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Duty to Consult in the Bigstone Pipeline Case: A Northern Gateway Sequel and TMX Prequel?

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Case commented on: *Bigstone Cree Nation v. Nova Gas Transmission Ltd*., 2018 FCA 89

While all eyes are on the Trans Mountain Expansion (TMX) pipeline saga, especially the political spats and constitutional law dimensions (clear as much of that law may be), the Federal Court of Appeal (FCA) released a decision in early May that is directly on-point with respect to legal challenges brought by Indigenous groups against the TMX project approval (consolidated by the FCA into one case). *Bigstone Cree Nation v. Nova Gas Transmission Ltd.* engages the same legislative scheme as the court challenges against the Northern Gateway Project (NGP), which was decided by the Court in *Gitxaala Nation v. Canada*, 2016 FCA 187, and at issue in TMX – i.e. the post-2012 integrated *NEB Act* - *CEAA 2012* review and approval regime. This post has two parts. In the first part, I focus on a few notable points of law that the FCA reiterated in *Bigstone*. In the second part, I move on to discuss how this appears to be an important duty to consult trilogy in the making, with this latest case providing hints toward the FCA upholding the TMX Order in Council (OIC) and Certificate of Public Convenience and Necessity (CPCN or certificate). The FCA's TMX decision is due out soon.

Context

Bigstone Cree Nation is a duty to consult case arising out of Treaty 8 territory in north-central Alberta. The Bigstone Cree Nation continues to rely on its traditional territory to exercise activities, practices, customs and traditions that include hunting, fishing and harvesting in an area of bountiful renewable resources. The area is also rich in natural gas. Nova Gas Transmission Ltd's (NGTL) $1.29 billion project would expand the existing federally regulated pipeline system by building, among other things, 230 kilometers of new pipeline in five separate sections, one of which is located directly within Bigstone Territory. As the FCA notes, the project as proposed "runs roughshod through three identified ranges of threatened boreal woodland caribou" [at para 5, citing FCA Order reasons issued in earlier proceedings, 2017 FCA 54]. The project required a CPCN under the *National Energy Board Act*, RSC, 1985 c N-7 (*NEB Act*) and is a "designated project" under the *Canadian Environmental Assessment Act 2012*, SC 2012, c 19 s 52 (*CEAA 2012)*, meaning that the NEB was required to conduct an environmental assessment under *CEAA 2012* in addition to fulfilling its duties under the *NEB Act*. All of this is similar to the NGP and TMX in terms of the legislative scheme engaged. It is also similar in that the project would have "moderate to high" impacts on proven Aboriginal rights, which therefore place Crown consultation obligations at the "high end of the spectrum" (*Bigstone* at para 35). To briefly summarize the process in *Bigstone*, the NEB led the review, which included Crown consultations up to the conclusion of the NEB's recommendation report. The NEB ultimately recommended that the Governor in Council (GIC) issue the CPCN and that it find that the project

would not result in significant adverse effects as long as the 37 recommendations were applied (some conditions were devoted specifically to issues raised by Indigenous groups). After additional consultation following the NEB review and recommendation (discussed below), including some not-so-smooth interactions between Bigstone Cree Nation and the federal government, on October 28, 2016 the GIC issued the OIC (with reasons) directing the NEB to issue the certificate. On November 4, 2016 the NEB issued the CPCN. The OIC included a preamble explaining that the GIC had considered the Indigenous concerns and interests and was satisfied that there had been appropriate accommodation and that the consultation process was consistent with honour of the Crown.

Bigstone Cree Nation disagreed. They brought an application for judicial review, challenging the OIC and certificate and arguing that Canada breached its consultation and accommodation obligations, that the Crown improperly delegated its duty to assess the project's effects on the environment and Bigstone Cree Nation's rights, that the OIC did not comply with the *NEB Act*, and that the decision was otherwise unreasonable for failing to provide sufficient reasons. They sought an order quashing the OIC and certificate, or at least an order requiring the Crown to enter into further consultations (the latter being the ultimate outcome of the NGP court challenges).

Ultimately, the FCA dismissed the Bigstone Cree Nation application with costs (at para 3).

Notable points

Reasons, Veto, (Non-)Perfection and Funding

At a general duty to consult level, *Bigstone* is an instructive FCA case worth noting for its succinct reiteration of several key points of law. Citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) and *Gitxaala*, the Court acknowledged that consultation at the high end of the spectrum will likely require the provision of written reasons showing Indigenous concerns were taken into account, that the duty to consult is not unlimited in scope and does not confer a veto power, and that the Crown is not to be held to a standard of perfection in conducting consultation activities (only a reasonable one) (*Bigstone* at paras 48 and 49).

The FCA also reiterated its view that the Crown has no obligation to provide funding, stating that funding is at most "one factor to determine if consultations were meaningful" (at para 45). The Court quite clearly indicated that Bigstone didn't sufficiently substantiate its arguments on this point, finding that Bigstone had "not even attempted to show how the purported lack of funding impacted on its participation…" (at para 45). This relates to the issue of diligence, further discussed in the next section and below.

