

Case Brief – Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34

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The British Columbia Supreme Court (the “Court”) recently ruled in favour of Coastal First Nations (“CFN”) in a case concerning the role of the Province of British Columbia (the “Province”) in the environmental review process for Enbridge’s Northern Gateway Pipeline project (the “Project”).¹ Coastal First Nations, a provincial incorporated society representing eight First Nations, brought claims against the Province and Northern Gateway Pipeline (the “NGP”).

The Court determined that the Province must not abdicate its capacity to meaningfully engage in the review process for the Project despite it being an interprovincial undertaking. It further held that the Province must maintain its ability to meaningfully consult and accommodate with the CFN by retaining the authority to impose conditions on the Project.

Background

The case concerned an Equivalency Agreement (the “Agreement”) made pursuant to s. 17 of the Environmental Assessment Act (“EAA”) between the Province and the National Energy Board (the “NEB”). The Agreement permitted the Province to abdicate its authority to the federal government to evaluate and approve or deny a project. The Agreement also eliminated the requirement for an Environmental Assessment Certificate (“EAC”) for all reviewable projects requiring both federal and provincial approval.

The Agreement first came under review before a Joint Review Panel (“JRP”). The Province, participating as an intervenor, set out five recommendations as minimum requirements before it would consider supporting the Project. The Province ultimately protested the Project on the grounds that evidence showed that the NGP would not have a “world-class spill response capability in place.”² In spite of this objection, the Province decided not to exercise its power to unilaterally terminate the Agreement.

On July 17, 2014, the federal government approved the Project, having implemented only one of the Province’s five recommendations.

¹ *Coastal First Nations v British Columbia (Environment)*, (2016) BCSC 34.

² *Ibid*, para 38.

The Issues

CFN challenged the validity of the Agreement, arguing that: 1. British Columbia was not entitled to abdicate its decision-making authority and responsibility under the EAA; and 2. the Minister of Environment had a duty to consult with First Nations before entering into the Agreement as well as before deciding not to terminate the Agreement.³

The Province argued that the internal structure of the EAA allowed the Executive Director to exempt certain projects from obtaining an EAC. The Province further argued that the duty to consult could be satisfied by either level of government. In this case, the duty was discharged through the JRP.⁴

NGP took the position that provincial environmental assessment regimes that interfere with the construction and operation of interprovincial undertakings are unconstitutional. Accordingly, the decision to approve or not to approve the Project fell exclusively within federal jurisdiction.⁵

The Decision

Duty to Consult

The Court rejected CFN's assertion that the Province had a duty to consult before entering into the Agreement, but found that the Province had a duty to consult with the CFN before deciding not to terminate the Agreement.⁶ The Province failed to discharge this duty, thereby breaching the honour of the Crown. The Court reiterated that although the Crown is indivisible when it comes to the concept of the honour of the Crown, "in this case, where environmental jurisdictions overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate."⁷ The Court noted that the Province was aware of the concerns of the First Nations with respect to the Project – concerns that largely coincided with those expressed by the Province at the JRP.

The Court held that it was not enough that the Province expressed their concern over the Project at the JRP. The Court stated that "consultation does not mean explaining, however fulsome, however respectfully, what actions the government is going to take that may or may not ameliorate potential adverse effects."⁸ The Supreme Court of Canada has rejected this

³ *Ibid*, paras 6-7.

⁴ *Ibid*, paras 10-11.

⁵ *Ibid*, paras 15-16.

⁶ *Ibid*, paras 204, 213.

⁷ *Ibid*, para 196.

⁸ *Ibid*, para 209.

paternalistic approach to consultation and accommodation. Instead, maintaining the honour of the Crown requires that First Nations be consulted as policy decisions are being developed.⁹

The Court further noted that by placing itself in a position where it could do no more than ask the federal government or the NGP to do more to protect its First Nations, the Province gave up its ability to give effect to its duty to consult.¹⁰

Jurisdiction

The Court rejected NGP's argument that the EAA could not apply to the Project because the Project fell exclusively within federal jurisdiction. The Court held that while the Province was not entitled to reject the project, it could impose additional conditions. The Court stated:

To disallow any provincial environmental regulation over the Project because it engages a federal undertaking would significantly limit the Province's ability to protect social, cultural, and economic interests in its lands and waters. It would also go against the current trend in the jurisprudence favouring, where possible, cooperative federalism.¹¹

At the same time, the Court acknowledged the possibility that constitutional issues could present themselves where the Province did impose conditions. However, the constitutionality of such an imposition could not be assessed until those conditions were put forward.

Validity of the Agreement

In interpreting the EAA, the Court found that the Agreement between the Province and the NEB was invalid to the extent that it removed the need for an EAC for a reviewable project. The Court recognized that the EAA granted the Province broad discretion to enter into agreements related to environmental assessments. However, the Court determined that it could not have been the legislators' intention to remove the Province's involvement when the objective of the EAA is to promote economic interest in and the environmental protection of the province.¹²

Why This Case Matters

This case has implications for all projects that fall under the Agreement. The Court made clear that the Province maintains complete discretion under s. 17 of the EAA to decide whether or not to order an EAC for these projects. However, the Court clarified that the Province must preserve its capacity to meaningfully engage in the review process for interprovincial undertakings.

⁹ *Ibid.*

¹⁰ *Ibid.*, para 210.

¹¹ *Ibid.*, para 53.

¹² *Ibid.*, para 178.

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Further, the Province cannot abdicate its constitutional duty to consult and accommodate to the federal government with regard to interjurisdictional undertakings flowing from the Agreement. Instead, the Province must maintain the capacity to meaningfully consult and accommodate by retaining the authority to impose conditions on interjurisdictional undertakings. Meaningful consultation requires engagement with First Nations at the policy level.