

## Consultation and Accommodation Updates

### ***Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354; 2008 FCA 20**

Decision dates: November 10, 2006; January 17, 2008

This case affects the following chapters of EAGLE's "Nation to Nation: The Law of Consultation and Accommodation" materials: Chapter 4 (The Crown's Obligations to Consult and Accommodate) and Chapter 7 (Federal Government). The case addresses issues related to consultation.

This case involved a review of the proposed Mackenzie Valley Gas Pipeline (MGP), which would transport natural gas through the traditional lands of several First Nations, from Inuvik to metres south of the border between the Northwest Territories and Alberta. From there, another proposed pipeline would connect it with existing Alberta pipelines that distribute gas to the south (the "Connecting Facilities"). The southern portion of the MGP is planned to pass through the traditional and Treaty 8 lands of the Dene Tha' First Nation (the "DTFN"), areas in which the DTFN asserts Aboriginal and Treaty 8 rights.

#### **The Environmental and Regulatory Review Process**

A Joint Review Panel (the "JRP") conducts the environmental assessment of the MGP through collecting certain information and holding public hearings. The JRP hearings include a review of the environmental impacts of the portion of the MGP that would exist south of the Alberta border.<sup>1</sup> The JRP then produces a report for the National Energy Board (the "NEB"). After its own public hearings, the NEB decides whether or not to recommend the issuance of a "Certificate of Public Convenience and Necessity" (the "Certificate") allowing the project to occur. Ultimately, the federal Cabinet approves the issuance of the Certificate, or not.

Four important regulatory/environmental layers preceded the JRP hearings:

1. The *Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project through the Northwest Territories* (the "Cooperation Plan"),<sup>2</sup> which sets up the framework for the environmental and regulatory processes to follow, especially how they will be integrated, how joint hearings will occur and how to develop the terms of reference for any future environmental assessment process;

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<sup>1</sup> Including the Connecting Facilities.

<sup>2</sup> Development of the Cooperation Plan directly involved Indian and Northern Affairs Canada, the Canadian Environmental Assessment Agency, the NEB, the Mackenzie Valley Environmental Impact Review Board (the "MVEIRB"), the Mackenzie Valley Land and Water Board, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, the Inuvialuit Land Administration and the Inuvialuit Game Council. Representatives of the Yukon and Northwest Territories governments and the Deh Cho First Nation (through its delegate on MVEIRB) were observers to the negotiations. Gas producers and potential proponents of the MGP also met with the parties who developed the Cooperation Plan.

2. The *Agreement for Coordination of the Regulatory Review of the MGP* (the “Regulators’ Agreement”),<sup>3</sup> which implements the Cooperation Plan and ensures compliance with relevant legislation;
3. The *Agreement for an Environmental Review of the MGP* (the “JRP Agreement”),<sup>4</sup> which specifies the JRP mandate and the scope of the JRP environmental assessment and sets out who chooses the JRP members; and
4. The *Environmental Impact Terms of Reference for Review of the Mackenzie Gas Project* (the “EI Terms of Reference”).<sup>5</sup> The EI Terms of Reference define the scope of the JRP environmental assessment and the information that the MGP proponent (Imperial Oil Resources Ventures Ltd. – “Imperial Oil”) had to provide for its Environmental Impact Statement. They include the Connecting Facilities in the scope of the JRP environmental assessment of the MGP.

In sum, the Cooperation Plan envisioned the JRP and the Regulators’ Agreement agreed on its incorporation. The JRP Agreement implemented the JRP and the EI Terms of Reference sets out the limits of its work.

