

Case Brief – *Sapotaweyak Cree Nation et al v Manitoba*, 2015 MBQB 35

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In *Sapotaweyak Cree Nation et al. v. Manitoba*, the Manitoba Court of Queen’s Bench (the “Court”) dismissed an application by the Sapotaweyak Cree Nation (“SCN”) for an interlocutory injunction requiring Manitoba and Manitoba Hydro (“Hydro”) to stop or refrain from cutting certain forested areas for construction of a transmission line before the duty to consult and accommodate had been discharged, and until Hydro complied with the specifics set out in the License.

Background

The transmission line crossed the traditional territory of the First Nation over approximately 11.2 square kilometers of Crown land and approximately 2 square kilometers of privately owned land.

The SCN took the position that Hydro was controlled by Manitoba and therefore shared the constitutional duty to consult. The First Nation alleged that neither had carried out meaningful consultation, and sought a declaration that both have “a duty to consult, grounded in the honour of the Crown”¹. The First Nation also sought an order requiring Manitoba to fulfill its consultative obligations prior to permitting Hydro to proceed with the transmission line, and to consult on the development of a Crown consultation policy and proper funding guidelines as reasonably necessary for the First Nation to “meaningfully participate” in the consultation process.

Hydro took the position that it was not “of the Crown”, that its powers flow from the statute that created it, and that there was no specific delegation by the Crown of the duty to consult. Hydro nonetheless engaged with Aboriginal groups through workshops, open houses, meetings, and Aboriginal Traditional Knowledge reports beginning in 2010.

The SCN sought an interlocutory injunction to prevent Manitoba and Hydro from clearing and cutting areas within the “northern section four” land until the Court was satisfied that adequate consultation and accommodation had occurred. Parties agreed that the First Nation was required to meet the test as set out in *RJR-MacDonald*²: (1) a serious issue to be tried; (2) irreparable harm if the interlocutory injunction is not granted; and (3) the balance of convenience favoured the granting of the injunction.

¹ *Sapotaweyak Cree Nation et al v Manitoba*, 2015 MBQB 35.

² *Ibid* at 1.

Decision

The Court held that Manitoba had fulfilled the duty to consult, and that Hydro did not hold a separate and distinct obligation. The Court further held that there was no specific delegation of the duty, and that the *Rio Tinto*³ Supreme Court case didn't apply due to distinguishable facts. As such, there was no serious issue raised. The Court also held that Hydro had fulfilled its License requirements. The Court observed that the public had been notified that it could challenge the issuance of the License, and that six entities raised challenges. The First Nation failed to avail itself of this opportunity. Regardless, the Court held that the First Nation had no standing as a third party to enforce the License between Manitoba and Hydro. The Court further held that the balance of convenience weighed in favour of refusing the injunction.

On the issue of funding the Court reviewed the measures taken by Hydro to provide funding and involve the First Nation in the process. The Court noted that the First Nation and Manitoba signed a funding agreement in January 2012, and that a sum of \$210,000 was either paid to or made available to the First Nation for this purpose. The Court found that the First Nation had not complied with the reporting requirements of the funding agreement, and had deprived itself of some of the funding. Bryk J. commented on the reciprocal duty of First Nations in the consultation process:

There is a reciprocal duty that attaches to First Nations during the process of consultation where the Honour of the Crown gives rise to a duty to consult. That reciprocal duty to “bring forward” requires First Nations and communities to constructively furnish relevant information and to do so in a clear and focused way during the consultation process. In this way, the government in question is assisted in being able to share information and, in turn, respond to its duty to reconcile and accommodate the interests and concerns raised.⁴

Finally, the Court found that the First Nation erred by referring to irreparable harm in general rather than specific terms; each alleged breach of right or culturally significant site must be specifically identified. Since Manitoba had discharged its duty to consult, the Court rejected the First Nation's argument that the loss of opportunity to engage in consultation was itself sufficient to establish irreparable

³ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.

⁴ *Ibid* at 204.