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Maintaining space for autonomy? Environmental assessments in the context of aboriginal land claims agreements

By Nigel Bankes

Cases Considered:

Quebec (Attorney General) v. Moses, 2010 SCC 17

This is the first decision of the Supreme Court of Canada to examine a modern land claims agreement; in this case the James Bay and Northern Quebec Land Claim Agreement (JBNQA or the Agreement) between Canada, Quebec and the James Bay Cree and the Northern Quebec Inuit. The argument in the case happens to relate to the nature of the environmental assessment process that should be applied to a particular project but there is a much broader issue at stake which is the capacity of federal and provincial governments to continue to make and apply laws within the territory covered by the Agreement to matters "covered" by the terms of the Agreement. By adopting an artificial distinction between that which is covered by the Agreement and that which falls outside it, the majority recognize that governments have retained significant authority to "supplement" the terms of the Agreement. But the government's authority to do so is not completely unlimited since the majority also recognizes that such authority must be exercised consistently with the Crown's duty to consult. By contrast, the dissent takes a more robust view of the coverage of the land claims agreement and as a result limits the capacity of governments to create a parallel normative world that sidelines negotiated arrangements for autonomy.

The facts

A mining company proposed to develop a vanadium mine in Northern Quebec in an area covered by the terms of the JBNQA. The JBNQA was approved and given effect by federal (*James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32) and provincial (*Act approving the Agreement concerning James Bay and Northern Québec*, R.S.Q., c. C-67) statutes which provided (federally, the provincial legislation is to the same effect) that "The Agreement is hereby approved, given effect and declared valid" and "Where there is any inconsistency or conflict between this Act and the provisions of any other law applying to the Territory, this Act prevails to the extent of the inconsistency or conflict."

At the time that the Agreement was negotiated there were no federal or provincial environmental impact assessment procedures and thus the parties agreed to create one in Section 22 of the Agreement in order to "reconcile" (as the Quebec Court of Appeal [2009] 1 CNRL 169 put in the instant case (at para 36)) the right of the signatories to carry on their traditional activities and the right of Quebec to develop the territory. The Agreement created different arrangements for federal and provincial projects but the Agreement was also careful to state (s.22.6.7) that in general there should only be one review process, federal or provincial. After the JBNQA was negotiated the federal government developed, successively, the Environmental Assessment and

Review Process Guidelines Order, SOR/84-467 (the subject of the *Oldman Dam* case [1992] 1 SCR 3) and the *Canadian Environmental Assessment Act*, (*CEAA*) SC 1992, c.37).

The mining project that lies behind this litigation will cause harmful alteration, disruption or destruction (HADD) of fish habitat within the meaning of s.35(1) of the *Fisheries Act*, RSC 1985, c.F-14. The federal Fisheries Minister is permitted to allow such a project to proceed under s.35(2) of the *Fisheries Act* but the exercise of this statutory power is a trigger to the application of the *CEAA*. The *CEAA* Agency ultimately took the view that a review panel should be struck to assess the project.

The Cree disagreed and sought a declaration to the effect that insofar as the project required a federal review the project should be reviewed under the federal review provisions of Section 22 of the JBNQA and not under the *CEAA*. Quebec commenced its own application seeking declarations that the project should be reviewed under the provincial review provisions under the JBNQA and that the *CEAA* was inapplicable to the project.

Justice Bénard at trial granted the province's application. She held that the project was a provincial project which triggered the provincial review provisions of Section 22; that the *CEAA* was inapplicable and that the project was not subject to review under the *CEAA*. The Court of Appeal reversed and found that the project should be subject to both provincial and federal assessments but that the federal assessment should be that prescribed by the JBNQA rather than the *CEAA* on the basis that the *CEAA* was inconsistent with the Agreement and in the event of an inconsistency the Agreement should prevail. The principal inconsistency between the Agreement and the *CEAA* was that while Section 22 of the Agreement provided for extensive Cree participation in the review process as of right, there was no similar entitlement under the *CEAA*. The Court of Appeal also held that Canada was free to add assessment triggers (such as s.35(2) of the *Fisheries Act*) to those found in the Agreement so long as they were not inconsistent with the Agreement.

On further appeal to the Supreme Court of Canada the Attorney General for Quebec sought to uphold the judgement at trial and to argue that once the assessment had been accepted by the provincial government the federal government was required to issue the necessary approval.

