NEW CASE ALERT: Crown consultation & pipelines

New federal court ruling suggests that Crown has an independent duty to consult, separate from its regulatory approval processes, on projects with major impacts on Aboriginal Title and Rights

When the federal Crown considers a pipeline project that will have a significant impact on Aboriginal Title and Rights, project-specific regulatory and environmental review processes like that of the National Energy Board ("NEB") are unlikely to be able to fulfill the Crown's duty to consult: ***Brokenhead Ojibway Nation v. Canada (Attorney General)***, 2009 FC 484. Because the NEB process is not designed to consider larger issues related to impacts on Aboriginal Title and Rights, nor to conduct the deeper consultation that such projects require, the Crown would "almost certainly have ... an independent duty to consult," beyond the scope of the NEB's process (para. 44).

In this case, the NEB and the federal cabinet approved three 1000-kilometre-long underground pipelines from Alberta to Manitoba. In doing so they relied heavily on steps taken by the corporate proponents to consult First Nations and mitigate project-specific concerns, and ignored repeated letters from Treaty One First Nations to cabinet ministers asking for meaningful consultation regarding the impacts of the projects on their outstanding treaty claims. The Treaty One First Nations challenged these decisions in Federal Court. While the court's ruling had to do with treaty land, it also has implications for First Nations in BC without treaties that are dealing with pipeline proposals. Although the court found that the Crown had satisfied its duty to consult with Treaty One First Nations in this case, the decision strongly suggests that where a project has potentially significant impacts on Aboriginal Title and Rights, regulatory and environmental assessment processes alone are unlikely to satisfy the Crown's duty to consult.

The primary issue before the court was whether the pipeline projects "had a sufficient impact on the interests of the Treaty One First Nations such that a duty to consult on the part of the Crown was engaged," and if there was a duty, to determine its content and "whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown" (para 16).

The court concluded that:

- The Crown had only a minimal duty to consult on the project (limited to the requirement of giving notice), because Treaty One First Nations had not provided sufficient evidence about impacts on their rights to support a deeper duty of consultation. The fact that the impacted lands were almost entirely private lands that had already been exploited was a key consideration in this aspect of the decision.
- The NEB's regulatory review process, along with the corporate proponents' efforts to consult and to make modifications to the project plan, were enough to fulfill the Crown's low-level duty to consult on the facts of this case.
- If there had been evidence that the pipelines would have a significant impact on First Nations' Title or Rights, a deeper duty to consult would have been triggered and the project-specific regulatory process of the NEB would not have been adequate to fulfill the duty to consult. The Crown would likely have had a duty to conduct separate consultation, outside of the regulatory process.

It is not clear, however, how much evidence or how substantial the impact would have to be to trigger a deeper duty to consult. Some language in the judgement would suggest that the threshold is quite low, such that whenever a pipeline crosses land that is subject to an "outstanding land claim," the Crown will have a deep duty to consult that cannot be satisfied by an NEB review (para. 44). Elsewhere the court states: "[T]he NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim *or* which is being used by Aboriginal peoples for traditional purposes" (at para 29, emphasis added).

Court finds insufficient evidence of project impact to support a high-level duty to consult

In the *Brokenhead Ojibway* case, the court found that the evidence presented by the Treaty One First Nations was "expressed in generalities" and did not point to any significant impact on specific First Nations rights or interests that could not be resolved in the regulatory process (para. 30). In doing so, the court emphasized that nearly all of the land required to build the pipelines was privately owned and previously disturbed for pipeline, agricultural and ranching purposes, or ran through or immediately adjacent to existing rights-of-way. (paras. 3, 32). In addition, the evidence suggested that First Nations representatives had previously indicated that the pipeline route was not the subject of any land claim or the site of any traditional activity (para. 30). Potential impacts on unresolved land claims in southern Manitoba would have raised a specific enough issue that was not within the scope of the NEB, but on the

facts of the case, the court found that the pipelines would have "negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba." On this point, the court noted:

> It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they claim were intended to be taken from those lands not already taken up by settlement and immigration. In the result, if the Crown had any duty to consult at all, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice [citing *Haida Nation*]. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more" (para. 43). (para. 43).

Thus, in this case, the court rejected the First Nations' argument for a separate Crown consultation process, distinct from the NEB process.

The court reviewed the consultation conducted by the proponent companies, and the NEB's process, and concluded that the Crown had met its low duty to consult in this case:

> The consultation duty owed by the Crown to the Treaty One First Nations has been met. This is not to say that the Treaty One First Nations do not have a credible land claim but only that the impact these Pipeline Projects have upon those claims is negligible. The Pipeline Projects have been built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in the future to be available for land claims settlement. The pipelines in question are also largely below ground and are reasonably unobtrusive. There is no evidence before me or, more importantly that was before the NEB or the GIC [Governor-in-Council, or Cabinet], to prove that the Pipeline Projects would be likely to interfere with traditional Aboriginal land use or would represent a meaningful interference with the future settlement of outstanding land claims in southern Manitoba. To the extent that any duty to consult was engaged, it was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for consultation and accommodation (para 45).

