Federal Court  Cour fédérale

Date: 20090512

Dockets: T-225-08
T-921-08
T-925-08

Citation: 2009 FC 484

Ottawa, Ontario, May 12, 2009

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-225-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION, PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
TRANSCANADA KEYSTONE PIPELINE GP LTD.

Respondents

Docket: T-921-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION,

PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and
ENBRIDGE PIPELINES INC.**

Respondents

T-925-08

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION, PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

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**THE ATTORNEY GENERAL OF CANADA,
THE NATIONAL ENERGY BOARD
and**

ENBRIDGE PIPELINES INC.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are the seven First Nations who are the successors to those Ojibway First Nations who entered into what is known as Treaty One with the federal Crown on August 3, 1871[1]. They are today organized collectively as the Treaty One First Nations and they assert

[1] Treaty One was the first of several treaties entered into from 1871 to 1877 between the federal Crown and the First Nations peoples who then occupied much of the lands of the southern prairies and the south-western corner of what is now Ontario.

treaty, treaty-protected inherent rights and indigenous cultural rights over a wide expanse of land in southern Manitoba. By these applications the Treaty One First Nations seek declaratory and other prerogative relief against the Respondents in connection with three decisions of the Governor in Council (GIC) to approve the issuance by the National Energy Board (NEB) of Certificates of Public Convenience and Necessity for the construction respectively of the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project (collectively, "the Pipeline Projects"). All of the Pipeline Projects involve the use or taking up of land in southern Manitoba for pipeline construction by the corporate Respondents. Because the material facts and the legal principles that apply are the same for all three of the decisions under review, it is appropriate to issue a single set of reasons.

I. Regulatory Background

The Keystone Pipeline Project

[2] On December 12, 2006 TransCanada Keystone Pipeline GP Ltd. (Keystone) applied to the NEB for approvals related to the construction and operation of the Keystone Pipeline Project (the Keystone Project).

[3] The Keystone Project consists of a 1235 kilometer pipeline running from Hardisty, Alberta to a location near Haskett, Manitoba on the Canada-United States border. In Manitoba all new pipeline construction is on privately owned land with the balance of 258 kilometers running over existing rights-of-way (including 4 kilometers on leased Crown land and 2 kilometers on unoccupied Crown land). The width of the permanent easement in Manitoba is 20 metres and the pipeline is buried.

[4] During its hearings, the NEB considered submissions from Standing Buffalo First Nation near Fort Qu'Appelle, Saskatchewan and from five First Nations in southern Manitoba known collectively as the Dakota Nations of Manitoba. Keystone also engaged a number of Aboriginal communities located within 50 kilometers of the pipeline right-of-way including Long Plain First Nation, Swan Lake First Nation and the Roseau River Anishinabe First Nation.

[5] In its Reasons for Decision dated September 6, 2007 the NEB approved the Keystone Project subject to conditions. Included in those reasons are the following findings concerning project impacts on Aboriginal peoples:

> Although discussions with Standing Buffalo and the Dakota Nations of Manitoba began somewhat later than they could have, overall, the Board is satisfied that Keystone meaningfully engaged Aboriginal groups potentially impacted by the Project. Aboriginal groups were provided with details of the Project as well as an opportunity to express their concerns to Keystone regarding Project impacts. Keystone considered the concerns and made Project modifications where appropriate. Keystone also worked within established agreements which TransCanada had with Aboriginal groups in the area of the Project and persisted in its attempts to engage certain Aboriginal groups. The Board is also satisfied that Keystone has committed to ongoing consultation through TransCanada.
>
> The evidence before the Board is that TransCanada, on behalf of Keystone, was not aware that Standing Buffalo and the Dakota Nations of Manitoba had asserted claims to land in the Project area. The Board is of the view that, since TransCanada has a long history of working in the area of the Keystone Project, it should have known or could have done more due diligence to determine claims that may exist in the area of the Keystone Project. The Board acknowledges that as soon as Keystone became aware that Standing Buffalo and the Dakota Nations of Manitoba had an interest in the Project area, it did take action and initiated consultation activities. The Board further notes that consultation with Carry the Kettle and Treaty 4 was based upon TransCanada's established protocol agreements and that Keystone is willing to establish similar agreements and work plans with other Aboriginal groups, including Standing Buffalo and the Dakota Nations of Manitoba.

