***Ka'a'gee Tu First Nation* v. *Canada (Attorney General)*, 2007 FC 763**

Decision date: July 20, 2007

This case addresses issues related to consultation and 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), Chapter 7 (Federal Government), Chapter 9 (Environmental Assessments), Chapter 10 (Other Sources of a Duty to Consult) and Chapter 13 (Know your Land and Laws – Gathering Information).

This case involved a Federal Court challenge of a decision to approve a recommendation of an oil and gas development project in the Northwest Territories. The Ka'a'gee Tu First Nation (KTFN), a community of the Deh Cho First Nations (the "Deh Cho") and a signatory to Treaty 11, challenged the approval of the "Extension Project," which Paramount Resources Ltd. ("Paramount") proposed as part of its Cameron Hills Development.[1] Paramount explores, develops, processes, transports and markets oil and gas and has exploration licences for over 80,000 acres in the Cameron Hills area, an area over which the KTFN claims Aboriginal and treaty rights.

The Extension Project would be located in the Cameron Hills (the "Project Area") and would add significant development to the Drilling Project and the Gathering and Pipeline System Project aspects of the Cameron Hills Development, as the judge described:

> The project initially involved approval for 5 additional wells but would eventually also include the drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; the production of oil and gas for over 15-20 years; the excavation of 733 km of seismic lines; the construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.[2]

The judge noted that an outstanding comprehensive land claim existed with respect to lands that include the Cameron Hills area. The federal government accepted the claim for negotiation and the Deh Cho, including the KTFN, and the federal and Northwest Territories governments were parties to the negotiations. The judge explained that "[t]he process was to provide a forum for respectful interaction of Aboriginal and Crown titles and jurisdictions with the view of negotiating a final agreement."[3]

The Environmental and Regulatory Review Process

The establishment of the Gwich'in and Métis Comprehensive Land Claim Agreements led to the enacting of the *Mackenzie Valley Resource Management Act* in 1998. This Act

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[1] The Cameron Hills Development also includes the "Drilling Project" (August 200) and the "Gathering and Pipeline System Project (April 2001).

[2] Para. 56.

[3] Para. 16. At para. 17, he also noted that interim agreements existed, including the *Interim Measures Agreement* (2003) that allows for collaborative land use planning: i.e., "the conservation, development and utilization of the land, waters and other resources" through the Deh Cho Land Use Planning Committee.

created the Mackenzie Valley Land and Water Board (the "MVLWB") and the Mackenzie Valley Environmental Impact Review Board (the "MVEIRB"), which operate "within an integrated and coordinated system of land and water management in the Mackenzie Valley."[4] The MVLWB issues land use permits and water licences in the unsettled land claim areas and must consider "the well-being and way of life of the Aboriginal peoples of Canada" when considering such permits and licences.[5] The Act establishes a three-stage review process: a preliminary screening, an environmental assessment (the "EA") and an environmental impact review (the "EIR"). If the MVLWB is satisfied that the project proponent has conducted sufficient "pre-application community consultation" with affected parties, it conducts the preliminary screening to see if the development might have a significant adverse impact on the environment. If it might have such an impact, the MVLWB refers the proposal to the MVEIRB conducts an EA that is open to public involvement and possibly involves a hearing. It must ensure that "the concerns of Aboriginal people and the general public are taken into account in the process."[6] Based on the evidence gathered, the MVEIRB decides either:

1. no assessment is necessary;
2. the approval of the project must include necessary measures to prevent an adverse impact;
3. the project should be rejected without an EA; or,
4. if the project is likely to cause significant public concern, that an EIR must occur.

However, the decision to hold an EIR is ultimately up to the Minister of Indian and Northern Affairs Canada and the other "Responsible Ministers."[7]

If the MVEIRB recommends project approval with added measures or rejection of the proposal because of its adverse effect on the environment, the Act allows the Responsible Ministers, after consulting with the MVEIRB, to reject the recommendation and order an EIR or adopt the recommendation with modifications. This second option is called the "consult to modify" process and it involves the Responsible Ministers and the MVEIRB, with no obligation to include anyone else.

Consultation Activities

The KTFN participated in the EA process of each previous phase of the larger Cameron Hills Development. The court found that the KTFN received funding to help them participate in consultation. This funding included money for an Oral Traditional Knowledge Research Project, which resulted in a documentary film of Elders speaking to KTFN about traditional knowledge. Other funding helped the KTFN participate in land and resource management activities in the area, including hiring an Oil and Gas Coordinator to address environmental concerns and to be a spokesperson for the KTFN. The judge noted that, although the total funding was less than the KTFN had requested, a surplus remained after the projects were completed.

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[4] Para. 19.

[5] Para. 21. The judge also quotes part of the Act, which requires the MVLWB to consider "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada… who use an area of the Mackenzie Valley; and… any traditional knowledge… that is made available to it." See also para. 24.

[6] Para. 23.

[7] The "Responsible Ministers" were the federal ministers of: Indian and Northern Affairs Canada, Environment and Fisheries and Oceans and the Northwest Territories Minister of Natural Resources.

