

## **Case Brief – *Bear v. Saskatchewan***

### **2016 SKQB 73**

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In *Bear v. Saskatchewan*, 2016 SKQB 73, the Court dismissed Muskoday First Nation’s claim that the Province of Saskatchewan had breached a 2007 Treaty Land Entitlement (TLE) Agreement by refusing to sell it certain Crown land and minerals at the Fort à la Corne (FALC) Forest Reserve.

In its claim, Muskoday First Nation (Muskoday) alleged that Saskatchewan had misconstrued its obligations under the TLE Agreement. Muskoday further alleged that Saskatchewan did not act honourably in its dealings, and favoured the public interest instead of providing favourable consideration to Muskoday as required by the TLE Agreement.

In response, Saskatchewan asserted that it was not in the public interest to grant Muskoday’s request. Saskatchewan also claimed that passing ownership to Muskoday would create uncertainty for mineral disposition holders at a time when they were in the process of making substantial investments.

#### **The honour of the Crown applies to TLE Agreements**

The case raised the question of whether the honour of the Crown applied to Saskatchewan’s treatment of Muskoday’s request, given that the TLE Agreement was not a treaty. The Court found that the honour of the Crown still applied to the TLE Agreement because it was the final step in a process designed to remedy Canada’s broken treaty obligations with First Nations:

There is a direct conceptual line between that start point and the end point, namely, the TLE Settlement Agreement. The concept of the honour of the Crown follows that straight conceptual line and falls on Saskatchewan in its dealings under the TLE Settlement Agreement.

The Court was clear, however, that Saskatchewan’s obligation to act honourably did not create an obligation to grant Muskoday’s request.

#### **The test for discharging obligations under the Muskoday TLE Agreement**

In setting out the standard for establishing whether Saskatchewan discharged its obligations under the TLE Agreement, the Court rejected the principle of “willing seller/willing buyer” as a benchmark. Rather, it applied the following test:

if Saskatchewan approached Muskoday's request in good faith and thoroughly deliberated the issues in question in an intellectually honest fashion and did not engage in "sharp practice", it would ... discharge its obligations under the TLE Agreement.

The Court concluded that Saskatchewan had met its obligations in this case.

### **The public interest is a valid consideration**

In arriving at its conclusion, the Court determined that it was appropriate for Saskatchewan to take the public interest into consideration in reviewing Muskoday's request. In fact, the Court determined that Saskatchewan had a duty to the public inasmuch as it had a duty to give favourable consideration to Muskoday in making its determination. The Court ruled that "[n]othing compels Saskatchewan to place one subgroup's interests ahead of everyone else's." The Court also accepted Saskatchewan's concern over the uncertainty the request would create for mineral disposition holders as a valid consideration.

### **Implications**

*Bear v. Saskatchewan* demonstrates that, while courts will accept the applicability of the honour of the Crown to TLE Agreements, the honour of the Crown does not necessarily oblige the Crown to sell land to a First Nation under such agreements. Further, the public interest and the concerns of other stakeholders may be viewed as appropriate and even necessary considerations in determining whether governments ought to have sold designated lands to First Nations under TLE Agreements. According to the Court, these considerations can even outweigh Crown obligations to give favourable consideration to First Nations.