Once an application is filed, all interested parties, including Aboriginal persons, have the opportunity to participate in the Board's processes to make their views known so they can be factored into the decision-making. With respect to the Keystone Project, the Board notes that Standing Buffalo and the Dakota Nations of Manitoba took the opportunity to participate in the proceeding and the Board undertook efforts to facilitate their application. The Board agreed to late filings by Standing Buffalo and the Elders had an opportunity to provide oral testimony in their own language at the hearing. In addition, the Board held two hearing days in Regina to facilitate the participation of Standing Buffalo and was prepared to consider hearing time in Winnipeg for the benefit of the Dakota Nations of Manitoba. The Board notes it undertook to ensure it understood the concerns of Standing Buffalo by hearing the testimony of the Elders, making an Information Request and asking questions at the hearing.

The Board is satisfied that Standing Buffalo and the Dakota Nations of Manitoba were provided with an opportunity to participate fully in its process and to bring to the Board's attention all their concerns. The hearing process provided all parties with a forum in which they could receive further information, were able to question and challenge the evidence put forward by the parties, and present their own views and concerns with respect to the Keystone Project. Standing Buffalo and the Dakota Nations of Manitoba had the opportunity to present evidence, including any evidence of potential infringement the Project could have on their rights and interests. The Dakota Nations of Manitoba did not provide evidence at the hearing.

Standing Buffalo filed affidavit evidence and gave oral evidence at the hearing, which was carefully considered by the Board in the decision-making process. Standing Buffalo also suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. In the Board's view, the evidence on this point is too speculative to warrant the Board's consideration of it as an impact given there are Crown lands available for selection and private lands available for purchase within the traditional territory claimed by Standing Buffalo.

It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board.

Standing Buffalo presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW. The

> Board notes Keystone's commitment to discuss with Standing Buffalo the potential for the Project to impact sacred sites, develop a work plan and incorporate mitigation to address specific impacts to sacred sites into its Environment Protection Plan. The Board would encourage Standing Buffalo to bring to the attention of TransCanada its concerns with respect to impacts to sacred sites from existing projects and to involve their Elders in these discussions.
>
> The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.
>
> With respect to the request by the Dakota Nations of Manitoba for additional conditions, the Board notes that Keystone and the Dakota Nations of Manitoba have initiated consultations and that both parties have committed to continue these discussions. In addition, the Board notes Keystone's commitment to address concerns that are raised through all its ongoing consultation activities and its interest in developing agreements and work plans with Aboriginal groups in the area of the Project. The Board strongly supports the development of such arrangements and encourages project proponents to build relationships with Aboriginal groups with interests in the area of their projects. Given the commitments both parties have made to ongoing dialogue, the Board does not see a need to impose the conditions as outlined.

[6] On the recommendation of the NEB the GIC issued Order in Council No. P.C. 2007-1786 dated November 22, 2007 approving the issuance of a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Keystone Project. This is the decision which is the subject of the Applicants' claim for relief in T-225-08.

The Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project

[7] In March 2007 and May 2007 respectively, Enbridge applied to the NEB for approval of the Southern Lights Pipeline Project (Southern Lights Project) and the Alberta Clipper Pipeline Expansion Project (Alberta Clipper Project). These two projects are related. The Alberta Clipper

Project consists of 1078 kilometers of new oil pipeline beginning at Hardisty, Alberta and ending at the Canada-United States border near Gretna, Manitoba.

[8] The Southern Lights Project uses the same corridor as the Alberta Clipper Project. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land[2].