The Crown Consultation Unit (the “CCU”) is a federal administrative entity. Despite its name, it had no authority to consult with Aboriginal groups about their interests, rights or other matters that were of concern to the DTFN. It is meant to coordinate and facilitate consultation on the MGP between First Nations and specific government ministers.<sup>6</sup>

### **Consultation Activities**

Throughout the planning and development of the MGP, the federal Crown conducted virtually no consultation with the DTFN. The Federal Court noted that the Crown failed to consult with the DTFN with respect to the formulation of the Cooperation Plan and with respect to the Regulators’ Agreement, the JRP Agreement and the EI Terms of Reference. The CCU did give copies of the draft EI Terms of Reference and draft JRP Agreement to the DTFN but with a deadline for input of the following day. The judge highlighted two DTFN’s concerns that had not been incorporated into the review processes: the uncertain enforceability of federal review process conclusions with respect to the Connecting Facilities and the lack of funding for meaningful consultation.

Meanwhile, the DTFN provided the CCU with information regarding its Aboriginal and Treaty rights and told the CCU it needed funding to enable meaningful consultation. The DTFN also “consistently and continuously pestered the CCU regarding its claim for recognition of rights north of [the 60° parallel – the Alberta-Northwest Territories border].”<sup>7</sup> In sum, the court found that “[t]here were no other impediments with the

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<sup>3</sup> A number of government ministries and agencies entered into the Regulators’ Agreement.

<sup>4</sup> The federal Minister of the Environment, the MVEIRB and the Inuvialuit Game Council entered into the JRP Agreement.

<sup>5</sup> The Minister of the Environment, the MVEIRB Chair and the Inuvialuit Game Council Chair issued the EI Terms of Reference.

<sup>6</sup> The CCU was to “set up meetings, prepare a formal record of meetings, and present a record of consultation to the NEB, to Ministers, and to other Government of Canada entities with regulatory decision-making authority” (para. 40).

<sup>7</sup> Para. 49. It eventually learned that the Crown inflexibly considered those rights extinguished by Treaty 8.

[DTFN] other than the failure or refusal of the federal government to engage in consultation” and that the DTFN “put up no barriers to such consultation....”<sup>8</sup>

The judge explained that neither the JRP nor the NEB nor the CCU had the jurisdiction to consult with the DTFN. The JRP had no mandate to consult and could not determine the existence of Aboriginal rights.<sup>9</sup> The NEB couldn’t consider the Connecting Facilities, as they existed south of the Alberta border and the scope of the project from the NEB’s perspective did not include the Connecting Facilities.<sup>10</sup> The NEB also likely couldn’t address Aboriginal concerns regarding the creation of the process because its jurisdiction only begins once a proponent has made a project application.<sup>11</sup> The judge lastly pointed out that “the CCU expressly states it is not doing consultation,” and he ultimately found that “[t]he CCU had no jurisdiction to consult on matters relating to the Cooperation Plan, the Regulators’ Agreement, the JRP Agreement, or the EI Terms of Reference.”<sup>12</sup>

The judge compared the situation of the DTFN with those of the Inuvialuit, the Gwich’in and the Sahtu peoples who, because of their respective land claims settlements with the federal Crown, had avenues of involvement in land use decisions<sup>13</sup> that the DTFN did not have. He also discussed the position of the Deh Cho First Nation (the “Deh Cho”), the DTFN’s neighbours to the north, who have interim agreements in place with the federal Crown that include the right to a delegate to the MVEIRB. The MVEIRB is composed of Gwich’in, Sahtu and Deh Cho delegates. The MVEIRB, the Minister of the Environment and the Inuvialuit Game Council appointed the members of the JRP. The judge summarized that, through these Boards and the JRP, these other First Nations were able to consult meaningfully about the MGP.<sup>14</sup> By contrast, the judge explained that, although the DTFN had intervener status for both the NEB and JRP hearings, “[t]hrough its lack of representation on any boards or panels engaged in conducting the environmental and regulatory review processes themselves, it will always be an outsider to the process.”<sup>15</sup>

### **The Federal Court’s Decision**

The DTFN claimed that the government’s duty to consult arose at that time of “discussions and decisions regarding the design of the regulatory and environmental

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<sup>8</sup> Para. 50.

