Aboriginal Law Update

Northern Gateway: BC Supreme Court Rules that British Columbia Must Issue its Own EA Decision and Consult First Nations

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In *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34, the court decided British Columbia must issue its own environmental decision and consult First Nations on the Northern Gateway Project (NGP), instead of deferring to the federal review and consultation. This decision has profound implications for reconciling provincial and federal jurisdiction over the environmental review of interprovincial projects, and the related Crown duty to consult affected First Nations. While the decision casts more uncertainty over the NGP, it also affects any resource development project that involves a harmonized federal/provincial review.

Background

At the centre of the case was the 2010 Equivalency Agreement (Agreement) that the British Columbia Environmental Assessment Office (EAO) entered into with the National Energy Board (NEB). The EAO agreed that the NEB (federal) review "constitutes an equivalent assessment" to a provincial assessment under the BC *Environmental Assessment Act* (EAA). The Agreement stated that the NGP did not require assessment under the EAA and could proceed without an EAA certificate (EAC). The Agreement also allowed the EAO to terminate the agreement upon 30 days' notice but any approval given by the NEB before termination would remain in effect.

The NEB and the Canadian Environmental Assessment Agency formed a Joint Review Panel (JRP) in 2010. The JRP undertook the federal review and issued its report in December 2013. The federal cabinet issued its decision and order on June 17, 2014, accepting the project and directing the NEB to issue a Certificate of Public Convenience and Necessity (CPCN). The NEB issued the CPCN with its 209 conditions on June, 18 2014.

The EAO relied on the Agreement and did not assess the NGP under the EAA. The Province participated in the federal JRP review and took the position that the NGP must meet five conditions before the Province would support the NGP. The Coastal First Nations also participated in the JRP review and opposed the NGP.

Court Decision

The court concluded that the Agreement could not relieve the Province of its obligation to issue a decision under the *Environmental Assessment Act*, and the related duty to consult affected First Nations. To reach this conclusion, the court's analysis touched on several broad themes.

Reconciling Federal and Provincial Jurisdiction Over Interprovincial Projects

Enbridge argued the NGP was an interprovincial undertaking, and therefore the approval power fell within the exclusive jurisdiction of the federal government.

The court decided several aspects of the constitutional question were premature. Since the Province had not yet issued an EAC, the court has no factual basis to assess how the constitutional law doctrines of inter-jurisdictional immunity and paramountcy might apply to reconcile a provincial EAC and its conditions with federal jurisdiction.

The court decided the only relevant constitutional analysis at this stage relates to the validity of s 17 of the EAA and its application to the interprovincial NGP. The court concluded the "dominant characteristic" of the EAA is the regulation of environmental effects in the Province, which is within the jurisdiction of the Province.[1] Any secondary incidental effects on the federal undertaking does not invalidate the EAA jurisdiction.

The court distinguished the analysis of jurisdiction related to the NGP from the analysis of other interprovincial undertakings, such as aviation and telecommunications. Disallowing provincial jurisdiction would "significantly limit the Province's ability to protect social, cultural, and economic interests in its lands and waters".[2]

While the court agreed that the Province could not refuse to issue an EAC, it nonetheless has the constitutional right to regulate the "territorial environmental impacts" of the interprovincial undertaking.[3] The application of the EAA to the NGP does not necessarily render the federal jurisdiction inoperable. The court held the EAA may apply to the NGP in accordance with the constitutional analysis established in the *Canadian Western Bank* case, which favours cooperative federalism where possible.[4]

The court viewed the federal approval as permissive since the NGP may proceed so long as the 209 conditions are met. The court decided the Province may add further conditions to an EAC that narrow the scope of the federal approval and its conditions, while maintaining the overall permissive nature of the EAC.[5] The court agreed there are limits to the conditions the Province may impose but decided the analysis of whether an EAC condition amounts to "impairment" or "operational conflict" with the federal approval must wait until the Province issues an EAC and specifies the conditions.[6]

Harmonizing Federal and Provincial Environmental Assessment

The court decided sections 27 and 28 of the EAA allow the EAO to rely on the federal assessment but not the federal decision. The Agreement was invalid to the extent it purported to remove the need for an EAC for the Project and a decision under section 17 of the EAA (even though court concluded the Province may not refuse to issue an EAC).

The court found the Legislature intended for the Province to maintain its decision-making authority for projects that may have a significant adverse effect.7 Otherwise, the Agreement would constitute a "blanket pre-approval" on all projects falling within the scope of the Agreement, which would leave no possible method for the Province to make enforceable conditions after the federal environmental assessment is complete.

Duty to Consult - Federal and Provincial Role

The court held the Province did not breach its duty to consult the First Nations before signing the Agreement in 2010. The court stated the Province is entitled to enter into these kinds of equivalency agreements without the need for consultation. The court did, however, find the Province breached its duty by failing to consult with the Coastal First Nations and the Gitga'at First Nation between December 2013 and June 2014, when it knew that the Province's concerns about the NGP – which were shared by the First Nations – had not been substantially addressed and the Province could have terminated the Agreement. Once the federal approval was issued in June 2014, the failure of the Province crystalized since it was too late to terminate the Agreement.

Implications for Cooperative Federalism

The court carved out a limited role for British Columbia to assess and decide on the NGP, an interprovincial pipeline that has been approved by the NEB. The Province may not refuse to issue an EAC, but it may impose conditions on the NGP so long as those conditions do not "impair" or create an "operational conflict" with the federal approval. In effect, the Province is left to exercise a small fragment of its s 17 authority, with no clear guidance on how to do so.

It is unclear how the Province will exercise its limited role and achieve the delicate balance the court required. The court noted a "significant gap" between the federal approval conditions and the conditions the Province required for support. If this decision stands, the Province will be obliged to peel back some of the conditions it had established for the NGP when it issues an EAC for the NGP – a politically difficult outcome for the Province.

Since the court deferred its constitutional analysis of how an EAC with conditions can reconcile with the federal approval and its conditions, this decision has cast yet more uncertainty over the NGP. If the Province issues an EAC with conditions that have any real substance, then a second round of constitutional litigation is likely.

Further, the court's finding that the duty to consult may attach to a Crown's failure to terminate a federal-provincial cooperation agreement is a novel and troublesome expansion of the consultation trigger outlined in the *Haida* case. The duty is now being attached to inaction by the Crown, rather than "contemplated conduct". Determining the event that triggers the duty to consult based on Crown inaction is fraught with challenges and opens the door to a new line of duty to consult claims.

In this case, the court thought the duty to consult arose when the Province knew that its concerns about the NGP had not been substantially addressed. This trigger is unworkable since it is vague and the Province could only know that its concerns were not addressed when the NEB rendered its decision, at which point the termination of the Agreement is too late. In effect, the court is saying the Province must anticipate the outcome of the NEB without letting the agreed equivalent review process run its course. That approach is not in the spirit of cooperative federalism.

If you have any questions about how this decision may affect you or your business, please contact David Bursey, Radha Curpen or Venetia Whiting.

Notes

1. At para 53, citing *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para 64.
2. At para 53.
3. At para 56.
4. At para 53, and at paras 197 and 198 citing *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
5. At para. 72.
6. At para. 74.
7. Pursuant to section 17(3) of the Act.

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