[9] The record discloses that Enbridge consulted widely with interested Aboriginal communities about their project concerns. This included communities located within an 80-kilometer radius of the pipeline right-of-way and, where other interest was expressed, beyond that limit. There were discussions with Long Plain First Nation, Swan Lake First Nation, Roseau River Anishinabe First Nation and collectively with the Treaty One First Nations. Enbridge also provided funding to the Treaty One First Nations to facilitate the consultation process.

[10] Furthermore, the NEB received representations from interested Aboriginal parties during its hearings. This included discussions with Standing Buffalo First Nation, the Dakota Nations of Manitoba, Roseau River Anishinabe First Nation and Peepeekisis First Nation. Among other concerns, Standing Buffalo raised the issue of unresolved land claims which the NEB characterized as follows:

> Chief Redman stated in his written evidence that Standing Buffalo has been involved in extensive meetings with the Government of Canada and the Office of the Treaty Commissioner regarding outstanding issues concerning unextinguished Aboriginal title and governance rights of the Dakota/Lakota. Chief Redman also stated that there have been 70 meetings and yet the Government of Canada has not acknowledged its lawful obligation and continues to discriminate against Standing Buffalo regarding its lawful

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[2] See Affidavit of Lyle Neis sworn September 19, 2008 at paras. 6 to 9.

> obligations concerning Aboriginal title, sovereign rights and allyship status by failing to resolve these outstanding issues.
>
> Despite sending a number of letters to the Government of Canada "regarding the discussions with the Government of Canada concerning the Board interventions and how they relate to outstanding Dakota/Lakota issues," Chief Redman stated that he has received no response.
>
> Chief Redman alleges the consultation listed in the Applicants' evidence relates to the Alida to Cromer Capacity Expansion hearing and the Applicants and Canada have failed to consult Standing Buffalo in breach of lawful obligation to the First Nation. He stated that the route of the pipeline is through traditional territories of Standing Buffalo and suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. Standing Buffalo also presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW for the Project.

[11] The NEB's Reasons for Decision by which it approved the Alberta Clipper Project include the following findings:

> In the case of the Project, the Board notes that fourteen Aboriginal groups participated in various ways in the proceeding. The Board is satisfied that the Aboriginal groups were provided with an opportunity to participate fully in its process, and bring their concerns to the Board's attention.
>
> A number of Aboriginal intervenors expressed concerns regarding how the proposed Project could impact undiscovered historical, archaeological and sacred burial sites. The Board notes Enbridge's commitments to work with Aboriginal communities in the event that such sites are discovered and the implementation of a Heritage Resource Discovery Contingency Plan which includes specific procedures for the discovery and protection of archaeological, palaeontological and historical sites including the evaluation and implementation of appropriate mitigation measures. The Board also notes Enbridge's decision to route the pipeline path to avoid the Thornhill Burial Mounds site. However, in view of the importance of these sites, should the Project be approved, the Board would include a condition to direct Enbridge to immediately cease all work in the area of any archaeological discoveries and to contact the responsible provincial authorities. This would ensure the protection

> and proper handling of any archaeological discoveries and potential impacts to traditional use. If the Project were to be approved, the Board would also direct Enbridge to file with the Board, and make available on its website, reports on its consultation with Aboriginal groups concerning the Thornhill Burial Mounds.
>
> In terms of the potential adverse impacts of the Project to current traditional use, the Board notes that there were suggestions of current traditional use over the proposed route, but no specific evidence was provided. The large majority of the facilities would be buried and would be completed within a short construction window and a large majority of the land required for the Project has been previously disturbed and is generally privately owned and used for agricultural purposes. In view of these facts and Enbridge's commitment to ongoing consultation with Aboriginal people throughout the life cycle of the Project, the Board is of the view that potential Project impacts to Aboriginal interests, particularly with regard to traditional use over the RoW would be minimal and would be appropriately mitigated. The Board is satisfied that ongoing discussions between the Applicant and Aboriginal people, together with the Heritage Resource Discovery Contingency Plan, would minimize potential impacts to traditional use sites, if encountered.
>
> The Board considers that Enbridge's Aboriginal engagement program was appropriate to the nature and scope of the Project. In view of Enbridge's demonstrated understanding that Aboriginal engagement is an ongoing process, its commitments and the proposed conditions, the Board finds that Enbridge's Aboriginal engagement program would fulfill the consultation requirements for Alberta Clipper.

