Aug 12, 2016

Note to Canada on the Northern Gateway Project: This is NOT What Deep Consultation With Aboriginal People Looks Like

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Case Commented On: *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII)

On June 20, 2016, the majority of the Federal Court of Appeal (FCA) quashed Order in Council P.C. 2014-809 requiring the National Energy Board (NEB) to issue Certificates of Public Convenience and Necessity to Northern Gateway on the basis that Canada had not fulfilled the duty to consult it owed to Aboriginal peoples affected by the Project. Concluding that "Canada offered only a brief, hurried, and inadequate opportunity in Phase IV – a critical part of Canada's consultation framework – to exchange and discuss information and dialogue" (at para 325), the Court identifies several ways in which the consultation process fell "well short of the mark". Marking a crucial step in the "Northern Gateway legal saga" (for a list of previous ABlawg posts, going as far back as 2012, see here), the FCA has remitted the matter to the Governor in Council for redetermination. While entitled to make a fresh decision, the FCA has made clear that should it decide to do so the Governor in Council may only issue Certificates for the Project after Canada has fulfilled its duty to consult with Aboriginal peoples (at para 335).

Needless to say, the substantive guidance provided by the majority's decision will be important whenever the duty to consult is engaged going forward. In the immediate future, attention will be focused on what this means for the Northern Gateway Project and the Trans Mountain Expansion Project consultations currently underway in accordance with the Federal Government's interim measures.

The Majority of the FCA's Duty to Consult Analysis

Throughout the Northern Gateway approval process, Canada acknowledged its duty to engage in deep consultation with the First Nations potentially affected by the Project "owing to the significance of the rights and interests affected" (at para 187). The First Nations agreed that deep consultation was owed but disagreed that the consultation process undertaken was sufficient to meet this duty, pointing to a number of deficiencies in the process (at para 191). This blog post will highlight, in turn, the majority's analysis relating to: (1) Canada's failure to share its assessment of the strength of the First Nations' claims to Aboriginal rights and title; and (2) Canada's execution of Phase IV of the consultation process.

Canada's Failure to Share Its Strength of Claim Assessments of First Nations Claims to Aboriginal Title and Rights

While concluding that Canada was not obliged to share with affected First Nations "its *legal* assessment" of the strength of their claims, the majority of the FCA held that Canada must disclose information on its strength of claim assessment and discuss that assessment with the affected First Nations. Why? As we have known since *Haida Nation*, the extent and content of

the duty to consult lies on a spectrum (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII)at para 39; see also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII) at para 36). When a claim is weak or the potential infringement is minor, the content of the duty to consult lies at the low end of the consultation spectrum. However, "[w]hen a strong *prima facie* case for a claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum" (*Gitxaala Nation* at para 174).

While Canada said it accepted an obligation to engage in deep consultation, its failure to share these assessments meant that no dialogue could take place as to what that meant – what subjects were on the table, how deep did, and must, the consultation or accommodation go? As the Gitxaala argued – and the majority accepted – Canada's failure to disclose information relating to strength of claim assessments wholly undermined the consultation process (at para 219) and, as discussed below, exacerbated the failure in the Phase IV consultations.

Failures in Execution of Phase IV of the Consultation Framework

The consultation framework established by Canada for the Northern Gateway Project provided for five phases of consultation throughout the regulatory process. Phases I – III allowed for consultation on the Joint Review Panel (JRP) agreement, the provision of information in the pre-hearing stage and participation in the JRP hearings. Phase IV provided for additional, direct consultations between Canada and Aboriginal groups *after* the JRP Report and *before* the Governor in Council considered the project, with Phase V contemplating further consultation during the regulatory and permitting processes after project approval. The court was satisfied that "[o]verall, the parties had ample opportunity to participate in the Joint Review Panel process and generally availed themselves of it" (at para 48). However, it was Phase IV of the consultation process – representing as it did Canada's first and last opportunity to discharge its obligation to engage in direct consultation and dialogue with Aboriginal groups on matters of substantive concern related to the Project – on which the majority focused its attention. While further consultation in the regulatory and permitting processes following project approval was contemplated, because the Governor in Council's decision is a "high-level strategic decision that sets into motion risks to the applicant/appellant First Nations' Aboriginal rights" (at para 237), the majority held that the duty to consult had to be discharged before the Governor in Council's decision approving the Project.

While careful not to hold Canada "to anything approaching a standard of perfection" (at para 185), the majority concluded that the Phase IV consultations were "unacceptably flawed" and "failed to maintain the honour of the Crown" (at para 230). The flaws were many.