<sup>9</sup> At para. 62, he added that “the JRP is engaged in environmental assessment, not aboriginal consultation,” and, though the JRP would assess the impacts of the MGP, including the Connecting Facilities, on Aboriginal communities, “it does so through the lens of environmental assessment, focusing on activities, not rights.” Moreover, the DTFN was challenging the very process by which the JRP was created.

<sup>10</sup> Unlike the scope of the JRP’s jurisdiction, which *did* include the Connecting Facilities due to the EI Terms of Reference expressly including them in the JRP review of the MGP. See above.

<sup>11</sup> He added that the NEB perhaps could not or should not consider “the creation of the process in which it was intimately involved” (para. 54).

<sup>12</sup> Para. 61.

<sup>13</sup> Respectively: the Inuvialuit Game Council, the Gwich’in Land and Water Board, the Sahtu Land and Water Board and the MVEIRB.

<sup>14</sup> The judge did single out the Deh Cho, whose representation on the MVEIRB, “may” result in meaningful consultation.

<sup>15</sup> Para. 72. As intervener, the DTFN could only provide oral and written submissions and submit questions to other interveners and the proponents.

review processes related to the MGP<sup>16</sup> and that the exclusion of the DTFN from those discussions and decisions was a failure to fulfill the duty. Canada argued that no duty to consult arose at that time, but, if such a duty did exist, it had fulfilled the duty by:

1. Including the DTFN in one media release inviting public consultation on the draft Environment Impact Terms of Reference and Joint Review Panel Agreement; and
2. A 24-hour deadline to comment on those documents.

The court found that a duty to consult and accommodate had arisen, due to DTFN Treaty 8 rights in Alberta, and that these actions did not fulfill that duty.

The court explained that the DTFN had “a constitutional right to be, at the very least, informed of the decisions being made and provided with the opportunity to have its opinions heard and seriously considered by those with decision-making authority.”<sup>17</sup> In particular, it noted that the 24-hour commentary deadline was “too little, too late.”<sup>18</sup>

The court discussed the timing and content of the duty to consult, reminding that:

In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation – which is reconciliation – must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown.<sup>19</sup>

The judge specifically considered and applied the decisions in *Haida Nation v. British Columbia (Minister of Forests)* [the *Haida* decision],<sup>20</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*<sup>21</sup> [the *Taku* decision] and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [the *Mikisew* decision].<sup>22</sup> He explained that:

The questions of fact involved in this issue – what the precise Aboriginal interests of the [DTFN] are and what are the adverse effects of this failure to consult – are better contemplated in determining the *content* of the duty to consult, not its bare existence. As the question posed by [the DTFN] is a question of law focused on whether the duty to consult extends to a time period prior to any decision-making as to land use, the appropriate standard of review for this inquiry is correctness.<sup>23</sup>

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<sup>16</sup> Para. 2.

<sup>17</sup> Para. 3.

<sup>18</sup> Para. 4.

<sup>19</sup> Para. 82.

<sup>20</sup> [2004] 3 S.C.R. 511.

<sup>21</sup> [2004] 3 S.C.R. 550.

<sup>22</sup> [2005] 3 S.C.R. 388. See our synopsis of this decision at:

<http://www.eaglelaw.org/education/pubpage/conandacom/mikisew%20case%20update%2006%2020%2006.pdf>.

<sup>23</sup> Para. 96. Correctness means the decision-maker must make the right decision. The judge later explained that he applied a standard of “reasonableness” when examining the Crown actions in fulfilling the duty (i.e., determining the content of the duty and responding to that content), rather than the very strict “correctness” standard he applied to the decision whether or not the duty arose.

The judge drew on the *Haida* decision and posed the following three-part question: (1) did the Crown have actual or constructive knowledge of an aboriginal or treaty right? (2) did it have actual or constructive knowledge that that right might be affected adversely by its contemplated conduct? and (3) what is the conduct contemplated?<sup>24</sup>

The judge found that “the right in question is the [DTFN] Treaty 8 right”<sup>25</sup> and explained, referring to the *Mikisew* decision, that the federal government, as a signatory to Treaty 8, has imputed knowledge of the existence of the right. He noted the Crown’s admissions that it owed a duty of consultation to the DTFN regarding construction of the MGP as proof that it contemplated that the construction could adversely affect Aboriginal rights.

