Northern Gateway Pipeline Project on Hold Until Canada Adequately Fulfills Duty to Consult

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Canadian resource industry, government leaders and Aboriginal communities will be adding the recent Federal Court of Appeal Northern Gateway decision to their summer reading lists.

On June 30 2016, the Federal Court of Appeal overturned the previous federal government's approval of the Northern Gateway project after finding the government had not adequately consulted with First Nations affected by the project.

This Court applies, but does not change, now settled legal principles to one of today's most significant and controversial resource projects. Much can be learned from a read of the case, about what is expected, and what is not expected for meaningful consultation..

The Court carefully but concisely articulates the legal framework for establishing the level of consultation expected of Canada. Specifically, the court walked through settled law emanating from Supreme Court of Canada. The Court highlighted when the duty to consult arises,[1] the fact-specific nature of the duty's content and extent,[2] that the duty to consult may be satisfied by participation in a forum created for other purposes[3] and that consultation must continue after the project is approved.[4] While consultation does not have to be perfect, it must be meaningful and good faith is required on both sides.[5] The duty to consult does not guarantee a substantive outcome, nor does it provide a veto right. It must however be more than providing information and an opportunity to "blow off steam".[6]

After establishing the applicable legal framework, the Court concluded the question is whether "reasonable efforts to inform and consult" were made.[7] From the outset of the project, Canada and affected First Nations agreed that deep consultation with affected First Nations was required.[8]

The affected First Nations' failed to convince the Court on a number of arguments. The Court did not accept that the Governor in Council prejudged the approval of the project, the project was over-delegated, funding for First Nations' participation was inadequate,

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[1] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SC, para 35
[2] *Rio Tinto Alcan In v Carrier Sekani Tribal Council*, 2010 SCC 43
[3] *Beckman v Littke Salmon/CarmacksFirst Nation*, 2010 SCC 53, para 39
[4] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, para 45
[5] *Gitxaala Nation v Canada*, 2016 FCA 187, para 181. [Gitxaala]
[6] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para 54.
[7] Gitxaala, *supra* note 5 para 185.
[8] *Ibid*, paras 187-188.

or that the consultation framework was unilaterally imposed upon First Nations. Additionally, the Court found that Canada was not obligated to share its legal assessment of First Nations' claims to Aboriginal rights or title,[9] as a legal strength of claim assessment is subject to solicitor-client privilege.[10]

The Court found however that the Crown failed to properly execute Phase IV of the consultation process. Phase IV occurred after the Joint Review Panel issued its report recommending approval with conditions; during this phase the Crown was "to engage in consultation concerning the Report and on any project-related concerns that were outside of the Joint Review Panel's mandate."[11]

Before evaluating Canada's implementation of Phase IV, the Court noted that Phase IV was a very important part of the consultation framework.[12] First, the Joint Review Panel's report left First Nations' with more specific concerns than could be formulated during prior to or during the Panel hearings.[13] Second, the report did not cover every subject on which consultation was required.[14] Finally, Phase IV constituted Canada's first and last opportunity to directly engage in consultation on matters of substance before the Governor in Council's decision.

The Court found that Canada made numerous errors in executing Phase IV.

Roughly two weeks before the Joint Review Panel issued its report, Canada notified affected First Nations that Phase IV would begin shortly after the report was released, 45 days would be allotted for consultation meetings, First Nations would be given 45 days to write and submit concerns by answering 3 questions, and such responses were to be a maximum of 2-3 pages in length.[15] First Nations responded that the timelines were arbitrarily short and insufficient.[16] Regarding timing, the Court noted both the authority under s. 54(3) of the *National Energy Board Act* [17]to extend the deadline and that the "importance and constitutional significance of the duty to consult provides ample reason…in appropriate circumstances, to extend the deadline."[18]

There was no evidence available showing Canada had considered asking the Governor in Council to extend the deadline. While the Court accepted that Canada did not necessarily have to ask for an extension, it concluded that in the absence of additional time, Canada ought to have taken a "pre-planned, organized" approach to Phase IV that would allow time to consider, discuss and respond to the "specific, focused and brief" First Nations concerns.[19] Instead, Canada's consultation during Phase IV "left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored."[20]

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[9] *Ibid*, para 224.
[10] *Halalt First Nation v. British Columbia*, 2012 BCCA 472 at para 123.
[11] *Ibid*, para 26.
[12] *Ibid*, para 239.
[13] *Ibid*.
[14] *Ibid*, paras 240-241.
[15] *Ibid*, para 245
[16] *Ibid*, para 246.
[17] *National Energy Board Act*, RSC 1985, c N.7, s. 54(3).
[18] *Gitxaala, supra* note 5, para 251.
[19] *Ibid*, paras 252-253.
[20] *Ibid*, para 325.

