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Yellowknives Dene First Nation v. Debogorski: Is the duty to consult changing?

By John Donihee, Of Counsel; Charles Birchall, Partner and Certified Environmental Law Specialist; Julie Abouchar, Partner and Certified Environmental Law Specialist, and Nicole Petersen, Associate. © Willms & Shier Environmental Lawyers LLP.

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Is the Duty to Consult Changing?

On June 23, 2015, the Federal Court of Appeal ("FCA") released *Yellowknives Dene First Nation v. The Minister of Aboriginal Affairs and Northern Development, the Mackenzie Valley Land and Water Board, and Alex Debogorski*, 2015 FCA 148.

Background

The FCA unanimously upheld the Federal Court's decision to deny the Yellowknives Dene First Nation's ("First Nation") application for judicial review of the Mackenzie Valley Environmental Impact Review Board's ("Review Board") approval of a small diamond exploration project.

The proponent intended to carry out the drilling project near Drybones Bay, southeast of Yellowknife NWT, an area of critical cultural and environmental significance to the First Nation. The Review Board concluded that the project was unlikely to have significant adverse impacts on the environment or be a cause of significant public concern. Therefore, an environmental impact review of the proposed development was not required and it could proceed to the regulatory phase for permitting and licensing.

The First Nation brought an application for judicial review of the Review Board decision. The Federal Court (2013 FC 1118) dismissed the application and awarded costs in favour of the Minister of Aboriginal Affairs and Northern Development.

The First Nation appealed to the FCA raising three issues:

(i) Was the decision that the proposed development was unlikely to have any significant adverse impact on the environment reasonable?

(ii) Was the decision that the proposed development was not a cause of significant public concern reasonable?

(iii) Did the Crown meet its duty to consult and, if required, accommodate the First Nation?

Respecting the first two issues, the FCA found that the decisions of the Review Board were reasonable.

On the third issue, the FCA held that the Review Board's "comprehensive consultation process" as part of, and prior to completing an environmental assessment under the *Mackenzie Valley Resource Management Act*, SC 1998, c 25 ("the Act") was sufficient to discharge the Crown's duty to consult. In other words, according to the FCA, Parliament intended that the Crown's duty to consult in these circumstances would be entirely delegated to the Review Board.

Issue of the Review Board's duty to consult in the Mackenzie Valley

Part 5 of the Act establishes the Review Board and outlines its duties during the conduct of an environmental assessment. The FCA referred to *Ka'a'Gee Tu First Nation v. Canada (Attorney General),* 2007 FC 763, ("*Ka'a Gee Tu*") where the Federal Court found that the Act provides a comprehensive consultation process for Aboriginal groups. According to the FCA this process is illustrated by the following sections of the Act:

- The purpose of Part 5 of the Act includes ensuring that the concerns of Aboriginal people are taken into account in the EA process (subsection 114(c);
- The environmental assessment process is required to have regard for the protection of the social, cultural, and economic well-being of residents and communities in the Mackenzie Valley and importance of the conservation of the well-being and way of life of the Aboriginal peoples in the Mackenzie Valley (subsections 115(1)(b) and (c);
- Every EA proposal for development must include consideration of the impact of the development on the environment, including any effect on the social and cultural environment and or heritage resources (subsection 111(1));
- In conducting a review, the Review Board may carry out consultations with any persons who use an area where the development might have an impact on the environment (section 123.1(b));
- The Review Board is required to issue public, written reasons (section 121); and
- The Review Board is given broad powers. After completing an environmental assessment it may, for example, recommend approval of a proposed development subject to the imposition of measures it considers necessary to prevent significant adverse impacts, or it may recommend that the proposal be rejected (section 128).

In *Ka'a Gee Tu,* the Federal Court found that the Act provides for a comprehensive consultation process, which in turn allows for significant consultation between a developer and affected Aboriginal groups. In this case, the FCA reviewed the relevant provisions of the Act and held that "the regime reflects Parliament's intent that the Review Board engage in the required consultation process as part of, and prior to completing an environmental assessment" (para 60). The FCA went on to say in the same paragraph "that the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports".

The FCA considered whether the consultation provided by the Review Board proceeding was adequate in the circumstances. Since the proposed development was unlikely to negatively affect the environment and, as a result, since no mitigation measures were required, the duty of consultation owed by the Crown was in the mid-range of the consultation spectrum. The FCA decided that the duty to consult was discharged through the Review Board process (para 54).