The Phase IV consultations were rushed. Affected First Nations were given only 45 days to advise Canada in writing of their concerns and thereafter only 45 days were allocated to meet with all affected Aboriginal groups (at para 245). Requests to extend the time-lines for consultation (which were designed to meet the decision-making timeframe established by the *National Energy Board Act*, RSC 1985 c N-7), were ignored (at paras 247-249). No evidence was provided that Canada gave any thought to asking the Governor in Council to extend the deadline, despite the fact that the "importance and constitutional significance" of the duty to consult would have provided "ample reason" to do so (at para 251).

The information gathered during this phase of the consultations and put before the Governor in Council did not accurately portray the concerns First Nations had expressed. And not only was

"Canada…less than willing to hear the First Nations on this and to consider and, if necessary, correct the information" (at para 255), it also did not explain what effect, if any, the errors had on the Governor in Council's decision.

The lack of meaningful dialogue during the Phase IV consultations was also of significant concern to the majority of the FCA (at para 263). First Nations were repeatedly told during the Phase IV consultation process that Canada's representatives were tasked with gathering information, were not authorized to make decisions and were required to complete the Crown Consultation Report by April 16, 2014 as the Governor in Council needed to make a decision by June 17, 2014 to meet timelines in the *National Energy Board Act* (at para 264). Not surprisingly, this meant that concerns raised by First Nations – which the majority of the FCA considered central to their legitimate interests – were left both unconsidered and undiscussed (at para 265). In short, the majority was persuaded that Canada had failed in its Phase IV consultations to engage "in a real and sustained effort to pursue meaningful two-way dialogue" or "grapple with the concerns expressed in good faith by all of the applicant/appellant First Nations" (at para 279). And "generic" and in some cases error-ridden letters sent to affected First Nations "summarizing at a high level of generality the nature of some of the concerns expressed" (at para 281) did little to further Canada's assertion that it had fulfilled its obligation to enter into meaningful dialogue.

These failures were exacerbated by Canada's unwillingness to disclose its strength of claims assessments – a matter fundamental to identifying the relevant impacts the Project might have on the affected First Nation and communicating those findings to the First Nations. The majority held that it was not consistent with the duty to consult for Canada to simply assert that the Project's impact would be properly mitigated, without first discussing the nature and extent of the rights impacted. And in cases where a strong *prima facie* claim exists and the potential for significant infringement of those rights exists, deep consultation also requires written explanation demonstrating how the Aboriginal group's concerns were considered and explaining the impacts of those concerns on the resulting decision. As the majority emphasizes, this becomes particularly important when the Crown is balancing multiple interests: "[i]n the absence of this safeguard, other issues may overshadow or displace the issue of the impacts on Aboriginal rights" (at para 315).

Finally, "and most importantly, on the subject of reasons" the majority noted that the Order in Council included only a single mention of the duty to consult (at para 320). The Governor in Council did not "express itself" as to whether Canada had fulfilled its duty to consult, raising the "serious question" (at para 321) of whether it actually concluded that it was satisfied that impacts of the Project – some of which were identified in the Report of the Joint Review Panel, and some not – "were left undisclosed, undiscussed and unconsidered" (at para 325).

Overall, therefore, the majority of the FCA concluded that "during the Phase IV process, the parties were entitled to much more in the nature of information, consideration and explanation from Canada regarding the specific and legitimate concerns they put to Canada" (at para 287). Moreover, the Phase IV consultations "did not sufficiently allow for dialogue, nor did they fill the gaps" (at para 327).

So What Does Discharging the Duty to Consult Look Like Going Forward?

Of course, this decision does not mark the end of the administrative approval process for Northern Gateway. Rather, the FCA has directed the matter back to the Governor in Council for

redetermination – with all the same powers as immediately before the first Order in Council was issued. The majority of the FCA is clear, however, that Canada must first fulfill its duty to consult with Aboriginal peoples before the Governor in Council could order the issue of Certificates for the Project. This would mean, at a minimum, that the Phase IV consultation must be re-done (at para 335).