The judgements

The Court split badly in this case. Justice Binnie wrote the judgement for the majority and carried with him the Chief Justice and Justices Fish, Rothstein and Cromwell. Justices LeBel and Deschamps (Abella and Charron JJ., concurring) wrote for the dissent. The judgements by and large turn on different provisions of the JBNQA. Justice Binnie chooses to emphasise two clauses of the Agreement which in his view affirm the continued vitality of laws of general application and the continuing power of governments to make laws of general application in areas covered by the Agreement; the dissent chooses to emphasise the clause of the Agreement that stipulates that ordinarily there should only be one review.

The majority denied the appeal but concluded that the project should be subject to a *CEAA* assessment rather than a federal assessment on the terms of Section 22 of the Agreement. In reaching this conclusion Justice Binnie relies heavily on two provisions of the Agreement, s.22.7.1 (permits to be granted under laws of general application) and s.22.7.5 (environmental assessment as a law of general application). These two provisions read as follows:

> 22.7.1 If the proposed development is approved in accordance with the provisions of this Section, the proponent shall before proceeding with the work obtai[n] where applicable the necessary authorization or permits from responsible Government Departments and Services. The Cree Regional Authority shall be informed of the decision of the Administrator.
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> 22.7.5 Nothing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project. [Emphasis as added in each para. by Justice Binnie]

The first of these two subsections allowed Justice Binnie to conclude that the parties contemplated an *internal* treaty approval mechanism and an *external* treaty permitting mechanism. The internal treaty mechanism governed the environmental assessment process until the Administrator under the Agreement had provided its approval. After that the external treaty mechanisms (i.e. the permitting under laws of general application) took over (see para. 38). The process contemplated by s. 35(2) of the *Fisheries Act* is an external mechanism the need for which is only triggered once a provincial resource project has secured provincial approval (at para. 54). Since this trigger was external to the Treaty it was not therefore subject "to the reference in s. 22.6.7 to only "one (1) impact assessment and review procedure"" (at para. 8):

> …. the agreement of the parties to avoid duplication *internal* to the Treaty does not eliminate the *post*-approval permit requirement contemplated by the Treaty if imposed *externally* by a law of general application, such as the *CEAA* or the *Fisheries Act*, whose operation is preserved by the Treaty itself … (at para 10)

It followed that for Justice Binnie the Agreement was not exhaustive of the environmental requirements pertaining to a project in the territory covered by the Agreement. The proponent still needed to obtain necessary federal permits even after the assessment prescribed by the Agreement had been completed and the provincial Administrator (or Cabinet exercising its power to override) had decided that the project should go ahead. The only thing that could prevent the federal government from layering on the additional requirement of a federal assessment prior to permitting would be if there was an inconsistency between this additional requirement and the terms of the Agreement. And was there? Justice Binnie held:

> I believe not. As stated, s. 22.7.1 of the Treaty provides that once the proposed development is approved by the Administrator following consultation and receipt of "recommendations", the mine promoter is required *notwithstanding such approval* to obtain "the necessary authorization or permits from responsible Government Departments and Services". Nothing in the Treaty relieves the proponent from compliance with the ordinary procedures governing the issuance of the necessary authorization or permits. If the makers of the Treaty had intended the Administrator's approval (or Cabinet's substituted approval) to be the end of the regulatory requirements, they would have said so, but they did not. They said the contrary. (at para 37).

The second subsection quoted above was important insofar as it allowed Justice Binnie to conclude (at paras. 43 & 44) that the Agreement "expressly preserved" the operation of a federal

environmental assessment procedure. It followed from this that it was the *CEAA* that should be applied to the project (at para. 45) rather than the federal Section 22 procedure of the Agreement as suggested in the decision of the Quebec Court of Appeal. But in applying the *CEAA* procedures the federal government must do so (at para. 45 (and see also para. 55)) "in a way that fully respects the Crown's duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388."

