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The Federal Crown Fulfilled its Consultation Obligations when the National Energy Board Approved a Seismic Program in Baffin Bay

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Case Commented On: *Hamlet of Clyde River, Nammautaq Hunters and Trappers Organization – Clyde River and Jerry Natanine v TGS-NOPEC Geophysical Company, Petroleum Geoservices Inc, Multi Klient Invest AS and the Attorney General of Canada*, 2015 FCA 179

This case is of interest for two principal reasons: (1) issues of standing (although the Court seems to have ducked the hard issues), and (2) the circumstances in which the Crown can rely on the procedures of a regulatory board to fully and completely discharge the Crown's constitutional obligation to consult and accommodate.

The Facts

TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. (PGS) and Multi Klient Invest AS (MKI) (the proponents) applied to the National Energy Board (NEB, the Board) for a Geophysical Operations Authorization (GOA) under the terms of paragraph 5(1)(*b*) of the *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (COGOA). The proponents proposed to undertake a 2-D offshore seismic survey program in Baffin Bay and the Davis Strait (the Project) over a period of five years. The Board granted the GOA subject to terms and conditions. As part of its decision-making on the GOA, the Board also had responsibilities under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA, 1992) (no longer in force but it was at the relevant time and none of the parties took issue with its applicability (at para 53).) In fulfillment of its responsibilities under that statute the Board conducted an environmental assessment (EA) and reached the conclusion that (at para 6):

> .... with the implementation of [the project operator's] commitments, environmental protection procedures and mitigation measures, and compliance with the Board's regulatory requirements and conditions included in this [Environmental Assessment] Report, the Project is not likely to result in significant adverse environmental effects.

The EA report is available on the Board's website here. The applicants, Hamlet of Clyde River, Nammautaq Hunters and Trappers Organization (HTO) – Clyde River and Jerry Natanine (a resident and the Mayor of Clyde River) brought this application for judicial review. The application belongs before the Federal Court of Appeal because of section 28(1)(f) of the *Federal Courts Act*, RSC 1985, c F-7. For more general discussion of judicial supervision of the NEB see my earlier post here.

Justice Dawson summarized the issues (at para 8) as follows:

> A. Do the applicants have standing to bring this application?

B. Was the Crown's duty to consult with the Inuit in regard to the Project adequately fulfilled?

C. Did the Board err in issuing the GOA? Specifically:

a. Were the Board's reasons adequate?

b. Did the Board reasonably conclude that the Project is not likely to result in significant adverse environmental effects?

c. Did the Board fail to consider Aboriginal and Treaty rights?

D. Was the Crown obliged to seek the advice of the Nunavut Wildlife Management Board?

A. Standing

The parties parsed the standing issues into two: (1) standing to raise administrative law questions, and (2) standing to raise questions relating to the duty to consult and accommodate. The Attorney General (AG) contested standing on both grounds. The proponents appear to have conceded standing in relation to the administrative law matters and joined the AG in contesting standing on the consultation and accommodation issues (at paras 10 & 11).

As to the administrative law issues, Justice Dawson concluded that the applicants (and apparently all of them, the HTO, the Hamlet itself and the mayor) had standing on the basis that they were all directly affected:

> The Board acknowledged in its environmental assessment that a number of potential adverse environmental effects could flow from the Project. These included a decrease in local ambient air and water quality, potential disturbance of traditional and commercial resource use if the seismic survey changed the migration route of marine mammals or fish, and adverse changes to the "ecosystem process" and marine presence due to spills or accidents. As the realization of any of these potential adverse impacts would affect the applicants' natural environment and the livelihood of the members of the HTO, they are directly affected by the decision within the meaning of subsections 18.1(1) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

While this conclusion may be contested in relation to the Hamlet and perhaps Natanine in his capacity as mayor (but not as Inuk beneficiary and hunter as he presumably is), it must surely be unassailable that the HTO had standing - although it might have been better to describe the HTO as bringing the application on behalf of its members or at least to refer to section5.7.1 of the Nunavut Land Claim Agreement (NLCA). That section provides that "Where a right of action accrues to an Inuk, the HTO of which that Inuk is a member may, with the consent of that Inuk, sue on that Inuk's behalf."

Justice Dawson's reasoning on the issues of consultation and accommodation is more puzzling. Although one might have expected her to start the analysis by asking who is the rights bearer both under the NLCA and more generally under section 35 of the *Constitution Act, 1982* (which might have led to some discussion of *Behn v Moulton Contracting Ltd*, 2013 SCC 26 esp at paras 26 -36), but instead of doing so she immediately launched into a discussion of public interest standing. The juxtaposition is as follows (at paras 18 and 19):

> I next consider whether the applicants should be granted standing to pursue claims based upon Aboriginal or treaty rights.
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> In *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII), [2012] 2 S.C.R. 524, at paragraph 37, the Supreme Court enumerated three factors to be considered in the exercise of discretion to grant public interest standing:
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> i) whether there is a serious justiciable issue raised;
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> ii) whether the applicant or plaintiff has a real stake or genuine interest in the issue; and
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> iii) whether, in all of the circumstances, the proposed proceeding is a reasonable and effective way to bring the issue before the courts.