It is worth noting that the key flaws in the Phase IV consultation identified by the majority – a lack of information, consideration and explanation – arose largely in the context of the environmental impacts and risks associated with the Project. For example, some of the concerns that the consultation process was rushed centered on the need for more time to conduct scientific studies, and particularly adequate spill modeling (at paras 249-250). The errors and omissions in letters sent to First Nations and put before the Governor in Council included the failure to identify concerns relating to the lack of baseline work and spill modeling in the open water area (at para 258) and the failure to respond to concerns regarding the risk of oil spills in their territory (at para 261). Failures in the Phase IV consultations to engage, dialogue and grapple with the concerns expressed in good faith by the First Nations and to respond in a meaningful way were exemplified by reference to environmental concerns and particularly by "missing information" in the JPR Report relating to spill modeling and assessment. It was Canada's response (or lack thereof) to the Kitasoo Nation's submissions that the Project's impacts could not be assessed without information regarding "spill modeling and assessment, the behavior (or fate) of bitumen in water, a baseline marine inventory and what the spill recovery would look like" that demonstrated to the majority "just how short of the mark the Phase IV consultation was" (at paras 266 and 267). This point was also made by reference to Canada's failure to adequately respond to the Heiltsuk Nation's Phase IV submissions that additional information was needed regarding the risk of an oil spill on their Aboriginal right to fish on a commercial basis (at para 268-270); to the Haisla Nation's evidence that errors in the Report of the JRP relating to impacts on hundreds of culturally modified trees at the proposed terminal site (at para 273); and to the Gitxaala concerns relating to oil spills (at para 277). The majority also viewed the generic letters sent by Canada, including the generic response to concerns raised by First Nations about the consequences of an oil spill (at para 282), the general references to the "rigorous science-based review" of the JRP (at para 284) and the failure to engage with the specific express concerns relating to the insufficiency of evidence to allow informed dialogue about the potential impacts of the Project on Aboriginal and treaty rights (at para 286) as inadequate to discharge the obligation to enter into meaningful dialogue.

Yet, these concerns were not raised solely in the context of Canada's failure to discharge its duty to consult. The FCA was also asked to consider several applications by First Nations and environmental NGOs to judicially review the Report of the JRP for the Northern Gateway Project on the basis that the environmental impacts and risks associated with the Project were not properly considered (see West Coast Environmental Law's summary of legal challenges here). However, as my colleague Martin Olszynski discusses here, the FCA dismissed these challenges. It did so on the basis that when the NEB is the "responsible authority" under the new *CEAA, 2012,* as is the case for pipelines proposed after that Act was brought into force, the legislative scheme assigns environmental assessment a different role – "a much attenuated role" – from that which it plays under other federal decision-making regimes (at para 123). Based on its analysis of the legislative scheme, which my colleague argues is not actually applicable to Northern Gateway, the FCA concluded that it is for the Governor in Council alone to determine "whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a 'report' within the meaning of the legislation" (see para 124).

Nevertheless, to successfully discharge the duty to consult – especially at the deep end of the spectrum – Canada must fill the information gaps and then allow for dialogue and consideration of the potential environmental impacts and risks associated with the Project on Aboriginal title and rights. Thus, while the majority of the FCA offers the opinion that this process "if well-organized and well-executed, need not take long" (at para 335), I would suggest that the basis for this assertion is not at all clear. Presumably, time must be allowed to conduct scientific studies, including adequate spill modeling and baseline work. Existing errors and/or gaps in the evidence referenced in the JRP Report, at least as it relates to First Nations, must also be addressed. Where knowledge gaps otherwise cannot be filled, Canada must engage with the specific concerns relating to the insufficiency of information and explain to affected First Nations how the Project's environmental impacts on their rights can be assessed. In other words, the actual and potential environmental impacts, at least as relevant to the affected First Nations, must be fully disclosed, discussed and considered before Canada can be said to have properly discharged its duty to consult.

Is Fulfilling the Duty to Consult Enough?

Before commencing its duty to consult analysis, the majority provides a brief discussion of the existing jurisprudence (paras 170-185). Drawing on the *Haida Nation* decision, the FCA states that "[t]he consultation process does not dictate a particular substantive outcome" and "does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim (at para 179). However, the discussion does not further reference the principles of consent or the stringent justification test established by the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (CanLII) (for my earlier ABlawg post on these principles see here). This is perhaps not surprising given that the First Nations who were parties to these proceedings had not finally proven claims to their territory and the FCA was therefore focused on discharging the duty to consult. However, when strong claims to Aboriginal title exist over lands that stand to be affected, I would argue that government decision makers need to pay attention to the *Tsilhqot'in* principles; merely satisfying the duty to consult it not enough. Rather, before approving a long-term project such as Northern Gateway, the government should seek the consent of those First Nations who assert strong title claims or at least satisfy itself that the infringement can be justified. Why? Because as the Supreme Court warned in *Tsilhqot'in* , "[i]f the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing" (at para 92). To begin a project without the consent of Aboriginal title holders, or ensuring that the incursion is not unjustifiably infringing, therefore risks its long-term viability.

This means that in addition to properly discharging the duty to consult before Northern Gateway, or any other pipeline project for that matter, is approved, the government should seek the consent of the First Nations who assert strong claims to Aboriginal title. Absent such consent, the government should ensure that the evidence is available to demonstrate: that the incursion will not substantially deprive future generations of Aboriginal title-holders of the benefit of the land (*Tsilhqot'in*, at para 86); that the project is necessary to achieve the government's goal and goes no further than is necessary to achieve it; and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (*Tsilhqot'in,* at para 87).