He decided that, contrary to Crown argument:

the regulatory and environmental review processes... from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature.... Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the MGP.<sup>26</sup>

He noted the requirement that consultation “must be undertaken with the genuine intention to address First Nations concerns” and that no such intention existed in this case before the review processes were in place.<sup>27</sup> He found that the public comment processes regarding the Cooperation Plan, the Regulators’ Agreement, the JRP Agreement and the EI Terms of Reference were not substitutes for consultation.

As to when the duty arose, the judge drew on language from the *Haida* decision and found that the Cooperation Plan was “a form of ‘strategic planning’... [that] sets up the means by which a whole process will be managed... [and] in which the rights of the [DTFN] will be affected.”<sup>28</sup> In this way, the judge decided that the Crown had “constructive” knowledge that creating the Cooperation Plan was an integral step in the MGP, which it knew had the potential to affect DTFN rights adversely. He decided that the duty arose either during contemplation of the Cooperation Plan, before the JRP Agreement was executed or sometime in between those events.

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<sup>24</sup> Para. 99.

<sup>25</sup> Para. 101.

<sup>26</sup> Para. 100.

<sup>27</sup> At para. 113, he later commented that:

Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation.

<sup>28</sup> Para. 108.

In summing up the Crown's failure to fulfill "the content of its duty to consult," the judge commented that it did not specifically notify the DTFN of the creation of the Cooperation Plan and that "[p]ublic consultation processes cannot be sufficient proxies for Aboriginal Consultation responsibilities."<sup>29</sup> Even if the duty arose only during the creation and finalization of the JRP process, he found that the Crown could not fulfill it

by giving the [DTFN] 24 hours to respond to a process created over a period of months (indeed years) which involved input from virtually every affected group except the [DTFN]. [The duty] certainly cannot be met by giving a general internet notice to the public inviting comments.<sup>30</sup>

## **Remedies**

The judge explained that the Supreme Court of Canada, in the *Haida* decision, "tied the issue of remedy into the ultimate goal of Aboriginal-Crown relations, namely, reconciliation."<sup>31</sup> He noted the problem that none of the government departments and other entities involved had responsibility for consultation. A further obstacle was that "to some extent 'the ship has left the dock,'" that is, it was too late to consult with respect to a process that had already begun. He was reluctant (though willing) to order that the process start again. Otherwise, he could not see how consultation could be meaningful.

The court declared that the Crown had a duty to consult with the DTFN and had breached that duty and ordered the Crown to consult with the DTFN according to an order it would make after a future remedies hearing. The judge ordered that, in the meantime, the JRP members could not consider any aspect of the MGB that affected the Connecting Facilities, the DTFN treaty lands or DTFN claimed Aboriginal rights. The JRP members also could not issue any report of its proceedings to the NEB, effectively preventing it from providing recommendations regarding the Certificate.

The judge ordered that, at a minimum, the hearing would address:

1. Whether the Crown should be required to appoint a Chief Consulting Officer (similar to a Chief Negotiator in land claims) to consult with the [DTFN];
2. The mandate for any such consultation;
3. The provision of technical assistance and funding to the [DTFN] to carry out the consultation;
4. The role, if any, that the Court should play in the supervision of the consultation; and
5. The role that any entities including the JRP and NEB should have in any such consultation process.<sup>32</sup>

## **Addenda**

In January 2007, the court lifted the stay on JRP members' MGP work, but continued its prohibition against any final decision or report.

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<sup>29</sup> Para. 115.

<sup>30</sup> Para. 116. He added that these actions wouldn't even meet the much less demanding – and not constitutional – administrative law principles of fairness.

<sup>31</sup> Para. 126.

<sup>32</sup> Para. 134.