The court examined the consultation activities that occurred during the first two phases of the Cameron Hills Development. Although a fair amount of consultation did occur, particularly during the second phase, the Responsible Ministers engaged in a "consult to modify" process to significantly modify recommendations within the MVEIRB's report regarding the second phase and the KTFN were prevented from participating. A similar outcome occurred with respect to the Extension Project.

The judge later noted that the consultation process pursuant to the *Mackenzie Valley Resource Management Act* allowed for "significant consultation," that the KTFN had "many opportunities" to express its concerns, that the KTFN was "heavily involved in the process and that [its] involvement influenced the work and recommendations of the [MVEIRB]."[8] He summarized that the MVEIRB report concerning the Extension Project "clearly shows that many of the concerns of the [KTFN] were taken into account" and that though the MVEIRB did endorse the project, "it did so only with significant mitigating measures and suggestions," which the KTFN supported and which "went a long way towards addressing their main concerns."[9]

The Federal Court Decision

The parties agreed that the KTFN have existing treaty rights to hunt, fish and trap in the Cameron Hills area; however, the KTFN (and the Deh Cho) also claimed Aboriginal title over the Treaty 11 lands, while the Crown maintained that Treaty 11 extinguished Aboriginal title.[10] The judge did not find it necessary (or appropriate without a trial) to decide the effect of the treaty on Aboriginal title.

The KTFN argued that the Extension Project negatively affects Treaty 11 rights and Aboriginal rights, giving rise to a Crown duty to consult and possibly accommodate KTFN concerns before approving the Extension Project. It further argued that the Crown failed to fulfill that duty. The KTFN, the federal Crown and Paramount agreed that the KTFN claimed treaty rights and asserted Aboriginal rights over the Project Area and that the Crown owed a duty to consult to the KTFN. However, the parties disagreed as to the seriousness of the impact of the Extension Project on those rights and the scope or content of the duty to consult. Accordingly, the Crown argued that it had met its duty.

To determine the scope of the duty, the judge (following the *Haida* decision[11]) assessed the strength of the KTFN case for rights or title and the seriousness of the potential adverse effects on those rights or title of the Extension Project approval. He noted that the Treaty 11 rights were established, requiring no further examination, but that the asserted claim to Aboriginal title also could impact the duty to consult and, therefore,

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[8] Para. 118.

[9] Para. 118. In particular, recommendations R-15 and R-16 affected a wildlife compensation plan and a socio-economic agreement.

[10] The Deh Cho and the KTFN consider Treaty 11 to be a peace and friendship treaty. The federal Crown considers the treaty to be an extinguishment treaty.

[11] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (see our analysis in the EAGLE publication, "Nation to Nation: The Law of Consultation and Accommodation," and access the decision at http://scc.lexum.umontreal.ca/en/2004/2004scc73/2004scc73.html).

required examination. Referring to the *Haida* decision, he reminded that the KTFN did not have to prove the existence of Aboriginal title for it to trigger the duty.

The court considered the following factors:

1. The disagreement between the parties as to the extinguishing effect of Treaty 11, if any, on Aboriginal title;
2. The fact that the Crown has participated in a land claims negotiation process with the Deh Cho since 1998;[12] and
3. The undisputed fact that "a significant component of Treaty 11, the Crown's obligation to set aside reserve lands, was not fulfilled."[13]

The judge balanced these factors against the language of Treaty 11, which may support the extinguishment of Aboriginal title and decided that, though measuring the strength of the case was difficult, it was at least a "reasonably arguable" case.[14] He found that the factors "[served] to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the Treaty rights in play."[15]

Regarding the seriousness of the potentially adverse effect on treaty and asserted rights, the judge found that the project would have a significant impact on the asserted Aboriginal title lands and on the Treaty 11 rights to hunt, fish and trap. He relied on the MVEIRB's opinion that significant adverse environmental effects and clear public concern existed and on the conclusions from its report. This report specifically noted the possible effects of the development on KTFN traditional activities. He highlighted that, irrespective of whether any of these activities actually occurred on the Cameron Hills plateau, that area lies within the area of asserted Aboriginal title and the MVEIRB had concluded that "the combined direct and indirect footprint" of the project would significantly impact the environment and had recognized the plateau as an important traditional use area.[16] Furthermore, the judge pointed to the MVEIRB's report on the Extension Project and its recommended mitigating measures as further evidence of significant potential impact on the Treaty 11 and asserted rights.

The judge distinguished the *Mikisew* decision,[17] noting that, different from that case, the KTFN asserted Aboriginal title and that this case involved a larger project with more potential impact. These factors led to a greater Crown duty to consult here than in the

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[12] The judge noted that this process has produced a Resource Development Agreement and an Interim Measures Agreement, which established the Deh Cho Land Use Planning Committee to plan land use in Deh Cho territory that includes the Cameron Hills area.
[13] Para. 105. At para. 106, the judge also referred to this obligation as, "arguably a fundamental aspect of the Treaty."
[14] Para. 107.
[15] Para. 107.
[16] Para. 110.
[17] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69. See our synopsis: http://www.eaglelaw.org/education/pubpage/conandaccom/mikisew%20case%20update%2006%2020%2006.pdf.

