exactly the same terms were forwarded to the PFRA on the same date (Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2478). The Piapot First Nation forwarded a letter on the same terms (except as to the effective date of the by-law and the references to the First Nation) to the PFRA on May 3, 2005 (Exhibit CU2 to the Affidavit of Ross Allary, A.B., at p. 2480).

[15] On April 13, 2006, Mr. Peigan, a representative of QVIDA attended at the Regina Commercial Crime section of the RCMP, and provided a statement to an investigator regarding allegations of trespass on reserve land by representatives of the PFRA and the SWA (Exhibit CV3 to the Affidavit of Ross Allary, A.B., at p. 2554).

> On April 18, 2006, Sergeant Richard Ré, the non-commissioned officer in charge of the Regina Commercial Crime Section, wrote to the QVIDA to advise it that the RCMP would not lay charges in respect of the alleged trespass by PFRA or SWA or their representatives. The material portions of the letter are reproduced below:
>
> > … The evidence obtained from Mr. Peigan on behalf of QVIDA and other sources have been reviewed in conjunction with a legal opinion received from the Department of Justice (Canada).
>
> Based on all the information gathered to this date we arrive at the following conclusions:
>
> > 1) Piapot First Nation, Sakimay First Nation and Ochapowace First Nation developed each a set of bylaws which came into force in the summer of 2005. Letters used as "Notice of Violation" were sent by the three First Nations to PFRA and SWA alleging trespass by increase of waters upon Piapot FN, Sakimay FN and Ochapowace FN. The Bylaws drafted by the three First Nations cannot be enforced due to the following:
> >
> > - Bylaws passed under section 81 of the Indian Act are limited to the geographical confines of the reserve.
> >
> > - The definition of trespass in the three Bylaws expands on the common law principle of trespass (one person's

> entering upon another's land without lawful justification). To refute the charge, the alleged trespasser would have to establish a lawful justification for being on the First Nation (If a civil servant carries out his/her duties on the First Nation, he/she is there for a lawful purpose pursuant to federal/provincial authority which supersedes the Bylaws i.e. Section 9(1) of the Prairie Farm Rehabilitation Act and section 6(1) of the Saskatchewan Water Corporation Act).
>
> - The Bylaws are outside the authority of the Indian Act because the general principles of common law trespass contemplate trespass by persons, not by inanimate things like water.
>
> 2) Consideration was also given to a possible charge of mischief pursuant to Section 430(1) of the Criminal Code if someone damaged First Nation's land by flooding. Again the aspects of legal justification and colour of right are covered as an exception in Section 429(2) of the Criminal Code. In view of the provisions included in the Prairie Farm Rehabilitation Act and the Saskatchewan Water Corporation Act, a prosecution under Section 430(1) cannot be pursued.
>
> Based on the information gathered through our investigation, the RCMP cannot proceed with charges in the matter.
>
> [Exhibit CV3 to the Affidavit of Ross Allary, A.B., at p. 2554-2555.]

[16] Following receipt of this letter, members of the affected First Nations met with representatives of the RCMP to discuss their response to the First Nations' complaints. At that meeting, counsel for the First Nations asked the RCMP to release the Department of Justice opinion on which they were relying. The RCMP undertook to inquire of the Department of Justice as to whether it would authorize the release of its opinion. Subsequently, on May 8, 2006, counsel for the First Nations wrote to the RCMP to renew his clients' demand for production of the Department of Justice's opinion. That letter summarized the First Nations' concerns as follows:

> In our opinion, the three paragraphs of legal response provided in your correspondence of April 19, 2006 are not an honourable response and follow a period of prolonged inactivity by the RCMP on these investigations which disclose the appearance of possible interference by the Crown to prevent lack of accountability pursuant to the Rule of Law, Inherent Rights, and Treaty Rights of proper and effective assistance by the RCMP to the affected First Nations.
>
> [Exhibit CX1 to the Affidavit of Ross Allary, A.B., at p. 2564.]

[17] On May 17, 2006, the RCMP responded to further inquiries on this issue in a letter to counsel for the First Nations, the relevant portions of which provide as follows:

> Sgt. Richard Ré, the investigator in this matter has completed this investigation and it has been determined that there is insufficient evidence to proceed with any charges to Statutes of Canada, Province of Saskatchewan or the By-laws Enacted by the three First Nations. The sensitivity of these matters has not gone unnoticed, therefore consultation has taken place with Mr. Chris Lafleur, Senior Counsel for Dept. of Justice/Prairie Region in Saskatoon. Mr. Lafleur has also drawn the same conclusions that there is no validity to pursuing charges for trespassing under the by-law.
>
> It is the RCMP's responsibility to investigate any matter relating to statute offences. This does not preclude you or your organization from pursuing this matter on a civil basis.
>
> [Exhibit CY1 to the Affidavit of Ross Allary, A.B., at p. 2566.]