If s.22.7.1 was important to the majority the dissent turns in large part on s. 22.6.7, the provision that seeks to avoid duplication:

> The Federal Government, the Provincial Government and the Cree Regional Authority may by mutual agreement combine the two (2) impact review bodies provided for in this Section and in particular paragraphs 22.6.1 and 22.6.4 provided that such combination shall be without prejudice to the rights and guarantees in favour of the Crees established by and in accordance with this Section.
>
> Notwithstanding the above, a project shall not be submitted to more than one (1) impact assessment and review procedure unless such project falls within the jurisdictions of both Québec and Canada or unless such project is located in part in the Territory and in part elsewhere where an impact review process is required. [Emphasis as provided in the dissent]

In making the distinction between provincial projects and federal projects the dissent concludes that the parties must have had in mind something other than the idea that any major resource project might engage aspects of both federal and provincial powers (see para 124 (dissent) & para. 36 (majority)). Thus it was the *nature* of the project and not the *effect* of the project that should govern the categorization of the project for environmental assessment purposes. By focusing on the nature of the project the dissent was able to conclude that the project fell within exclusive provincial jurisdiction and that the second exception in s.22.6.7 did not apply (at para. 134). Any other interpretation (at para. 135) would turn the exception into the rule which "would directly contradict the clear intention of the parties" and (at para. 136) "If this Court were to find that jurisdiction for environmental assessment purposes depends on both the nature and the impact of a project, the distinctions the parties were so careful to draw would become meaningless. The parties drew these distinctions for a reason, and the Court ought to give effect to them." The crucial passage is as follows (at para. 132):

> In view of the parties' express intention that the Agreement constitute a comprehensive governance scheme for the entire Territory, that there be no other government assessment process, that there be no parallel process in the Agreement itself, that it provide for only one environmental assessment as the general rule, and that it be paramount over all other laws of general application that are inconsistent with it, s. 22.7.5 [which provides that the federal government does not have conduct an assessment unless required by federal law] cannot be interpreted as triggering a separate federal environmental assessment of the Project under the *CEAA*. To agree that the *CEAA* should prevail over the specific

> provisions of the Agreement would be to subvert the constitutional ordering established and intended by the parties to the Agreement. (emphasis added)

In sum, for the dissent the Agreement was both comprehensive and *exhaustive*.

> In light of the constitutional normative hierarchy, the *CEAA* cannot prevail to impose a parallel process in addition to the ones provided for in the Agreement. Any other interpretation would mean that the federal government can unilaterally alter what was intended to be a comprehensive, multilateral scheme. The federal government is therefore prohibited from effectively and unilaterally modifying the procedure established by the Agreement, or derogating from the rights provided for in the Agreement, by purporting to attach conditions based on external legislation of general application. (at para. 141).

How does the dissent deal with Binnie's reliance on 22.7.1 (the recognition of a separate permitting power)? For the dissent the permitting scheme could not be used to import another assessment process:

> The approach taken by our colleague Binnie J. is inconsistent with the spirit of the Agreement, and perhaps even with its words. He focuses on the fact that a federal permit is issued only after the assessment process under the Agreement has been completed. However, because of the environmental assessment under the *CEAA* that necessarily accompanies the permit-issuing process, the Project would then be subject to a second environmental assessment process, contrary to the express terms of the Agreement. [135]

All of this led the dissent to the conclusion that any environmental assessment should be conducted under the terms of the Agreement and that in this case the relevant assessment procedure should be the provincial assessment procedure. It followed from this that the federal Minister must issue a permit (if at all) on the basis of the environmental provisions of the Agreement rather than on the basis of the *CEAA* (at para 142). Did this amount to an inappropriate delegation of federal authority? For the dissent the answer was no (at para 138) given the overall purposes of the Agreement and its (now) constitutional status.

Comment

I will comment on four aspects of the two judgements. First, I ask whether the majority's conclusion makes sense. Second, I comment on the manner in which the judgements deal with the status of the land claims agreement and relevant interpretive rules. Third, I discuss the federalism ideas in the case, and finally the duty to consult in the context of modern land claims agreements.

Does the majority judgement make sense?

The majority is quick (at para. 5) to agree with the position taken in the Cree's factum to the effect that Quebec's submission "makes no practical sense" but I fear that the same may be true of the majority's own conclusion. Indeed, for me there is an air of unreality about the conclusion in this case which I will try to demonstrate.

Suppose that three parties have just concluded long and arduous negotiations over the EIA process to be applied within a particular territory. Suppose that at the end of these negotiations and just before inking the deal one party says to the other two; "by the way you do realize that in addition to the EIA process that we have just negotiated we reserve the right to add an additional EIA process that will apply to the same projects and that the rules and principles dealing with your participation that we have just agreed upon will not necessarily apply." What do you think the other two parties would say? Something like, "that's fine with us, that's what we bargained for" or "you must be joking; we haven't spent six months negotiating this deal for you to do an end run around it; that's not negotiating in good faith".