I am not sure how the second paragraph follows from the first.

In the end Justice Dawson concluded that the HTO at least might also claim public interest standing. That itself is a puzzle since logically a public interest standing conclusion must be a finding in the alternative since the Court only gets to public interest standing if it has concluded that there is no reasonable prospect of the issue being brought forward by another party with standing as of right. But, however we dice this, there was clearly one party with standing to raise both the administrative law and constitutional law issues.

B. Had the Crown fulfilled its duty to consult and accommodate?

Much of the judgment is taken up with an assessment of the evidence. The key *legal* conclusions are these.

1. Standard of review (at para 34). "Questions as to the existence of the duty to consult and the extent or content of the duty are legal questions, reviewable on the standard of correctness. The consultation process and the adequacy of consultation is a question of mixed fact and law, reviewable on the standard of reasonableness (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at paragraph 61-62; and, *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,2010 SCC 43 (CanLII), [2010] 2 S.C.R. 650, at paragraph 64)."

2. Parliament may structure the way in which the Crown discharges its duty to consult and in doing so may impose consultation obligations on regulatory tribunals such as the NEB. Whether it *has* done so is ultimately a matter of statutory interpretation. See in particular at paras 43 – 46 and *Haida*, *Rio Tinto* and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 S.C.R. 550.

3. Parliament may also authorize a tribunal such as the NEB to make determinations as to whether or not the Crown has fulfilled the duty to consult and accommodate. Parliament may do this explicitly or implicitly (by authorizing a tribunal to decide questions of law): *Rio Tinto*, and see my post on that decision here. The power to discharge the obligation to consult and the authority to rule on adequacy are distinct and different issues. The focus here was on the former issue although perhaps there is some evidence of spillover: see para 51.

4. In this case the Board had both the power and the duty to discharge the Crown's obligation to consult and accommodate. The Court reached this conclusion by pointing to an amendment to CEAA, 1992 which redefined the term "environmental effect" of a project so as to include the effect of any change in the environment caused by the project which might in turn affect the "current use of lands and resources for traditional purposes by aboriginal persons". Justice Dawson framed her conclusion this way (at para 65):

> I conclude that the Board has a mandate to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult with Aboriginal peoples. Of course, when the Crown relies on the Board's process, in every case it will be necessary for the Crown to assess if additional consultation activities or accommodation is required in order to satisfy the honour of the Crown.

   In this case the Crown apparently conceded (see at para 70) that it did not engage in any other activities of consultation and accommodation.

   The Court was careful to note that its conclusion on this matter applied to the CEAA 1992 Act only.

5. The Court held that the consultation required was at the deep end (at para 74) of the *Haida* spectrum. The right was treaty based (the NLCA) and the potential impacts serious. These impacts were summarized by Justice Dawson referring to the Board's EIA report (at para 73):

> As to the potential effect of the Project upon this right, migratory marine mammals harvested by the Inuit move through the Project area. Potential adverse environmental effects found by the Board include:
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> i) Sensory and physical disturbance to marine mammals causing: temporary reduction in hearing sensitivity; permanent hearing impairment; masked communication; and, changes in behaviour and distribution including avoidance of the seismic ship and alteration of migration routes.
> ii) Potential disturbance to traditional and commercial resource use if the survey changes the migration routes of marine mammals or fish.
> iii) Adverse changes to marine life presence due to spills or accidents releasing hydrocarbons into the marine environment.

6. Justice Dawson concluded that the Crown, through the Board, had discharged its obligations. In reaching that conclusion Justice Dawson rejected the applicants' contention that the Board or some other entity should only have considered the application following a strategic environmental assessment. More generally Justice Dawson held that the Board's consultation activities were adequate because (at paras 92 – 100) the process:
   - Provided timely notice.
   - The proponents were required to provide adequate information and to respond to questions.

- The Board held meetings at which community members could address concerns to the Board.
- The proponents changed aspects of the project's design in response to articulated concerns.
- The Board's process was designed to facilitate aboriginal participation.
- The CEAA assessment addressed concerns raised by aboriginal participants.
- The terms and conditions to which the GOA was subject were responsive to the concerns that had been raised.

C. Did the Board err in issuing the GOA?

Under this heading the applicants sought to attack: (1) the reasons offered in support of the Board's decision, (2) the Board's conclusions with respect to the significance of the adverse environmental effects of the project, and (3) the Board's consideration of aboriginal and treaty rights. The standard of review in relation to the questions raised under this heading was reasonableness.