[18] The fact of having consulted Mr. Lafleur is one of the grounds upon which judicial review of the RCMP's decision not to proceed with charges was sought. Mr. Lafleur attended a meeting of the various parties involved in this dispute on January 19, 2006. The appellants believe that Mr. Lafleur attended the meeting as counsel to the PFRA: see para. 113 of the Affidavit of Ross Allary, A.B., at p. 83. The PFRA denies that Mr. Lafleur provided it with legal advice at any time, and asserts that he was present at the meeting in his capacity as counsel for INAC: see paras. 15-16 of the Affidavit of Ron Woodvine, A.B., at p. 2571-2572.

PROCEDURAL HISTORY

[19] On June 15, 2006, the appellants launched an application for judicial review in the Federal Court of the "final decision made by the Royal Canadian Mounted Police not to lay trespass or charges with respect to certain complaints of the Applicants about the actions of the Prairie Farm Rehabilitation Authority (PFRA) and the Saskatchewan Watershed Authority (SWA) leading to the flooding of land of the applicants, on the basis of the investigation of Sergeant Richard Ré…" (A.B., at p. 40).

[20] The application, as amended, sets out six grounds of review which may be broadly summarized as follows. The failure of the RCMP to lay charges is a breach of Treaty 4, which promises the assistance of the "redcoats" to keep order in the event of a breach of the Treaty or the criminal law. The failure of the RCMP to take into account the inherent and treaty rights of the First Nations is a breach of the Crown's fiduciary obligations and is a failure to maintain the honour of the Crown. The RCMP failed to properly consider the Crown's admission of certain acts when refusing to exercise its prosecutorial discretion. The RCMP failed to properly exercise its discretion and demonstrated actual bias against the appellants when it sought legal advice from Mr. Lafleur who, it is alleged, also provided legal advice to one of the potential defendants, the PFRA. Finally, the RCMP disregarded the treaty context and failed to uphold the honour of the Crown when it acted as it did in this matter.

[21] The application was dismissed. That decision was appealed on October 15, 2007. The notice of appeal lists twelve grounds of appeal, some of which deal with evidentiary and procedural matters, while others deal with the grounds alleged in the notice of application.

ANALYSIS

[22] In my view, the application judge correctly stated the law and applied it properly to the many questions the parties put before him. I would adopt his reasons and would add to them only in relation to the issue of police and prosecutorial discretion and the appeal to the honour of the Crown.

[23] I have set out the facts in considerable detail in order to make it clear that the argument with respect to the honour of the Crown is being made in a very particular context. It will be recalled that the structures that give rise to the flooding in question were constructed in the 1940s. It will also be recalled that Canada has accepted that the flooding, which resulted from the construction of those structures, was not authorized, and that the affected First Nations are entitled to compensation. Negotiations with respect to compensation have begun, but, for whatever reason, these appellants have not been in a position to conclude an agreement with Canada. It is in this context that the appellants argue that the honour of the Crown is engaged in the RCMP's exercise of its discretion to lay charges against an agency of the Crown in relation to the flooding, which is the subject of these negotiations.

[24] It is apparent from the facts that there has been an ongoing collaboration between the appellants and the RCMP with respect to the issue of trespass on the reserve. There were a number of meetings on the subject as well as attempts to respond to the appellants' concerns. The disagreement underlying the present appeal arises from the RCMP's decision not to lay charges under the by-laws passed by the Piapot and Ochapowace First Nations.

[25] While the application judge recognized a distinction between police and prosecutorial discretion, his analysis essentially treated them as aspects of a single discretionary power. I believe it is preferable to recognize that both the police and the Attorney General (usually acting through his agents) have an independent discretion to exercise. This distinction was affirmed in *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, as follows:

> 62. The appellant contends that a bright line must be drawn at the stage where charges are laid, in order to keep the functions of the police separate from those of the prosecutors. This separation, he argues, is the only way to maintain the Crown's crucial objectivity when reviewing the appropriateness of charges…
>
> …
>
> 67. …The distinct line appears to be that police, not the Crown, have the ultimate responsibility for deciding which charges should be laid. This can still be true after the Crown has made its own pre-charge assessment, and when the two arms of the criminal justice system disagree on whether to lay charges.