Court suggests that regulatory processes may not be capable of considering/addressing significant impacts on Aboriginal Title and Rights

The court suggests (without deciding) that, on projects where there are potentially significant impacts on Aboriginal Title and Rights , regulatory review processes focused on project-specific mitigation, avoidance and environmental issues will be inadequate to fulfill the Crown's deeper duty to consult, as these processes are not designed to address the broader questions required of such consultation (paras. 26-27, 29). The court stated:

> The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB… were well-received and largely resolved. ...
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> From the perspective of Treaty One First Nations, the remediation of their project specific concerns may not answer the problem presented by the incremental encroachment of development upon lands which they claim or which they have enjoyed for traditional purposes. While the environmental footprint of any one project might appear quite modest, the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound.
>
> It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.
>
> The fundamental problem with the claims advanced in these proceedings… is that the evidence to support them is expressed in generalities. Except for the issue of their unresolved land claims in southern Manitoba that evidence fails to identify any interference with a specific or tangible interest that was not capable of being resolved within the regulatory process. Even to the extent that cultural, environmental and traditional land use issues were raised in the evidence, they were not linked specifically to the projects themselves. This is not surprising because the evidence was clear that the Pipeline Projects were constructed on land that had been previously exploited and which was almost all held under private ownership (paras. 26-31).

The court did not rule that a separate Crown consultation was never required. Rather, it found that the First Nations' arguments for a separate "overarching consultation" process were not supported by the evidence they presented (para. 35). At the same time, however, it recognized that the regulatory process must be accessible, adequate, and meaningful (para. 42), and that separate consultation might be required where the concerns of First Nations cannot be dealt with inside the regulatory process: "Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either [Cabinet] or some arguably relevant Ministry" (para. 37).

In this vein, the court observed that if there were evidence that the pipelines would simply cross, or significantly impact, land that was subject to an "outstanding land claim," the regulatory process would not have satisfied the duty to consult and separate consultation would likely be necessary:

> I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context (para 44).

In making the suggestion that the NEB's process cannot fulfill the duty to consult when there are significant impacts on Aboriginal Title and Rights, the court's decision appears to be consistent with the court's similar conclusion in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, that a joint review panel does not have the mandate to conduct Crown consultation, because it does not have the authority to address the necessary range of issues. The court also suggests that regulatory processes focused on the remediation of project-specific concerns might not address the possibly "quite profound" cumulative impacts of development on Aboriginal Title and Rights (para. 28).

Implications for BC pipelines: regulatory processes alone will not be likely to satisfy the Crown's duty to consult and accommodate First Nations

As the Enbridge Northern Gateway Project has the potential for significant impacts, it likely triggers a deep duty to consult on the high end of the high end of the spectrum set out by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. Thus, the *Brokenhead Ojibway* case raises significant questions about the Crown's stated intention to rely principally on the Joint Review Panel (JRP) process for the Enbridge project, as the case confirms that the JRP does not have a mandate to conduct deep First Nations consultation, or to fully assess the potential impacts on Aboriginal Title and Rights. The JRP will conduct an environmental assessment under the *Canadian Environmental Assessment Act* (the "*CEA Act*"), which limits this assessment to impacts on current First Nations land uses and cultural heritage,[1] not the full scope of potentially affected Aboriginal Rights. While the Crown has indicated that the Canadian Environmental Assessment Agency will deal with any left-over consultation on matters falling outside of the scope of the JRP, there is no indication that a formal process will be put into place to comprehensively review the wider questions of impacts on Aboriginal Title and Rights. The *Brokenhead Ojibway* decision may lend support, alongside the decision in *Dene Tha'*, to the position that the JRP is an inappropriate vehicle to rely on for consultation and that a robust, separate Crown consultation process may be required.

The decision does not shed much additional light on whether a First Nation should engage in a consultation process that it considers inadequate. The court indicated that: "First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief" *provided "*that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way" (para. 42). Although the court notes that the Crown did not answer or even acknowledge Treaty One's diligent attempts to directly engage the federal Crown in "a meaningful consultation and accommodation" about the impacts of the pipelines on their rights, the court appears to have concluded that this conduct did not represent a failure of the Crown to meet its duties when considered in light of the whole record of consultation, including the NEB process. The fact that some nations (although not necessarily all of the litigants) did participate in discussions with the proponent, and/or the NEB process and that many of their site-specific concerns were apparently "well-received and largely resolved" contributed to the court's conclusion that the NEB process was adequate in this case (para. 26).

An additional point of interest in the decision is the extent to which the NEB, and the court, was content to allow the proponent companies' efforts to satisfy the requirements of consultation. The Supreme Court of Canada stated in *Haida Nation* that the Crown could delegate "procedural aspects of consultation" to project proponents while retaining the ultimate responsibility to consult. In this case, as the court found that the duty to consult was at the lowest possible level (the mere provision of notice), the proponent's consultation and mitigation appears to have been sufficient. It follows from the court's discussion of the regulatory process that on a project triggering a deeper duty to consult, the Crown will not be able to rely as heavily on the proponent's efforts to meet its duty.

Case name: *Brokenhead Ojibway Nation v. Canada (Attorney General)*
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[1]The *CEA Act* defines "environmental effect" as including effects of changes to "physical and cultural heritage" and "the current use of lands and resources for traditional purposes by aboriginal persons."