In June 2007, the Dene Tha' and the Ministry of Indian Affairs and Northern Development came to a settlement. They entered into the *Canada – Dene Tha' Mackenzie Valley Gas Project and Connecting Facilities Settlement Agreement* (the "Agreement") with its two Annexes: *The Mackenzie Gas Project and Connecting Facilities Consultation Protocol* (the "MGP Protocol") and *Federal Authorizations Consultation Protocol* (the "Authorizations Protocol"). The court stayed the portion of its decision regarding remedies.

The Agreement provides a \$25 million settlement of claims regarding federal MGP authorizations made without adequate consultation. This money is to be used for consultation under the MGP Protocol. In return, the DTFN agree to allow the MGP to proceed without DTFN interference. The DTFN also agree to release the federal Crown from liabilities with respect to the MGP and Connecting Facilities (related to the failure to consult) and related federal authorizations and obligations to consult.

The MGP Protocol establishes a consultation table and phases of a consultation process to occur between the DTFN and the federal Crown with respect to the MGP and Connecting Facilities. The Authorizations Protocol sets out a process for the federal government to consult with the DTFN on contemplated authorizations that may have an adverse effect on the DTFN traditional territory and some surrounding area.

### **The Federal Court of Appeal<sup>33</sup>**

Although the Agreement settled the dispute, the Canadian government appealed this decision to the Federal Court of Appeal, looking to overturn the principles of the decision. On January 17, 2008, the three judges of that court unanimously dismissed the appeal. In their reasons for judgment, the judges found that the decision to allow the judicial review contained neither any error of law nor "any palpable and overriding error of fact" that would warrant their intervention.<sup>34</sup> In rejecting the government's arguments, they noted: "this case does not establish a new principle relating to the determination of when the duty to consult arises, or the content of the duty to consult."<sup>35</sup>

The judges emphasized that the lower court judge was justified in finding as a fact that, [G]iven the unique importance of the Mackenzie Gas Pipeline, and the particular environmental and regulatory process under which the application for approval of the Mackenzie Gas Pipeline would be considered by the Joint Review Panel and the National Energy Board, the process itself had a potential impact on the rights of the Dene Tha'.<sup>36</sup>

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<sup>33</sup> 2008 FCA 20.

<sup>34</sup> Para. 7. However, at para. 11, the court did suggest that, while they would not intervene in the decision, they did not agree with every part of it and specifically noted their disagreement that this case was as similar to the *Mikisew* case as the lower court judge thought. They also disagreed that "adequate consultation in relation to an asserted Aboriginal right cannot be achieved unless the person or agency representing the Crown is empowered to determine the validity of the right."

<sup>35</sup> Para. 8.

<sup>36</sup> Para. 9.

They confirmed that the test set out in the *Haida* and *Taku* decisions and applied in the *Mikisew* decision was not so “rigid or inflexible” that it required the filing of a formal approval application before consultation obligations would arise.<sup>37</sup>

### **Important related legal issues**

The Federal Court decision included some points that, while indirectly relevant to the law of consultation, also have independent legal importance.

1. When discussing the scope of the NEB’s jurisdiction, the judge commented that “[i]t seems that inadequate Aboriginal consultation would be a factor that would militate against the public benefit of the MGP.”<sup>38</sup> The “public benefit” of a proposed project is an essential component of the NEB review.
2. The court relied on the *Mikisew* decision and rejected the Crown’s implied argument that if a pipeline does not run through a reserve, it does not engage a Treaty 8 right. The judge explained that “[a] reserve does not have to be affected to engage a Treaty 8 right. . . [w]hat is important is that the pipeline and the regulatory process, including most particularly environmental issues, are said to affect the Dene Tha’.”<sup>39</sup>
3. The judge noted that, in this context, “environment” has a broad meaning that “includes the ‘cumulative effect’ of the MGP and the [Connecting Facilities] and any other facilities to be developed in the future.”<sup>40</sup>

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<sup>37</sup> Para. 9.

<sup>38</sup> Federal Court decision at para. 55.

<sup>39</sup> Federal Court decision at para. 12.

<sup>40</sup> Para. 34.