[12] The NEB's findings concerning the impact of the Southern Lights Project on Aboriginal peoples included the following:

> The Applicants indicated that they were not aware of any potential impacts on Aboriginal interests that had not been identified in the Southern Lights applications or subsequent filings. The Applicants submitted that, in the event that there are more interests that are identified that may be impacted, they would meet with the Aboriginal organization or community that has identified an interest and work with that community to jointly develop a course of action.
>
> The Board is of the view that those Aboriginal people with an interest in the Southern Lights applications were provided with the details of the Project and were given the opportunity to make their

> views known to the Board in a timely manner so that they could be factored into the decision-making process.
>
> Further, the Board is of the view that the Applicants' consultation program was effective in identifying the impacts of the Project on Aboriginal people.
>
> The Project would involve a relatively brief window of construction, with the vast majority of the facilities being buried. As almost all the lands required for the Project are previously disturbed, are generally privately owned, are used primarily for agricultural purposes and are adjacent to an existing pipeline RoW, the Board is of the view that potential Project impacts on Aboriginal interests could be appropriately mitigated. The Board is therefore of the view that impacts on Aboriginal interests are likely to be minimal.

[13] On the recommendation of the NEB the GIC issued Order in Council Nos. P.C. 2008-856 and P.C. 2008-857, both dated May 8, 2008, approving the issuance of Certificates of Public Convenience and Necessity authorizing the construction and operation respectively of the Southern Lights Project and the Alberta Clipper Project. These are the decisions which are the subject of the Applicants' claims for relief in T-921-08 and in T-925-08.

[14] In 2006 and 2007 the Treaty One First Nations attempted to directly engage the federal Crown in "a meaningful consultation and accommodation" concerning the Pipeline Projects and their impact upon their "constitutionally protected Aboriginal and Treaty rights and title" but those efforts were ignored.

II. Issues

[15] It is the position of the Treaty One First Nations in these proceedings that the federal Crown failed to fulfill its legal obligations of consultation and accommodation before granting the necessary approvals for the construction of the Pipeline Projects in their traditional territory.

Although the Treaty One First Nations acknowledge that the corporate Respondents and the NEB have engaged in consultations in connection with the Pipeline Projects and have accommodated some of their concerns, those efforts they say, are not a substitute for the larger obligations of the Crown. Indeed, while the NEB and the corporate Respondents appear to have been quite attentive to the remediation of Aboriginal construction or project-related concerns, they acknowledge an inability to resolve outstanding land claims[3].

[16] At the root of these proceedings is the issue of the Treaty One First Nations' outstanding land claims in southern Manitoba. The primary issue before the Court is whether the Pipeline Projects have 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. If a duty to consult was engaged, the Court must also determine its content and consider whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown.

III. Analysis

Standard of Review

[17] With respect to the issue of the standard of review that applies in these proceedings, I would adopt the view of my colleague Justice Danièle Tremblay-Lamer in *Tzeachten First Nation v. Canada (Attorney General),* 2008 FC 928, 297 D.L.R. (4th) 300 at paras. 23-24:

> 23 In *Ka'a'Gee Tu First Nation v. Canada (Attorney General),* 2007 FC 763, 315 F.T.R. 178 at paras. 91-93, my colleague Justice Edmond Blanchard, following the general principles espoused in *Haida Nation v. British Columbia (Minister of Forests),*

[3] The NEB Reasons for Decision by which the Keystone Pipeline Project was approved clearly acknowledge this limitation in the following passage: "It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board." The same limitation was noted by the Federal Court of Appeal in *Standing Buffalo Dakota First Nation et al. v. Canada and Enbridge,* 2008 FCA 222 at para. 15.