The dissent is in the second camp (see the references above to the prohibition on creating a parallel process). The majority must be in the first camp but I am not sure that the majority adequately confronts the challenge of explaining why the dissent is wrong. Instead the majority relies, as noted above, upon the two provisions of the agreement quoted above, s.22.7.1 (permits under laws of general application) and s.22.7.5 (EA as a law of general application). But note how much work the majority needs to make those two provisions accomplish. The power to permit projects under laws of general application apparently incorporates an EIA law of general application notwithstanding the fact that the EIA rules are developed in great detail in the Agreement itself. And a provision to the effect that Article 22 does not impose an obligation on the federal government to conduct an EIA apparently confers a power to conduct an EIA under laws of general application without reference to the participatory requirements of the JBNQA.

The status of the Agreement and the interpretive approach to modern land claims agreements

The majority has comparatively little to say about either the status of the Agreement or the interpretive approach that a court should take in approaching a modern land claims agreement. As to the status of the Agreement, the majority noted that the JBNQA is a Treaty (at para. 1) within the meaning of s.35(1) of the *Constitution Act, 1982* (at para. 15) and "an epic achievement in the ongoing efforts to reconcile the rights and interests of Aboriginal peoples and those of non-Aboriginal peoples" (at para. 14). But it is also a contract "meticulously negotiated by well resourced parties" (at para. 7). By contrast with the dissent the majority had nothing to say about the status of the Agreement as a statutory instrument carrying the force of law. The status of the Agreement as a contract informed the majority's interpretive approach which is to "pay close attention" to the terms of the Agreement (at para. 7) and "do the parties the courtesy of respecting the rights and obligations in the terms they agreed to" (at para. 12).

The dissent emphasised that the JBNQA was both an aboriginal rights agreement (a treaty) and an intergovernmental agreement (at paras. 82, 84 & 138); it had the force of law because of its statutory adoption but it was also a treaty within the meaning of s.35(3) of the *Constitution Act 1982*, and as a result "it follows that special principles of interpretation will apply to it" (at para. 107). But what were the applicable principles? The dissent canvassed the interpretive rules that the courts had developed with respect to historical treaties (referring in particular to Justice McLachlin's judgement in *R. v Marshall*, [1999] 3 SCR 456). However, the dissent concluded that not all ambiguities should necessarily be resolved in favour of the aboriginal signatories. This was because (at para 115) the conditions of "unequal bargaining skill and vulnerability of the Aboriginal parties in particular — do not necessarily exist in the context of a modern agreement" and because (at para. 117) "an interpretive approach under which all ambiguities are automatically resolved in favour of the Aboriginal parties, as such an approach might encourage the parties to use vague language in the hope that later litigation would produce a result more

favourable than what could be obtained through negotiation ….". This discussion led the dissent to articulate the following approach:

> When interpreting a modern treaty, a court should strive for an interpretation that is reasonable, yet consistent with the parties' intentions and the overall context, including the legal context, of the negotiations. Any interpretation should presume good faith on the part of all parties and be consistent with the honour of the Crown. Any ambiguity that arises should be resolved with these factors in mind. (at para. 118).

In sum, the majority seems to have convinced itself that this was a relatively straightforward interpretive problem. All that it had to do was look at the terms of the contract and give effect to them. I think that there at least two difficulties with that approach. First, any interpretive issue that requires the interpreter to place a text within multiple normative orders is almost by definition going to be complex and not simple. I think that there is an analogy here with interpretation in the context of international law. Article 31(3)(c) of the Vienna Convention on the Law of Treaties instructs the interpreter to take into account not only its object and purpose but also "any relevant rules of international law [e.g. other treaties, custom, general principles] applicable in the relations between the parties". Second, it is impossible to draft a complete contract. There will always be matters that the parties did not anticipate and when these issues arise the question of how they are to be accommodated (or not) within the agreed framework will always raise difficult questions.