In at least three instances, the Governor in Council was given information that did not accurately or sufficiently convey First Nations' concerns.[21] The court determined at no time were these errors corrected or brought to the attention of the Governor in Council.[22]

Also of concern to the Court was the absence of representatives with decision-making authority at consultation meetings. In many instances, First Nations submitted they did not have adequate information, had not been adequately consulted or had found errors in the Joint Review Panel report or other information put to the Governor in Council. In response, Canada's representatives repeatedly stated they were present at the meetings to collect information and that "decision making is at a different level."[23] The Court was satisfied that Canada failed to explain why information was missing or inaccurate or why they had not sent representatives that had the authority to consult adequately or meaningfully. Summarizing the evidence regarding Phase IV consultation meetings, the Court found Canada failed to "engage, dialogue and grapple with the concerns expressed to it in good faith" and that "[m]issing was a real and sustained effort to pursue meaningful two-way dialogue."[24]

Canada relied heavily on 2 letters it sent to affected First Nations. However, these letters were found to be insufficient to discharge the obligation to participate in a meaningful dialogue. Beyond containing errors, the Court determined the letters could "best be characterized as summarizing at a high level of generality the nature of some of the concerns expressed."[25] Following the authority of the Supreme Court of Canada on the duty to consult, the Court concluded that the affected First Nations were entitled to "much more in the nature of information, consideration and explanation"[26] than what was provided in the letters.

The Court also highlighted Canada's repeated resistance to sharing information emanating from its strength of claim analyses. The Court agreed with Canada that the consultation process was not the correct time to negotiate title and governance matters[27] and that Canada was not obligated to share the legal component of the analyses.[28] However, the affected First Nations were entitled to a meaningful discussion about the strength of their respective claims.[29] A First Nation must have sufficient information about its rights before it can assess and discuss the existence and severity of a project's potential impacts. Additionally, case law clearly indicates that under the duty to consult, the Crown must make findings concerning a project's possible impacts and communicate these findings to First Nations.[30] The then Minister of the Environment committed to share an explanation respecting the strength of claim and depth of consultation evaluation in a letter written in 2012.[31] This commitment was never followed up on. In fact,

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[21] *Ibid*, para 255.
[22] *Ibid*, para 258.
[23] *Ibid*, para 266.
[24] *Ibid*, para 279.
[25] *Ibid*, para 281.
[26] *Ibid*, para 287.
[27] *Ibid*, para 309.
[28] *Ibid*, para 224.
[29] *Ibid*, para 309.
[30] *Ibid*, para 291.
[31] *Ibid*, para 292.

throughout the consultation process, Canada consistently refused to provide this information.[32]

In response, Canada argued it had "reasonably accommodated potential impacts on assertions of Aboriginal title and governance claims."[33] However, the Court determined that it was inconsistent with the duty to consult by concluding problems could be mitigated at the project development stage without prior adequate consultation.[34]

The Court concluded that many consequences of the Project were "left undisclosed, undiscussed and unconsidered."[35] While the Court lauded Northern Gateway's undertakings and efforts to consult and accommodate, and found that many possible impacts would be mitigated or eliminated as a result of the conditions imposed on the Project, "legitimate and serious concerns about the effect of the Project upon the interests of affected First Nations remained."[36] The Court ordered that the Order in Council directing the National Energy Board to issue Certificates of Public Convenience and Necessity be quashed, the Certificates themselves quashed and the matter be remitted to the Governor in Council for redetermination.[37]

The Court emphasized that the Governor in Council may only decide to order the Certificates after Canada has fulfilled the duty to consult and in particular only after the Phase IV process is redone.[38]

Other interesting points arising from the decision:

- The decision is a reminder that the Crown must remain meaningfully engaged in the Aboriginal consultation process even after an environmental assessment report has been issued. The Court commended Northern Gateway, the project proponent, on its extensive consultation during other phases of the process. It was the Crown's cursory and rushed effort in Phase IV that was problematic.
- Justice Ryer wrote a brief dissenting decision, concluding that the majority's stated reasons for quashing the Order in Council and associated Certificates were inadequate. Justice Ryer's reasons highlight how much room exists between a standard of perfection and reasonable satisfaction, and the level of subjectivity in duty to consult analyses.

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[32] *Ibid*, para 291.
[33] *Ibid*, para 306.
[34] *Ibid*, para 308.
[35] *Ibid*, para 325.
[36] *Ibid*, para 326.
[37] *Ibid*, para 333,
[38] *Ibid*, para 335.

The Federal Court of Appeal provides excellent instructions on what constitutes meaningful consultation, click here for the decision. Going forward the Crown must be responsive to First Nations' concerns on timing, accuracy of information and availability of information for all projects subject to the environmental assessment process. In addition, the Crown must be prepared to send representatives that have the authority to "do more than take notes".[39] The honour of the Crown will not be satisfied unless First Nations can both express their concerns and receive a meaningful response.

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[39] *Ibid*, para 279.