> 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63, indicated that a question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to consult and accommodate is reviewable on the standard of reasonableness.
>
> 24 Accordingly, when it falls to determine whether the duty to consult is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

Also see: *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at paras. 33 and 34.

[18] In the result the question of the existence and content of a Crown duty to consult in this case will be assessed on the basis of correctness. The question of whether any such duty or duties were discharged by the Crown will be determined on a standard of reasonableness.

To What Extent Was the Crown on Notice of the Applicants' Concerns?

[19] The Crown makes the preliminary point that much of the evidence tendered in this proceeding to establish a foundation for the asserted duty to consult was not placed before the GIC by the Treaty One First Nations. While that is true, the GIC was made aware and must be taken to have known of the Treaty One First Nations' primary concern that the Pipeline Projects traversed land that was at one time within their traditional territory and, as well, that the Treaty One First Nations have asserted a long-standing claim to additional land in southern Manitoba. In addition,

the Crown is always presumed to know the content of its treaties: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 34.

[20] The record before me establishes very clearly that the Treaty One First Nations diligently attempted to directly engage the Crown in a dialogue about the impact of the Pipeline Projects on their unresolved treaty claims. Over several months in 2007 letters were sent from Treaty One First Nations' Chiefs to the Prime Minister, to the Minister of Indian Affairs, to other Ministers, and to the Secretary to the GIC seeking consultation, but their letters were never answered even to the extent of a simple acknowledgement. The frustration engendered by the Crown's refusal to open a dialogue with the Treaty One First Nations prior to the commencement of this litigation is reflected in the following passage from the affidavit of Chief Dennis Meeches of the Long Plain First Nation Reserve:

> 38. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the Crown has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.
>
> 39. I have no doubt that throughout all this time, the federal government, acting on behalf of the crown, has been aware of the existence of my First Nation's rights, title, and interests in the (*sic)* our traditional territory. I have brought this to the attention of federal ministers and the Canadian public many times over the years, and particularly in relation to the proposed construction of pipelines through our Territory.
>
> 40. The events in this process regarding consultation on pipeline construction have added to my serious concerns about the Federal Government's respect for me, our First Nation, my people, and our Treaty. We raised concerns about the pipelines crossing our territory and our rights, title, and interest being affected. We asked to be consulted about these matters, we told the government we would suffer serious adverse effects if the pipelines were constructed without

> accommodating our interests and rights. We warned that if the pipelines proceeded without our being consulted, we would have no alternative except to appeal to the Courts for relief, and that this could cause unfortunate delays with the potential to cause damages for the companies involved and the Canadian economy in general. Nonetheless the federal Ministers have ignored us to this day, and with respect to the Keystone pipeline, made their decision without any consultation whatsoever. I feel frustrated, angry, saddened and disappointed about being ignored and treated this way.

To the extent noted above the GIC was well aware of the Treaty One First Nations' broad concerns about the potential impact of the Pipeline Projects. From the NEB Reasons for Decision issued in connection with the Pipeline Projects, the GIC was also aware of the specific concerns of the Aboriginal peoples who were either consulted or who made representations at the NEB hearings. Against this evidentiary background, it is disingenuous for the Crown to assert that it was unaware of the concerns raised by the Treaty One First Nations in these proceedings. The evidence the Crown objects to adds nothing of significance to what it already knew or would be taken to have understood.