On the reasons issue, the principal difficulty for the Attorney General was that in a purely formal sense there were no reasons accompanying the issuance of the GOA. Instead there was simply a cover letter (1.5 pages) and the actual GOA itself (three pages in length and consisting of some 15 conditions). However, it is evident that Justice Dawson was not prepared to take such a technical approach given the Board's detailed consultation exercise and the principal outcome of that exercise which was the Board's 30+ page EIA Report (referred to above). That broader context (at paras 102 – 103) provided the necessary reasons:

> I see no merit in this submission. The Board's reasoning is found in the environmental assessment and the terms and conditions imposed on the GOA. These reasons deal with the real controversy: what are the potential impacts of the Project on the section 35 Aboriginal right to harvest wildlife.
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> When the GOA is read in the light of the environmental assessment, the terms and conditions imposed upon the GOA and the entirety of the Board's record, this Court is well able to understand why the GOA was issued.

While the EIA report did not deal with all of the issues that the Board needed to consider under *COGOA,* Justice Dawson seems to have been of the view that these other issues were either not of core significance or were such that the reasons could be inferred from the terms and conditions that had been attached.

As for the remaining issues Justice Dawson had little difficulty dismissing the applicants' claims. It will always be a challenge to raise any assessment of "significance" to the level of a reviewable error and, given all of the background here, the failure of the EIA report to mention aboriginal and treaty rights and the Crown's duty to consult was not material. While at one level this latter point seems convincing when put together with the complete delegation of all consultation obligations to the Board, and the failure to provide reasons that spoke to the Crown's duties, it is much less convincing, since it suggests that a decision-maker can engage in the discharge of a constitutional obligation without realizing and articulating the normative quality of the interests at stake. It brings to mind the argument that we sometimes see from governments to the effect that: (1) we had no obligation to consult, but, (2) if we had such an

obligation we discharged it. I don't think that the Crown or a delegated authority of the Crown can discharge its obligations in such a non-reflective manner.

D. Was the Crown obliged to seek the advice of the Nunavut Wildlife Management Board (NWNB)?

The NLCA establishes a number of boards and authorities with different public government functions including the Nunavut Impact Review Board and the NWMB. This particular contention of the applicants raised a relatively simple question of interpretation of the Agreement. Section 15.3.4 of the NLCA provided as follows:

> Government shall seek the advice of the NWMB with respect to any wildlife management decisions in Zones I and II which would affect the substance and value of Inuit harvesting rights and opportunities within the marine areas of the Nunavut Settlement Area. The NWMB shall provide relevant information to Government that would assist in wildlife management beyond the marine areas of the Nunavut Settlement Area. [Emphasis added by Justice Dawson.]

The narrow question was whether the decision to grant a GOA was a wildlife management decision. Evidently it was not. True, such a decision might affect Inuit harvesting rights, but that does not make it a decision in relation to wildlife management. Otherwise all decisions involving resource projects would so qualify.

A Final Comment

This decision, along with *Taku River,* is authority for the proposition that in the appropriate circumstances the Crown can discharge its obligation to consult and accommodate *entirely* through a regulatory board such as the NEB. Justice Dawson concedes that this will not always be the case (at para 65) but she gives little if any guidance as to when something more might be required. What then might be some relevant considerations, or how might one frame an appropriate test?

One way to frame the test would be to say that the regulatory tribunal might be able to discharge the Crown's obligations where the tribunal had exclusive jurisdiction over the approval(s) required for the project, the issues raised during the consultation exercise, and where the tribunal's decision is final. This test would not be met where: (1) the project required multiple approvals and from decision-makers other than the regulatory tribunal, (surely the norm and not the exception, but it might be necessary to seek judicial review of each of those decisions), (2) the issues or solutions offered by those consulted (i.e. the proposed accommodations) go beyond the authority of the tribunal (for an example see the decision of the Alberta Energy Regulator (AER) in *Prosper Petroleum Ltd.*, 2014 ABAER 013 and the AER's discussion of the proposed Moose Lake Protection Plan), and (3) where the final decision is to be made by another body such as the Governor in Council which might be able to take into account a broader range of circumstances (for example, the new procedures for granting a certificate of public convenience and necessity under the *National Energy Board Act*, R.S.C. 1985, c. N-7), or perhaps change the terms and conditions of the tribunal's proposed decision.

In any such a case it would be up to the Crown to show why it might still be entitled to rely exclusively on the consultation activities engaged in by the regulatory tribunal. In this particular case the Minister did have to make an additional decision before the GOA was issued and that was the responsibility under section 5.2 of *COGOA* to approve a benefits plan or waive the need for such a requirement. While Justice Dawson refers to this requirement in the context of the adequacy of the Board's reasons (at para 101) there is no discussion of the requirement in the context of the duty to consult. Perhaps the issue was not raised in this context by counsel for the applicants but is this not is an example of a situation that actually required incremental consultation and where the Minister (the Crown) could not just rely on the Board's EIA process as satisfaction? It is true that the community was adamantly opposed to the project but does that relieve the Minister from consulting on the potential economic benefits which might flow from the five year project? After all, if the community bears the risks there needs to be some assessment of potential benefits as well. One of the preambular paragraphs to the NLCA refers to providing Inuit the "means of participating in economic opportunities."