It also bears mentioning that the FCA succinctly embraced what appears to be an emerging consensus in the jurisprudence, especially after *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 (CanLII), that it is reasonable for the Crown to rely on an existing regulatory process like that of the NEB for undertaking consultation, and that Indigenous groups have a

responsibility to make use of such processes if they wish to voice their concerns (*Bigstone* at para 50). The latter point is also a consistent theme throughout the decision, and observable in the fact that the Court awarded costs against Bigstone Cree Nation.

Diligence

In assessing sufficiency and adequacy of consultation and accommodation, the FCA strongly emphasized its view that "Bigstone failed to act diligently" (at para 39). In a relatively harsh characterization of the Bigstone Cree Nation's approach to consultations, DeMontigny J.A. states, "[t]his is clearly evidence that Bigstone was not seriously engaged in the process" (at para 41). This view was central to the finding that the Crown was justified in not agreeing to a further time extension during the final phase (at para 43). In this way, *Bigstone* offers the latest judicial commentary (using words of the strongest kind) underscoring the view that meaningful engagement and consultation is a two-way street and a shared obligation. These are important views from the FCA for proponents, the Crown and Indigenous groups alike. (I'll save for another day my thoughts on why courts ought to be more context-sensitive in determining whether Indigenous groups deserve more latitude in this regard.)

Conditions into the Future

Some of the project approval conditions in *Bigstone* were prospective in nature, requiring future studies, follow-up programs and the like. Bigstone Cree Nation took issue with this, arguing that it was unlawful delegation of the duty to consult. The FCA rejected that argument, finding that the NEB has an "ongoing regulatory role" and that it is a "dynamic process that is not frozen in time" (at para 56, citing *Alberta Wilderness Assn v. Express Pipelines Ltd.*, 1996 CanLII 12470 (FCA)). Citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), the Court reiterated that the duty to consult and accommodate does not come to an end once the approval of a project has been given (*Bigstone* at para 59). As discussed below, this is relevant in the TMX context, where some conditions are also of a prospective nature.

Role of MPMO

Bigstone is also notable for the detail it provides about the very central role that the Major Projects Management Office (MPMO) plays in Crown consultation for federally regulated projects. This is a point that I think many parties involved in these cases don't understand all that well. Neither the federal government nor the courts have done a good job of explaining the role of MPMO in Crown consultation, despite the reality that the office acts like a central agency (though it's actually located within Natural Resources Canada, which is a line department) and is typically the primary face and brains of "the Crown" in cases of fulfilling Crown obligations in relation to major resource projects.

In short, the MPMO's role is to coordinate the Crown's overall approach to consultation across federal departments (*Bigstone* at para 8). The *Bigstone* decision refers to different activities of MPMO throughout the decision (e.g. paras 9, 17, 28, 37, 43 and 51). As a whole, the *Bigstone* decision paints a helpful picture of how MPMO operates in the context of a major pipeline

review and approval process, i.e. by working in parallel with the NEB (or Joint Review Panel, as the case may be) to coordinate and supplement consultation en route to the ultimate decision by federal cabinet.

From my perspective, it is curious that in recent years it is the MPMO that writes to Indigenous groups to say the government intends to rely on the NEB (or Joint Review Panel) process to fulfill the duty to consult, but then doesn't provide much explanation as to why it is MPMO writing in the first place, let alone how or why the MPMO is a proper representative of the Crown that is respectfully engaging on a "nation to nation basis". (As an aside in relation to Bill C-69, it is also interesting to note that the new *Impact Assessment Act* (IAA) identifies the Impact Assessment Agency as the coordinating entity for consultations, which introduces some uncertainty as to the future of the MPMO; see s 155(b) of IAA in Bill C-69).

Beyond these notable points, I think *Bigstone* offers hints as to which way the FCA will rule in the TMX case.

Trilogy in the Making?

Several key dimensions of *Bigstone* indicate there is a duty to consult trilogy in development here and the decision seems to offer a few hints as to which way the FCA will decide in the TMX case. Note that I do think there are good reasons why it would be better if the Court goes in the other direction of these hints, but I'll refrain from expressing any such views until after the decision is handed down.

Bigstone as Gitxaala Sequel

Gitxaala was the first case to consider the post-2012 legislative scheme that integrates elements from the *NEB Act* and *CEAA 2012* and culminates in final decision-making by the Governor in Council. And *Bigstone* is the second. And TMX will be the third. So, there's your *CEAA 2012* – *NEB Act* – Duty to Consult trilogy set-up. But there's more – *Bigstone* represents a solidifying of the FCA's views on the dynamic between legislative scheme and the duty to consult, and it also communicates a view from that Court that the Crown is on the right track.

