Northern Gateway Pipeline - Province Must Consult and Decide But May Impose Conditions

Aboriginal Law Bulletin

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The Supreme Court of British Columbia recently released its decision in *Coastal First Nations v. British Columbia (Environment),* 2016 BCSC 34*,* a legal challenge filed against the Enbridge Northern Gateway Project regarding the lack of a Provincial environmental assessment.

In its reasons, the court struck down part of an equivalency agreement between British Columbia and Canada that gave the federal government exclusive decision-making authority over the project. While finding that British Columbia could rely entirely on the environmental assessment undertaken by the National Energy Board, the court ruled that British Columbia improperly delegated its authority to issue an environmental assessment certificate (by which it can impose additional conditions on the project). The court further held that British Columbia breached the honour of the Crown by failing to consult before deciding not to terminate the equivalency agreement. In the result, British Columbia must now decide whether to issue an environmental assessment certificate and must consult the Gitga'at First Nation before reaching its decision**.**

Background

The Enbridge Northern Gateway Project ("Project") proposes to transport bitumen and condensate through an interprovincial pipeline and oil tanker shipping route that intersects the claimed traditional territories of the petitioners – Gitga'at First Nation and Coastal First Nations. The Gitga'at claim Aboriginal rights within their traditional territory, which includes lands and waters within and adjacent to the proposed shipping route for oil tankers connected to the Project. Coastal First Nations is a non-profit society representing nine First Nations who claim Aboriginal rights and title to lands, waters and resources that may be adversely affected by the operation of the Project.

In 2010, British Columbia's Environmental Assessment Office and the National Energy Board ("NEB") ratified an equivalency agreement ("Agreement"), which provided that projects requiring approval under the *British Columbia Environmental Assessment Act*[1] and the *National Energy Board Act*[2] required only one environmental assessment. The Agreement further provided that reviewable projects could proceed without a provincial environmental assessment certificate ("EAC"). British Columbia retained the right to terminate the Agreement on 30 days' notice (which would only affect a project if the NEB had not yet made its decision regarding that project).

The environmental assessment of the Project was referred to a Joint Review Panel

("JRP") in 2010 pursuant to this Agreement. During the JRP hearings, British Columbia publicized concerns regarding oil spill prevention, response and remediation, and the potential impacts of the Project on Aboriginal and treaty rights. The petitioners echoed British Columbia's concerns. British Columbia outlined "Five Conditions" it declared were "minimum requirements that must be met before we will consider support for any heavy oil pipeline projects in our province." When the JRP issued its final report to recommend the Project's approval in 2013, it failed to fully address the conditions established by British Columbia. The petitioners made two requests for consultation from British Columbia shortly thereafter. British Columbia did not respond until after the NEB approved the Project in 2014.

In 2015, the petitioners commenced litigation seeking declarations that the Agreement was invalid to the extent it exempted the Project from requiring an EAC, and that British Columbia was required to consult with the Petitioners about whether to issue an EAC.

Decision

The court held that British Columbia improperly delegated its authority to issue an EAC and owed the petitioners a duty to consult before deciding not to terminate the Agreement. Before the Project can proceed, British Columbia must now decide whether to issue an EAC and consult the petitioners before reaching its determination. Key aspects of the court's decision are outlined below.

British Columbia cannot abdicate its authority to issue an EAC for reviewable projects

All reviewable projects in British Columbia must obtain an EAC before any project-related work can commence. British Columbia is free to rely on an environmental assessment conducted by the federal Crown in deciding whether to issue an EAC; however, the court held that British Columbia cannot contract out of its authority to decide whether to issue an EAC. Clause 3 of Agreement attempted to do just that. The fact the Petitioner's had not challenged Clause 3 during the JRP process or in any of its ongoing litigation before the federal courts did not constitute undue delay or and abuse of process. This led the court to invalidate Clause 3 of the Agreement. As a result, British Columbia must now decide whether to issue an EAC before the project can proceed.

British Columbia retains the power to impose conditions on federally regulated projects

The proponent argued that the Project was an interprovincial pipeline and therefore not within the jurisdiction of the Province at all. The Court disagreed and held that the environmental aspects of the Project "disproportionately impacts the interests of British Columbians" and that British Columbia had constitutional authority (in concert with Canada) over the environment. The court held that British Columbia retains the power to impose environmental conditions on a project that are more stringent than those imposed by the federal government. However, the court was careful to note that this does not mean that all provincial conditions on a federally regulated project would be permissible. The court stated, "I agree that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding". While British Columbia and the federal government share the power to regulate the environment, one of the principles of "cooperative federalism" means that federal laws will prevail if it would be impossible for a proponent to simultaneously comply with the conditions of federal and provincial law. The Court held that the conditions imposed would need to be analysed to determine if they were so stringent as to "block the project" – but left that determination to another day, when the conditions (as opposed to speculation) were in front of the Court.

British Columbia's decision to enter into the Agreement did not require consultation

British Columbia did not owe a duty to consult prior to executing the Agreement. The court found that the broad application of the Agreement to environmental assessments across the province did not give rise to specific adverse impacts on Aboriginal rights. In the absence of a causal connection between potential adverse impacts on the Petitioner's Aboriginal rights and the Agreement, no consultation was required.

British Columbia's decision not to terminate the Agreement required consultation

British Columbia breached the honour of the Crown by failing to consult the petitioners about whether to terminate the Agreement. The court rejected British Columbia's argument that it owed no duty to consult after learning that the petitioners' Project-related concerns—concerns that mirrored those expressed by the Province both before and after the JRP process—had not been substantially addressed by the JRP. The court noted that British Columbia had the right to terminate the Agreement and address the petitioners' concerns by imposing additional conditions on the project. Instead, British Columbia decided not to terminate the Agreement. This decision triggered the duty to consult. British Columbia breached its duty because it relinquished its ability to consult and accommodate the petitioners' concerns without consulting the petitioners. To remedy the breach, the court ordered British Columbia to consult the Gitga'at before deciding whether to issue an EAC.

Conclusion

This case exposes real risk in relying on equivalency agreements such as this Agreement, whereby the Province gives up all its decision making authority over environmental assessments. This case is likely to be appealed, and until it works its way through the courts, the full implications of this decision for proponents awaiting environmental approvals pursuant to the Agreement remains to be seen. In the short term, with this decision, interprovincial projects subject to this equivalency agreement should be considering seeking and obtaining Environmental Assessment Certificates from British Columbia.

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[1] SBC 2002, c 43.
[2] *National Energy Board Act*, RSC 1985, c N-7.

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