Implications of the FCA Decision

The FCA began its analysis of the duty to consult by stating "it is now settled law that Parliament may choose to delegate <u>procedural aspects</u> of the duty to consult to a tribunal" (para 55). However, the FCA then moved on to determine, based on the Act and the factual circumstances of the case, whether the Crown's duty to consult <u>on both a procedural and substantive basis</u> had been met through the Review Board's EA process. In order to buttress this approach, the FCA set out relevant sections of the Act that are designed to ensure that the concerns of the Aboriginal people are taken into account in the environmental assessment process. The FCA pointed to the regime as a whole, including specific provisions (section 115) requiring regard for the protection of Aboriginal rights and general provisions like section 123.1(b) that provides that the Review

Board may carry out consultations with any persons who use an area where the development might have an impact on the environment.

The first question is whether Parliament did in fact delegate more than procedural aspects of the duty to consult under the Act to the Review Board.

While it is true that one of the key purposes of the Act is to take into account the effect of a project on the well-being and way of life of the Aboriginal peoples in the Mackenzie Valley, this does not necessarily mean that the Crown's duty to consult is therefore transferred to the Review Board. It should also be noted that the reference by the FCA to section 123.1(b) concerning consultations relates only to review panels or joint review panels and not to Review Board environmental assessments. Further, the Act does not state or even imply that it intends the Board's process to replace the Crown's duty to consult. Neither is the Board granted the authority to make determinations of law.

It would appear that the FCA simply accepted the fact that the Minister had relied on the Review Board process to discharge the Crown's duty to consult (para 49) and then found reasons for justifying such an approach. Nevertheless, such an approach would seem to run counter to settled Supreme Court of Canada case law that restricts Crown delegation to consult to only its procedural aspects.

It will be interesting to see how the Debogorski case will be interpreted and applied to other cases involving regulatory tribunals. Under their respective statutes, will certain regulatory tribunals now be held responsible for dealing with both the procedural and substantive aspects of the Crown's duty to consult?

***John Donihee*, B.Sc., M.E.S., LL.B., LL.M.,** *is one of Canada's foremost experts in environmental, regulatory, administrative and Aboriginal law in Canada's North and a member of Willms & Shier's Northern Team. John's particular focus is on land claims implementation and modern treaties in the North. He can be reached at 613-217-8521 or by e-mail at* jdonihee@willmsshier.com.

***Charles (Chuck) J. Birchall*, B.A. (Hons.), LL.B., LL.M.**, *is a partner at Willms & Shier Environmental Lawyers LLP in Ottawa and a member of the firm's Northern Team. Chuck has over 25 years of legal experience devoted exclusively to environmental law and is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. Chuck provides advice on a variety of environmental compliance matters, as well as on energy law and Aboriginal consultation issues. Chuck has particular experience advising on environmental assessment issues raised by mining, oil and gas, energy and infrastructure projects. He can be reached at 613-761-2424 or by e-mail at* cbirchall@willmsshier.com.

***Julie Abouchar*, BSc., LL.B., LL.M.,** *is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and a member of the firm's Northern Team. Julie is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. She has been named annually by her peers to Best Lawyers in Canada, Environmental Law and Energy Regulatory Law and rated Repeatedly Recommended in the Canadian Legal Lexpert Directory, Aboriginal Law and Environmental Law. She can be reached at 416-862-4836 or by e-mail at* jabouchar@willmsshier.com.

***Nicole Petersen*, B.A., J.D.,** *is an associate lawyer at Willms & Shier Environmental Lawyers LLP in Toronto and a member of the firm's Northern Team. Nicole has a broad environmental law, environmental litigation, Aboriginal law and energy and natural resources law practice. She can be reached at 416-642-4872 or by e-mail at* npetersen@willmsshier.com.

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Willms & Shier Environmental Lawyers LLP – TORONTO
4 King Street West, Suite 900, Toronto, Ontario, Canada M5H 1B6
T: 416 863 0711 F: 416 863 1938 www.willmsshier.com

Willms & Shier Environmental Lawyers LLP – OTTAWA
45 O'Connor Street, Suite 700, Ottawa, Ontario, Canada K1P 1A4
T: 613 761 2424 www.willmsshier.com