The *Bigstone* case is basically a straight-up endorsement of *Gitxaala* on two levels. First, the federal government has clearly taken the Court's direction in *Gitxaala* on board. The government basically conducted consultations using the playbook written in *Gitxaala* to a tee – it relied on the NEB process to fulfill at least part of Crown obligations, notified Indigenous groups of such early on, provided funding, conducted two-way engagement with multiple opportunities to provide and seek information, and, most importantly as a post-*Gitxaala* lesson learned, conducted four months of additional consultation after the NEB had issued its recommendation report (four months being the exact amount of time the Court suggested was needed to make things 'right' in the *Gitxaala* situation; see *Gitxaala* at para 329).

Second, the Court in *Bigstone* took the *Gitxaala* Court's interpretation of the *NEB Act* - *CEAA 2012* regime at face value and quickly moved on (*Bigstone* at para 23). This is an implicit but important endorsement of the previous FCA interpretation, making it relatively clear that the

FCA is not interested in applying the legislative regime any differently than was done in *Gitxaala*, notwithstanding the fact that it appears clear now that those provisions were applied in error in that case (see my colleague Martin Olszynski's post on *Gitxaala* and his last comment to his post). For example, *Bigstone* further locks in the view that there is only one "decision" in these contexts that can be challenged: that of the Governor-in-Council (*Bigstone* at para 30).

Finally, and this is basically a mix of the above two points, on the consultation issue in *Gitxaala* the only shortcoming of consequence (leading to quashing of the OIC and certificate) was the inadequate consultation in phase four following the NEB recommendation report when the Governor-in-Council was considering the matter. The only thing the Crown did substantively differently in *Bigstone* is the additional consultation in that last phase. The overarching message from the FCA: *Gitxaala* is good law in relation to the duty to consult and accommodate; if the Crown follows it then an OIC and certificate will stand on this aspect. This brings us to TMX.

Bigstone as a TMX Prequel

The legal question on the consultation and accommodation aspect of TMX is whether the Crown fulfilled its obligations in a manner consistent with the honour of the Crown. This is substantively the same as *Bigstone* and *Gitxaala*. In light of *Bigstone*, the pragmatic question seems to simply be whether the federal government followed the *Gitxaala* playbook closely enough. They did so in *Bigstone* and the OIC and certificate stood up. I hesitate to shift into predictive mode (which comes with the risk of an eventual meal of crow), but it's plain to see substantial similarities between Crown consultation in *Bigstone* and TMX that may lead the FCA to conclude that the federal government did indeed do the "right" plays in TMX.

Following the federal election in 2015 and the May 2016 final TMX recommendation report (and also following the *Gitxaala* decision, released on 23 June 2016), the federal government created additional time and space to engage in further and deeper consultation during phase four. For example, the federal government extended the consultation time frame, allocated additional funds for Indigenous consultation (in Budget 2016), undertook additional consultations with First Nations whose interests would be affected by the pipeline, and eventually committed to setting up an Indigenous Advisory and Monitoring Committee (see Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project, 2016 Ministerial Panel Report for TMX & CBC report on Indigenous-led oversight committee for TMX).

The way the *NEB Act – CEAA 2012* scheme is set up, and the way the FCA has been applying it, allows for the Crown to use phase four (i.e. post NEB recommendation report and pre-GIC decision) to fill in any gaps or shortcomings in consultations that took place during the regulatory review. The Court has taken the view that less in the NEB review process may be okay if there's more in phase four, almost like a safety net. *Bigstone* and *Gitxaala* make clear how important phase four is. The federal government seems to have gotten that message and ramped up efforts in TMX phase four to a point that, if that's where the Court is focusing – and this does indeed seem to be the focus given *Bigstone* – then we may well see the Crown get a pass on this front in the TMX context.

The Court's treatment of the prospective project approval conditions and related arguments about delegation of the duty to consult also subtly point toward an FCA decision upholding the TMX OIC and certificate. Conditions of this type are attached to the TMX certificate and were a live issue in the case and it is hard to see the Court deviating significantly from its views on such in *Bigstone*.

Having said all this, there are certainly features that fundamentally distinguish the TMX case from *Bigstone*. Most notably, there are many different Indigenous groups involved in the TMX litigation, meaning there were far more contexts and instances where the Crown consultation may have been insufficient such that the Court can find shortcomings. Another key distinction is the marine and coastal risks in TMX. While TMX and Bigstone share the fact that much of the projects are in existing right of ways (which has been used to suggest TMX will not have significant impacts), TMX brings the significant additional dimension of increased shipping and increased risks of spills. Notwithstanding the consultation being "deep" and at the high end of the spectrum in *Bigstone*, one could wonder if the potential infringements in TMX somehow required even more than the additional steps taken by the Crown in phase four (or earlier), given these riskier marine dimensions that are not completely understood. However, given the deference the FCA has been showing in assessing adequacy of consultation and accommodation as a question of mixed fact and law (reviewable on a standard of reasonableness; see *Bigstone* at para 34), one can still see a path to the FCA upholding of the TMX OIC and certificate.

In any event, through its recent announcement to buy the TMX project, Ottawa has clearly indicated which direction it thinks the TMX decision will go. We'll soon see what the FCA has to say, and even then, it's quite likely that an appeal will ensue, prolonging uncertainties while the case goes to the Supreme Court of Canada.

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