Duty to Consult – Legal Principles

[21] For the sake of argument, I am prepared to accept that an approval given by the GIC under s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act) may, in an appropriate context, be open to judicial review in accordance with the test established in *Thorne's Hardware Ltd. v. Canada*, [1983] 1 S.C.R. 106, [1983] S.C.J. No. 10 on the basis of a failure to consult. It is enough for present purposes to say that where a duty to consult arises in connection with projects such as these it must be fulfilled at some point before the GIC has given its final approval for the issuance of a Certificate of Public Convenience and Necessity by the NEB.

[22] The Crown's duties to consult and accommodate were thoroughly discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and in *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74, [2004] 3 S.C.R. 550. More recently in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, [2007] F.C.J. No. 1006, Justice Edmond Blanchard provided the following helpful summary of those and other relevant authorities:

> 94 The duty to consult was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075). In more recent cases, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida*, supra; *Taku*, supra, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71).
>
> 95 In *Haida*, Chief Justice McLachlin sets out the circumstances which give rise to the duty to consult. At paragraph 35 of the reasons for decision, she wrote:
>
> > But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see Halfway River First Nation v. British Columbia (Minister of Forests), [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, per Dorgan J.
>
> 96 For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated conduct might adversely affect those rights. While the facts in *Haida* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

97 While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances. Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida*, the Chief Justice wrote:

> ...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

98 At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. '"[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established,

> the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision- making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> 99 The kind of duty and level of consultation will therefore vary in different circumstances.

[23] These are the general principles by which the issues raised in these proceeding must be determined. Of particular importance in this case is the principle that the content of the duty to consult with First Nations is proportionate to both the potential strength of the claim or right asserted and the anticipated impact of a development or project on those asserted interests.

Was a Duty to Consult Engaged and, if so, Was that Obligation Fulfilled?

[24] I do not intend nor do I need to determine the validity of the Treaty One First Nations' outstanding treaty claims and on a historical and evidentiary record as limited as this one, it would be inappropriate to do so: see *Ka'a'Gee,* above, at para. 107. Suffice it to say that I do not agree with Enbridge when it states that "Treaty One is clear on its terms that the Aboriginal parties cede all lands except those specifically set aside for reserves". The exercise of treaty interpretation is not constrained by a strict literal approach to the text or by rigid rules of construction. What the Court must look for is the natural common understanding of the parties at the time the treaty was entered into which may well be informed by evidence extraneous to the text: see *Mikisew,* above, at paras. 28-32. From the evidence before me there could well have been an understanding or expectation at the time of signing Treaty One that the First Nations' parties would continue to enjoy full access to unallocated land beyond the confines of the reserves, that additional reserve lands would be later made available and that further large scale immigrant encroachment on those lands was not contemplated. I am proceeding on the assumption, therefore, that the Applicants' claim to additional treaty lands and the right to continued traditional use of those lands within Manitoba is credible. The more significant issue presented by this case concerns the impact of the Pipeline Projects on the interests and claims asserted by the Treaty One First Nations and the extent to which those concerns were adequately addressed through the NEB regulatory processes.

[25] In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia*, 2005 BCSC

1712, 51 B.C.L.R. (4th) 133 at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

[26] 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 the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB (including, to some extent, the Treaty One First Nations) were well-received and largely resolved.

[27] These regulatory processes appear not to be designed, however, to address the larger issue of unresolved land claims. As already noted in these reasons, the NEB and the corporate Respondents have acknowledged that obvious limitation.

[28] From the perspective of the 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.

[29] 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.

[30] The fundamental problem with the claims advanced in these proceedings by the Treaty One First Nations 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. For example, the evidence is clear that the Alberta Clipper and Southern Lights projects will have negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba. The Southern Lights Pipeline uses the same corridor as the Alberta Clipper Pipeline. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land. With the exception of 700 meters of pipeline corridor crossing the Swan Lake Reserve (with that Band's consent) the Aboriginal representatives consulted by Enbridge indicated that the affected lands were not the subject of any land claim or the site of any traditional activity[4].