Mikisew decision.[18] The judge decided that the duty to consult in this case had to involve "formal participation in the decision-making process."[19]

Although his factual findings suggested that the process had, for the most part, meaningfully met the duty to consult, a fatal problem arose when the Responsible Ministers engaged the "consult to modify" process without consulting the KTFN, resulting in the modification of many of the MVEIRB's recommended mitigation measures.[20] The KTFN "had no opportunity for any input" regarding these changes, aside from objecting to them. The judge noted that, because no consultation occurred, we cannot know if other options could have partially or completely meet KTFN objections.

The judge emphasized that reliance on the provisions of the *Mackenzie Valley Resource Management Act* was not enough to discharge the Crown's duty to consult, which "cannot be boxed in by legislation," adding that "[t]he powers granted to the Ministers under the Act must be exercised in a manner that fulfills the honour of the Crown."[21] He found that the "consult to modify" process did not provide an opportunity for meaningful KTFN input wherein the Crown demonstrated the intention to substantially address KTFN concerns. There was no consultation, meaningful or otherwise.

The judge summarized that the Responsible Ministers had "essentially decided not to rely on the investigative and fact finding role of the [MVEIRB]" and so they could not argue that prior consultation was enough.[22] The new proposals arising in the "consult to modify" process, which "allowed for fundamental changes to be made to important recommendations" resulting from earlier consultation,[23] also carried a duty to consult and the Crown did not fulfill that duty.

The KTFN had claimed that they lacked sufficient resources to meaningfully participate in consultation. The judge decided that he could not answer that question, noting that the KTFN neither identified what additional resources it needed nor for what activities it needed those resources. He also pointed out that the KTFN actually did not spend all of the funding it received.

The KTFN had also claimed that the Traditional Knowledge study that Paramount prepared was insufficient for lack of meaningful consultation with the KTFN. Although

[18] At para. 115, he added that, in *Mikisew*, the Supreme Court of Canada did require the Crown to attempt to minimize the adverse impacts of the relevant project, even though the duty to consult was at the lower end of the spectrum of possible consultation obligations.
[19] Para. 117.
[20] Of particular importance, recommendations R-15 and R-16 (see note 9, above) were substantially revised despite "the firmly expressed and long held position of the [KTFN] that these recommendations were critical to them." (Para. 120)
[21] Here, the consult to modify process was "inconsistent with the honour of the Crown." Para. 121. On this point, he referenced *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 and noted that a statutory process could possibly fulfill the duty (see our analysis in the EAGLE publication, "Nation to Nation: The Law of Consultation and Accommodation," and access the decision at: http://scc.lexum.umontreal.ca/en/2004/2004scc74/2004scc74.html). He distinguished this case.
[22] Para. 123.
[23] Para. 124.

he explained that he did not necessarily have to decide this issue,[24] the judge suggested that the KTFN had also failed to consult, adding that "any future consultative process will require the [KTFN] sharing their traditional knowledge and full meaningful participation in the consultation process."[25] This statement seems to clearly require such information sharing as part of the consultation duties of an Aboriginal community. Earlier related comments suggest that if the Aboriginal community has concerns regarding the sensitive and confidential nature of the traditional knowledge and its release to the general public, the community must show evidence that those concerns could not be addressed. Otherwise, it will not have justified its non-participation in the consultation process.

The court declared that the federal government had a duty to consult with the KTFN before approving the Extension Project and that it breached that duty. It ordered the parties to consult meaningfully "with the view of taking into account the concerns of the KTFN and if necessary [accommodating] those concerns."[26]

Addendum – *Ka'a'gee Tu First Nation* v. *Canada (Indian Affairs and Northern Development*, 2007 FC 764

Decision date: July 20, 2007

The KTFN separately applied for judicial review of the decision of the Mackenzie Valley Land and Water Board (the "MVLWB") to issue a related amended land use permit to Paramount following the approval of the Extension Project. The KTFN alleged that the federal government's failure to consult with and accommodate the KTFN was also a failure to comply with requirements in the *Mackenzie Valley Resource Management Act*, invalidating the permit.[27] The judge found that section 114 of that Act required the Crown to take into account the concerns of the KTFN. Since, as the judge explained, the "central purpose" of the duty to consult is "the obligation to ensure that the concerns of the Aboriginal people are taken into account," the failure to consult means that those concerns were not taken into account, as required in the Act.

The judge found that the Crown had not complied with the Act and, therefore, that the MVLWB should not have issued the amended permit. He quashed the permit.

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[24] Therefore, his comments may be *obiter* and not generally binding in future cases as a legal precedent.
[25] Para. 130.
[26] Para. 133.
[27] Section 62 of this Act states "A board may not issue a licence, permit or authorization for the carrying out of a proposed development… unless the requirements of [Part 5] have been complied with…." Section 114, in Part 5 of the Act, states:

> The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and
> …
> (*c*) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.