For the dissent the question is perhaps, did the dissent's views on treaty interpretation and the status of the agreement contribute materially to the conclusion that the dissent reach. I think that this may be true in two respects. First, the dissents comments on the statutory and constitutional status of the Agreement perhaps made it easier to reach the conclusion that the Agreement really had re-distributed constitutional power and had therefore limited the autonomy of the federal minister under the federal fisheries power. Second, the broader contextual approach of the dissent might have led to think that the problem had to be resolved within the context of the treaty relationship rather than outside that relationship.

Was this an aboriginal rights case or a federalism case?

I acknowledge that whether this case is an aboriginal rights case or a federalism case hardly admits "either\or" answer. After all, the leading aboriginal title case in Canada until *Calder* [1973] SCR 313 began life as a federalism case: *St. Catherine's Milling & Lumber Co. v. R* (1888), 14 App. Cas. 46 (PC). That said, while this case was initiated by the Cree, the Attorney General of Quebec seems to have hijacked the case to further a provincial (not aboriginal) autonomy argument. Or at least this is the way in which Justice Binnie portrays the matter in the opening paragraph of his judgement: "The question raised by this appeal is whether a mining project within the territory covered by the [JBNQA] that [results in a HADD] is nevertheless exempted by virtue of the Treaty from any independent scrutiny by the federal Fisheries Minister before issuing the federal fisheries permit." Framed in such exceptionalist terms (and see also at para 3) the case is portrayed in part as a struggle between (federal) laws of general application and the anathema of "provincial paramountcy" (at para. 13).

This framing of the issue by the majority serves to emphasise that the land claims agreement did not change the fundamental ordering of Canadian federalism. Despite the references in the

dissent (at paras. 61 & 83) to the JBNQA as implementing a form of self-government, the JBNQA did not create or recognize a third order of government. How do we know this? Because the fundamental power to make laws (and new laws like a new *CEAA*) remained in Ottawa and Quebec City. The Agreement may afford the James Bay Cree and Inuit the right to participate in environmental and resource management within the territory of the Agreement but the norms that are to be applied in that co-management setting are the norms of the Agreement and the norms of settler society (the laws of general application) and not indigenous norms (the norms of self-government). The judgement of the majority confirms this and in doing so it also confirms how narrow and confined is the space left to the Agreement if the Court is able (as it was here) to create an area that is within the Agreement and an area that is without and to paint with a broad brush the scope of the power of the two governments to make laws outside the Agreement.

The role of the duty to consult in a modern land claims agreement

As indicated in the introduction to this note, this case is in part a case about the tension between stability and change and as suggested in the last section the tension between Treaty norms and laws of general application. But it is also a case that touches on the interrelationship between treaty norms and other constitutional norms, in this case the duty to consult and accommodate. This is also the subject matter of another case (*David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, et al. v. Little Salmon/Carmacks First Nation, et al*. Docket 32850) which was argued before the Court in the Fall of 2009 and on which we await judgement. Only the majority of the Court dealt with the issue in *Moses*; but Justice Binnie had to deal with it precisely because of his conclusion that the permitting process under the *Fisheries Act* (and the *CEAA* process that was ancillary to the permitting decision under s.35(2)) fell outside the terms of the Treaty. Did that mean that the federal government had an unfettered discretion in the way in which it applied the *CEAA* to this project? Could it, for example, ignore the implications of the participation rights of the Cree under the JBNQA? The majority's response is "no" because the federal power is conditioned by the duty to consult (see para 45 quoted above referring to *Haida Nation* etc , but note also the circularity of the reasoning – the *CEAA* is extra-Treaty but the Crown's duty to consult is expressed to be "on matters affecting their James Bay Treaty rights"). What might that mean in this case? The Court does not offer much guidance but it does allude to the provisions in the *CEAA* that contemplate joint and substitutionary panel reviews where a project engages multiple jurisdictions including the jurisdictions of land claims agreements (at para 48*):*

> Common sense as well as legal requirements suggest that the *CEAA* assessment will be structured to accommodate the special context of a project proposal in the James Bay Treaty territory, including the participation of the Cree. Reference has already been made to the possibility of a joint or substituted panel under ss. 40 to 45 of the *CEAA*.

In many respects I think that this is the most interesting and most important part of the decision because it serves to emphasise the continuing constitutional relationship between the federal and provincial governments and the beneficiaries of modern land claim agreements. A land claims agreement such as the JBNQA does not exhaust that relationship; it is simply one important aspect of that relationship.