[31] Although Enbridge and the NEB did receive representations from Aboriginal leaders about specific impacts upon known and unidentified archaeological, sacred, historical, and paleontological

[4] See affidavit of Lyle Neis sworn September 19, 2008 at paras. 36-37.

sites, the record indicates that those concerns were considered and accommodated including, in one instance, the relocation of the right-of-way to protect a burial ground. The level of engagement between Enbridge and Aboriginal communities and Band Councils (including the Treaty One First Nations) was, in fact, extensive and quite thorough. The NEB findings in relation to the Aboriginal concerns raised before it are reasonably supported by the record before me and the Treaty One First Nations have not argued otherwise except to say that they do not necessarily agree.

[32] The NEB findings concerning the Keystone Pipeline were to the same general effect and are reasonably supported by the evidence in that record. In fact, the Treaty One First Nations do not dispute the NEB findings that the land affected by the Keystone Pipeline was almost all in private ownership and previously utilized for pipeline, agricultural and ranching purposes[5]. Once buried it is reasonable to conclude that this pipeline would have a minimal impact on the surrounding environment.

[33] The inability of the Treaty One First Nations to make a case for a substantial interference with a treaty or a traditional land use claim around these projects becomes evident from the affidavits they submitted. The affidavit of Chief Terrance Nelson offers one example of this at paras. 29-34:

> 29. We are located near the proposed pipeline, maybe 18 miles away. Our traditional community are very concerned that their culture, which involves the use of traditional herbs and medicines, will be affected by the pipeline. They are worried about spiritual aspects of having a pipeline running through the ground.

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[5] Paragraph 4 of the Applicants' Memorandum of Fact and Law in T-225-08 states: "While the lands required for the project are generally 'previously disturbed' agricultural lands and generally privately owned, the NEB determined that the project 'has the potential to adversely affect several components of the environment, as detailed in the ESR'". An almost identical passage is set out at para. 12 of the Applicants' Memorandum of Fact and Law in T-921-08.

> 30. The rivers are already quite polluted, and our people are concerned about further pollution if there would be a leak of the pipeline that would spread through the water ways in this low and flat area. There are tributaries of the Red River which flow south and then flow back north into Lake Winnipeg.
>
> 31. Our people do considerable hunting. There is a concern that the pipelines could affect animal migration, or that animals would abandon the area completely.
>
> 32. Our people have been in this are for centuries. There are numerous burial sites in the area. Our elders also know of sacred sites. Our people engage in many traditional activities throughout the year. They gather many herbs, and many plants are becoming very scarce and are at risk.
>
> 33. Our First Nation has no knowledge that at any time any Treaty One First Nation, including our own First Nation, has surrendered our Treaty, Treaty-protected inherent rights or title to our traditional territory within the boundaries of Treaty 1. Our only agreement was to share lands for "immigration and settlement".
>
> 34. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to consult with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the federal government, on behalf of the Crown, has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.

[34] I do not question that the above statements reflect a profoundly held concern not only of Chief Nelson but of others in the Manitoba Aboriginal community. The problem is that to establish a procedural breach around projects such as these there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately consult. The Treaty One First Nations are simply not correct when they assert in their evidence that a duty to consult is engaged whenever the Government of Canada

makes “any decision related to lands in our traditional territory inside the boundaries of Treaty 1”[6]. There is no at-large duty to consult that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown’s duty to consult.

[35] Moreover, in a number of respects, the arguments advanced by Treaty One First Nations for a duty to consult outside of the NEB process exceeded the scope of the evidence they adduced in support.

[36] For example, the Treaty One First Nations assert that, had the Crown engaged in a separate consultation, it would have been told that the Pipeline Projects would disrupt “their ongoing harvesting activities” and that they were also concerned about “environmental pollution”. The Treaty One First Nations also claim that they needed to be consulted about previously unidentified sacred or cultural sites which might have been threatened by the Pipeline Projects. At the same time they acknowledge that these were matters that were brought before the NEB or raised with the corporate Respondents and largely accommodated or mitigated. The advantage of a separate consultation with the Crown about such matters is not explained beyond making the point that where mitigation measures are adequate but unilaterally imposed there must still be a consultation to meet the goal of reconciliation. This argument effectively ignores the fact that the mitigatory measures adopted here by the NEB were not unilaterally created but were the product of an extensive dialogue with interested Aboriginal communities including some of the Treaty One First Nations.