[26] The rationale for that discretion was set out recently in the Supreme Court's decision in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190 (*Beaudry*), where the following appears:

> 37 Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law,

> they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the "course of justice". The ability - indeed the duty - to use one's judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*, [1998] 2 S.C.R. 387, at p. 410, is directly on point here:
>
> > Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.
>
> Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having *carte blanche*, police officers must justify their decisions rationally.

[27] In *Beaudry*, the Supreme Court went on to say that the exercise of police discretion, when challenged, must be justified both subjectively and objectively. Subjectively, the discretion must have been exercised honestly, transparently and on the basis of valid and reasonable grounds. Objectively, the exercise of the discretion must be assessed in light of the material circumstances: see paras. 38-39.

[28] The application judge considered *Beaudry*, but concluded that it did not materially affect the test to be applied. In his view, there was little difference between reviewing the exercise of discretion on the basis of rational justification or on the basis of flagrant impropriety, which is the language used to describe the basis on which the exercise of prosecutorial discretion is to be reviewed.

[29] I agree with the application judge that courts should not embark upon a review of either police or prosecutorial discretion except in the clearest cases of abuse. But I am not persuaded that the same test applies in both cases, largely because of the different roles that the police and the prosecution play in the administration of justice. This is not a question that I need to answer because the exercise of police discretion passes muster in this case regardless of which test is applied.

[30] The facts, as set out earlier in these reasons, amply justify the conclusion that both the subjective and objective elements of the test were satisfied in this case. The RCMP's decision was made honestly and transparently and for a legitimate reason, namely the evidence did not support the charges. In light of all the material circumstances, including the state of the negotiations for compensation and the legal advice received, the RCMP's decision was objectively justifiable.

[31] I agree with the application judge that the appellants have not established "flagrant impropriety" in the RCMP's exercise of discretion not to lay charges.

[32] That said, does the appellants' appeal to the honour of the Crown change anything? The theory of the honour of the Crown as a constraint on the Crown's exercise of its rights and powers in circumstances where First Nation interests are at stake was given full expression in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (*Haida Nation*). In that case, the issue was the provincial Crown's right to issue logging permits with respect to lands over which the Haida Nation claimed Aboriginal rights. The question was the extent to which the Crown

could take action that might adversely affect First Nation interests prior to a determination as to the nature and extent of those interests.

[33] The Supreme Court held that "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown": see *Haida Nation*, at para. 16. The heart of the doctrine, in the context of treaty making, is found at paragraph 25 of the Court's decision, where it says:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[34] The obligations imposed by the honour of the Crown are not exhausted by the conclusion of a treaty. As the Court pointed out at paragraph 32 of its reasons:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.

[35] Finally, the Supreme Court recognized the mutuality of the obligations that the Crown and the First Nations owe each other:

> 42. At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised [citation omitted], through a meaningful process of consultation. Sharp dealing is not

> permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached [citations omitted]. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

[36] In the present case, negotiation and treaty making have concluded. The issues between the appellants and the Crown relate to the Crown's failure to respect those treaties, and the compensation owing to the affected First Nations as a result. It is clear that the honour of the Crown is engaged in those negotiations, but it is not the course of the negotiations that is the subject of the appellants' appeal to the honour of the Crown. If the honour of the Crown is engaged by the exercise of the discretion as to whether or not to lay charges, I would find that the Crown's duty to consult and accommodate has been satisfied by the course of dealings between the parties.

[37] However, in my view the honour of the Crown is not engaged at all on these facts. The exercise of police discretion exists in a different legal context from the obligations of the Crown with respect to Aboriginal peoples. The framework within which the police and the Attorney General (and his agents) exercise their discretion does not overlap the framework within which Canada seeks to achieve a just and equitable resolution of the claims of its Aboriginal peoples. The concepts of consultation and accommodation, in the sense required by the doctrine of the honour of the Crown, cannot coexist with the independent exercise of police and prosecutorial discretion.

[38] For these reasons, as well as those given by the application judge, I would dismiss the appeal.

"J.D. Denis Pelletier"
J.A.

"I agree.
John M. Evans J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-464-07
STYLE OF CAUSE:	CHIEF DENTON GEORGE ET AL v. AGC ET AL
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	March 5, 2009
REASONS FOR JUDGMENT BY:	Pelletier J.A.
CONCURRED IN BY:	Evans J.A. Ryer J.A.
DATED:	April 24, 2009

APPEARANCES:

Mervin C. Phillips	FOR THE APPELLANTS
Chris Bernier	FOR THE RESPONDENT ATTORNEY GENERAL OF CANADA

SOLICITORS OF RECORD:

PHILLIPS & CO. REGINA, SASKATCHEWAN	FOR THE APPELLANTS
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT