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Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current state of the Duty to Consult.

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Case Commented On: *Tsleil-Waututh Nation v. Canada* (Attorney General) 2018 FCA 153

In a highly anticipated decision on the proposed Trans Mountain Expansion Project ("TMX"), the Federal Court of Appeal ("FCA") quashed federal approval of the project. The Court did so on two grounds.

First, it held that, while the National Energy Board's process and findings were largely acceptable, the Board made a "critical error" in not including "Project-related tanker traffic" as a formal part of its environmental assessment under *Canadian Environmental Assessment Act, 2012* SC 2012, c 19, s 52 (*CEAA, 2012*). As a result, "the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest" (*Tsleil-Waututh,* at para 5). For more on this aspect of the decision, see Martin Olszynski's post.

Second, the FCA held that the federal government failed to discharge its constitutional obligation to consult and accommodate Indigenous peoples. At 'Phase III' of the consultation process, the FCA held, the government failed to "engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns" (*Tsleil-Waututh,* at para 6).

This post focuses on the consultation aspect of the judgment. The decision is helpful insofar as it illustrates important limitations of the duty to consult doctrine. I address two of those limitations, which I argue are closely linked: 1) the lack of a legal obligation to obtain Indigenous consent for development projects and 2) the ongoing uncertainty created by the doctrine of the duty to consult.

Before getting to these limitations, I note that this case also demonstrates the duty to consult at its most robust. I make a few brief remarks on these positive aspects of the decision, both to provide some context and to bring my more critical remarks below into sharper focus.

The consultation that the FCA took issue with occurred during execution of "Phase III" of the consultation plan. This Phase "was to focus on outstanding concerns about the Project-related impacts upon potential or established Indigenous or treaty rights and on any incremental accommodation measures that Canada should address" (*Tsleil-Waututh,* at para 530). That is, if Indigenous concerns were to be accommodated beyond what was recommended in the NEB's final report, this phase of consultation would provide the guidance for those accommodations.

It is here that the FCA found that "the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court" (*Tsleil-Waututh,* at para 557). Phase III took place after the NEB had made a recommendation to the Governor in Council, but before the Governor in Council (i.e. federal Cabinet) had made a decision. The degree to which consultation impacted the final decision can be seen at this stage, as the NEB recommendations can be compared to the final decision of the Governor in Council in light of the issues brought forward by Indigenous parties to the consultation.

The FCA provided four reasons why Phase III consultation was important: 1) it provided an opportunity for consultation on substance, rather than process (*Tsleil-Waututh,* at para 566), 2) the NEB report which preceded Phase III did not "deal with all of the subjects on which consultation was required" (*Tsleil-Waututh,* at para 567), 3) the project's impacts were not assessed on the basis of each Indigenous group, but on impacts in the project area as a whole (*Tsleil-Waututh,* at para 568), and 4) the NEB report itself contained matters of central significance that gave rise to the need for further consultation (*Tsleil-Waututh,* at para 569).

At precisely the stage where Indigenous accommodation was to be a central issue, the Governor in Council hamstrung its decision-making by holding too strictly to the NEB recommendations and declining to impose new conditions on the project on the basis of the erroneous belief that it was prohibited from doing so. In short, the consultation at Phase III was found to be deficient owing primarily to lack of meaningful two-way dialogue. This issue was compounded by two factors: an unwillingness to modify NEB recommendations, and a belief that new conditions could not be imposed on the basis of Indigenous consultations (*Tsleil-Waututh,* at paras 559-560).

The FCA was clear about the importance of dialogue in satisfying the duty to consult:

> Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers (*Tsleil-Waututh,* at para 558).

The court went on, stating that "the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants" and that "as a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation" (*Tsleil-Waututh,* at paras 559 and 564). Consultation cannot be characterized by merely an 'exchange of information,' but requires a dialogue that "should lead to a demonstrably serious consideration of accommodation" (*Tsleil-Waututh,* at para 564).

The FCA's holdings on the adequacy of consultation illustrate a high standard whereby Indigenous input is to be given serious consideration and the shape of accommodation is to be determined through consultation and dialogue. It is not enough, the court held, to listen to

Indigenous concerns. Those concerns must be seen to have been accommodated in the decision-making process (*Tsleil-Waututh,* at paras 575, 598, 627, 760). Further, there seems to have been an avenue opened for Indigenous Law - i.e., the law of Indigenous peoples themselves as opposed to state law about Indigenous peoples - to play an important role in the process. As Benjamin Ralston noted, the FCA suggested that the environmental impact assessments produced by the Tseil-Waututh and Stó:lō could be a source of possible accommodations had the government taken them into account (*Tsleil-Waututh,* at paras 649 - 653, 681-682). These impact assessments are examples of Indigenous law, and allowing them to influence the content of accommodations would be a recognition of the important role Indigenous law has to play. Recognizing Indigenous law also nods to the nation-to-nation nature of the relationships at stake. As Robert Janes argued, the FCA rejected a narrow bureaucratic vision of the duty to consult, emphasizing instead the diplomatic character of Crown-Indigenous relations. Again, this latter vision has animated much of the Supreme Court jurisprudence on the matter, though, as is always the case with any legal doctrine, application has been uneven.

As noted at the outset, however, while in some respects the FCA's decision shows the duty to consult in the best possible light, it also clearly illustrates the limits of the doctrine.

First, the decision makes clear that consultation does not require Indigenous consent. The 'Free, Prior, and Informed Consent' ("FPIC") standard articulated in *United Nations Declaration on the Rights of Indigenous Peoples* is not part of the consultation doctrine and was not applied in this case. This may come as a surprise given some of the many exaggerated stances taken following the decision. Yet, the decision itself is clear:

> As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focused. This means that the dialogue Canada must engage in can also be specific and focused. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples (*Tsleil-Waututh,* at para 772).

That is, if consultation at Phase III were more thorough, the project could move forward in the face of Indigenous opposition. The judicial conception of reconciliation does not require Indigenous consent; it establishes a framework through which the assertion of Crown sovereignty is *reconciled* with the fact of Indigenous prior occupancy by placing procedural limitations on the discretionary authority of the Crown. Thus, 'accommodation' which falls short of achieving consent may nonetheless "further the objective of reconciliation."

Of course, people disagree about whether FPIC is the appropriate standard. There are also legitimate concerns about whether the duty to consult is an appropriate or effective vehicle through which to implement FPIC. Any conflation of the duty to consult and FPIC based on *Tsleil Waututh*, however, fails to grasp how the doctrine works and how it was applied in this case. This case clearly retains the aspects of the doctrine that allow the Crown to act in the face of Indigenous opposition if certain procedural benchmarks are met, as indicated by the Court's concluding remarks that its decision would lead to only a delay in the project.

However a person feels about the appropriateness of this limitation in principle, a clear reading of the case illustrates that it remains in place despite the court holding for the Indigenous parties in this particular instance.

This limitation may not seem problematic to those who are not convinced of the normative argument for moving to an FPIC regime (or, indeed, the legal arguments). As I argue below, though, the second limitation of the duty to consult - the uncertainty the doctrine creates - illustrates that there is also a strong practical argument for acquiring Indigenous consent prior to approving developments in contested areas.

As the reaction to this decision demonstrates, the duty to consult in its current iteration does not produce legal certainty. Though the claim that the courts are 'moving the goal posts' does not withstand scrutiny (this decision did not modify legal doctrine in the least), the fact is that the outcome of *any* litigation is uncertain. While the courts have provided considerable guidance on what they will look for in assessing the adequacy of consultation, and *Tsleil Waututh* provides even more, decisions will always be highly fact-specific. Under the current regime, parties are left guessing as to whether there has been sufficient consultation until they hear from a court.

A project approval process that allows the Crown to act without Indigenous consent will always be subject to subsequent litigation, the outcome of which will be uncertain. This is a time-consuming, costly, and uncertain way to proceed with development projects. The TMX project has been in the works since 2013, only to have approval quashed by the courts at this stage. This is not a failure of the duty to consult *per se*; it is a failure of a project approval process and an approach to managing state-Indigenous relationships that funnels the parties toward litigation, with the attendant costs and uncertainties that portends.

The uncertainty created by this process, and weakness of the duty to consult doctrine, is clear if we consider likely outcomes of this decision. Recalling the government's assertions soon after release of the decision that the pipeline will still be built, we can assume that Canada will either appeal the decision to the Supreme Court or try to remedy the deficiencies through further consultation and a supplemental environmental assessment and then reissue the permits. Consider the latter, just in relation to the consultation issue. Leaving aside possible issues with the *Species at Risk Act,* SC 2002, c 29 that may limit the project once marine shipping is taken into account, consultation itself would involve months of work at considerable cost.

Presuming that at the end of those consultations the Indigenous parties now opposed to the project remain opposed, as they have given every indication they would be, the matter would quickly find itself once again before the courts. That is, the parties would invest considerable time and resources into a process which would ultimately be subject once again to judicial decision-making: the parties effectively have little certainty concerning what the outcome of their negotiations will produce.

If the government were to succeed at this stage, with the court upholding the project approval, that would only be the start of a new round of disputes. Indigenous parties might at that point bring an infringement action or make an Aboriginal title claim, for example. Either option would commence lengthy and expensive court proceedings, the results of which, again, would be highly

uncertain. Injunctions to stop work while those claims were being heard would almost invariably be brought. Work could begin again only to be stopped by injunction pending the resolution of outstanding claims. It is important to recall that the duty to consult is not a final determination of the Indigenous rights at issue. The duty originated as a means to protect asserted rights that are in the process of being negotiated or litigated (though it also applies in proven and existing rights contexts). As the Supreme Court wrote in *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73*,* (*Haida Nation*), "The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests" (at para 27). Even where the Crown has satisfied the duty, final determination on the scope of the asserted rights or any potential infringement of those rights remains outstanding.

If, at the end of this potential subsequent litigation the Crown were to finally receive the court's blessing, Indigenous peoples may well then turn to the international arena, as the Hul'qumi'num Treaty Group did in bringing a case to the Inter-American Commission on Human Rights. They may also turn to direct action. While some may argue that such action undermines the rule of law, the fact of the matter is that many Indigenous peoples consider the legal doctrines of Canada's courts to be illegitimate. Rightly, they understand the source of the court's authority to define their rights as grounded in the imposition of a foreign legal system predicated on the doctrine of discovery and notions of European cultural superiority. No matter how a person feels about these arguments, as a practical matter the possibility that force would be required to build a pipeline should be part of any deliberations.

What, then, is to be done? One of the ironies of this situation is that it is the court's own doctrine that has pushed the parties to rely on endless litigation. The s.35 framework, including the duty to consult, allows the Crown to proceed unilaterally subject to procedural requirements and a proportionality analysis. The Crown has an incentive in negotiations, then, to accommodate Indigenous concerns only to the extent it believes it is legally bound to. Once the Crown believes its actions satisfy the duty to consult and the proportionality test for infringement, it can proceed regardless of outstanding Indigenous concerns. For Indigenous peoples who believe a Crown action infringes their rights or jurisdiction in such circumstances, litigation and direct action are the only options available. As outlined above, however, litigation is a costly and uncertain process for all parties.

The solution, then, if there is one, is negotiation and consent. The negotiation of outstanding claims is, in fact, a constitutional obligation imposed by the honour of the Crown. As the Supreme Court held in *Haida Nation* "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims" (at para 20). Ideally, negotiated agreements could lead to clearly defined jurisdictions where parties would understand at the outset which governments (Federal, Provincial, or Indigenous) would have jurisdiction in relation to given subject matters and territories. As the dispute between BC and Alberta shows, clear jurisdictional lines are by no means a failsafe. Yet, it places the courts in the more familiar position of resolving conflicting jurisdictional claims rather than the more

subjective task of assessing the quality of consultations. Where comprehensive agreements cannot be reached, acquiring Indigenous consent through a contract or limited subject-matter treaty *before* approving projects would prevent the endless cycle of litigation likely to otherwise ensue in such cases. The legal certainty that *everyone* longs for would be best served by moving to a consent model. Some may object by suggesting that this would lead to interminable negotiations. This critique misses two important points. First, it overlooks the very real motivations all parties frequently have to come to an agreement. While Indigenous opposition to projects tends to attract headlines, in many cases Indigenous peoples are willing partners in many kinds of development. Second, the fear of lengthy negotiations must be considered in light of the length of multiple trials, which may begin with duty to consult cases, before moving through infringement cases or assertions of rights and title, the latter accompanied by injunctions along the way. Projects can be delayed for well over a decade through litigation with little certainty as to outcome. In my view more timely and, importantly, legitimate outcomes can be achieved through consent than through *ad hoc* litigation strategies. (It is on this basis that Joshua Nichols and I argue in a forthcoming edition of the Alberta Law Review (Issue 56, Volume 3) for the articulation of a 'Duty to Negotiate' which takes consent as a starting point).

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