[6] See affidavit of Chief Francine Meeches at para. 36.

[37] The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. 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 the GIC or some arguably relevant Ministry.

[38] The authorities relied upon by the Treaty One First Nations to support their separate argument for a duty to consult with respect to their land claims are distinguishable because each of those cases involved fresh impacts that were, to use the words of Justice Ian Binnie in *Mikisew*, above, “clear, established and demonstrably adverse” to the rights in issue. That cannot be fairly said of the relationship between the Pipeline Projects and the Treaty One First Nations’ land claims in this case where no meaningful linkage is apparent on the evidence before me.

[39] This is not a case like *Mikisew* where there was compelling evidence of injurious affection to the interests of local hunters and trappers notwithstanding the limited footprint of the proposed winter road. This is made clear at para. 55 of the decision:

> 55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how

> remote or unsubstantial the impact. The duty to consult is, as stated in Haida Nation, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

Even though the project considered in *Mikisew* involved direct and immediate interference with identified Aboriginal interests, the Court said that the Crown's consultation duty was at the lower end of the spectrum requiring notice to the Mikisew and the careful consideration of their concerns with a view to minimizing adverse impacts.

[40] The development that was of concern in *Taku*, above, similarly involved the construction of an access road. Although the road was said to represent a small intrusion relative to the size of the outstanding land claim it would nonetheless "pass through an area critical to the [Taku River First Nation's] domestic economy". This was held sufficient to trigger a duty to consult that was significantly deeper than minimum requirement. Because the environmental assessment for the road mandated consultation with affected Aboriginal peoples and because the Taku River First Nation was consulted throughout the certification process, the Crown's duty was found to have been met.

[41] In *Ka'a'Gee*, above, Justice Blanchard dealt with an application for judicial review from a decision by the federal Crown to approve an oil and gas development in the Northwest Territories. That project was extensive and involved the drilling of up to 50 wells, the excavation of 733 kilometers of seismic lines, the construction of temporary camps, the use of water from area lakes and the disposal of drill waste. Justice Blanchard found that the project would have significant and lasting impact on an area over which the affected First Nation asserted Aboriginal title and where

they carried out harvesting activity. This, he said, triggered a duty to consult that was higher than the minimum described in *Mikisew*. Up to a point, Justice Blanchard was satisfied that the comprehensive regulatory process was sufficient to fulfill the Crown's duty to consult. It was only when the Crown unilaterally modified the process and made fundamental changes to important recommendations that had come out of the earlier consultations that the duty to consult was found to have been breached.

[42] I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. 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. That is so because the consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht v. Canada*, 2008 FCA 212, [2008] F.C.J. No. 946 at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

[43] 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[7]. In the result, if the Crown had any duty to consult with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht v. Canada*, 2007 FC 567, [2007] F.C.J. No. 827 at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No 946 at para. 37.

[44] 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.

IV. Conclusion

[45] 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, to prove that the

[7] See para. 52 of the Applicants' Memorandum of Fact and Law in T-225-08.

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.

[46] These applications are, accordingly, dismissed. If any of the Respondents are seeking costs against the Applicants, I will receive further submissions in that regard. Any such submissions shall not exceed 5 pages in length and must be submitted within 7 days of this Judgment. I will then allow the Applicants an additional 10 days to respond with their own submissions which individually shall not exceed 5 pages in length.

JUDGMENT

THIS COURT ADJUDGES that these applications are dismissed with the matter of costs to be reserved pending further submissions, if any, from the parties.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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