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The Enbridge Northern Gateway Project after *Gitxaala Nation v. Canada*, 2016 FCA 187

Summary by:
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Case commented on: *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII) http://canlii.ca/t/gscxq

On September 20, 2016, the Government of Canada,[1] and Proponent of the Enbridge Northern Gateway Project,[2] announced that neither would seek leave to appeal to the Supreme Court of Canada from the Federal Court of Appeal decision in *Gitxaala Nation v. Canada*. By virtue of the decisions not to seek leave to appeal, the Federal Court of Appeal Judgment is now final and binding on the Government of Canada.

On June 23, 2016, in a 2-1 decision, the Federal Court of Appeal overturned Project approvals for the Enbridge Northern Gateway Project given by the Governor in Council, and the National Energy Board, and remitted the matter of Project approval back to the Government of Canada for redetermination in accordance with the Judgment of the Court. Technically, the Federal Court of Appeal quashed Order in Council P.C. 2014-809[3], issued on June 17, 2014 by the Governor in Council acting on the advice of the Minister of Natural Resources; and also quashed Certificates OC-060 and OC-061[4] issued by the National Energy Board.

These Project approvals were quashed because of inadequate Aboriginal consultation by the Government of Canada at "one critical part" of its

[1] http://www.cbc.ca/news/politics/enbridge-northern-gateway-federal-court-1.3770543. The Government of Canada does not appear to have issued a Press Release or Backgrounder in relation to its decision not to appeal from the Judgment of the Federal Court of Appeal.
[2] http://www.gatewayfacts.ca/Newsroom/In-the-Media/Northern-Gateway-announces-it-will-not-appeal.aspx
[3] Order in Council P.C. 2014-809 http://www.gazette.gc.ca/rp-pr/p1/2014/2014-06-28/html/order-decret-eng.php
[4] Certificates OC-060 https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/2398286/2482225/Certificate_OC-060_-_Hearing_Order_OH-4-2011_-_A3Y2X1.pdf?nodeid=2482014&vernum=-2 and OC-061 https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/384192/620327/2398286/2482225/Certificate_OC-061_-_Hearing_Order_OH-4-2011_A3Y2X3.pdf?nodeid=2482387&vernum=-2

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consultation framework referred to as "Phase IV".[5] The Court of Appeal majority decision concludes: "bearing in mind that only reasonable fulfillment of the duty to consult is required, we conclude that in Phase IV of the consultation process — including the execution of the Governor in Council's role at the end of Phase IV — Canada fell short of the mark." (underlining added for emphasis).

The Court decision therefore makes clear that a critical component of failure was that of the Governor in Council, itself. The Court also states: "In its Order in Council, the Governor in Council decided to acknowledge only the existence of consultations by others during the process. It did not say more despite the requirement to provide reasons under section 54 of the *National Energy Board Act* and under the duty to consult. The Governor in Council had to provide reasons to show that it fulfilled its legal obligation. It did not do so" (underlining added for emphasis). The majority Judgment of the Federal Court of Appeal cites paragraph 44 of the *Haida* case[6], and then states: "this is a case where deep consultation required written explanations ... to show that the Aboriginal groups' concerns were considered and to reveal the impact those concerns had on the Governor in Council's decision...". To make it perfectly clear, the Court of Appeal decision states further: "we note that the Governor in Council must provide reasons for its decision in order to fulfill its obligations under subsection 54(2) [of the *National Energy Board Act*] and the duty to consult" (underlining added for emphasis).

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[5] Aboriginal Consultation Framework for the Northern Gateway Pipeline Project http://www.ceaa-acee.gc.ca/050/documents/40861/40861E.pdf

[6] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 (CanLII), http://canlii.ca/t/1j4tq.

> 44 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.

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For Government of Canada operations, the enduring consequence of the Federal Court of Appeal decision should be the recognition of a constitutional obligation flowing from the Honour of the Crown, and falling on the Governor in Council, to give reasons in comparable contexts. In this sense, the Federal Court of Appeal decision is consistent with the generative nature of the constitutional principles engaged by section 35(1) of the *Constitution Act, 1982*.[7] The Federal Court of Appeal merely attached the obligation to give reasons, recognized as a constitutional common law obligation in the seminal Supreme Court of Canada decision in *Haida*, to the Governor in Council's project approval functions under the *National Energy Board Act*.

The remittal Order from the Federal Court of Appeal identifies the options now available to the Government.

> [344] We would further order that:
>
> (a) The matter is remitted to the Governor in Council for redetermination;
>
> (b) At its option, the Governor in Council may receive submissions on the current record and, within the timeframe under subsection 54(3) of the *National Energy Board Act* calculated from the date submissions are complete, may redetermine the matter by causing it to be dismissed under paragraph 54(1)(*b*) of the *National Energy Board Act*;

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[7] *Manitoba Metis Federation Inc. v. Canada* (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623

> [69] This Court has also recognized that the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court found that s. 35(1) restrains the legislative power in s. 91(24), in accordance with the "high standard of honourable dealing": p. 1109. In *Haida Nation*, this Court explained that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees": para. 20. Because of its connection with s. 35, the honour of the Crown has been called a "constitutional principle": *Little Salmon*, at para. 42. (underlining added)

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650

> The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function"

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(c) If the Governor in Council does not pursue the option in paragraph (b) or if it pursues that option but does not cause the matter to be dismissed at that time, the matter will remain pending before it; in that case, Phase IV consultation shall be redone promptly along with any other necessary consultation with a view to fulfilling the duty to consult with Aboriginal peoples in accordance with these reasons;

(d) When the Attorney General of Canada is of the view that the duty under paragraph (c) and any procedural fairness obligations are fulfilled, she shall cause this matter to be placed as soon as practicable before the Governor in Council for redetermination, along with any new recommendations and any new relevant information; and

(e) The Governor in Council shall then redetermine this matter in accordance with these reasons within the timeframe set out in subsection 54(3) of the *National Energy Board Act*, running from the time it has received any new recommendations and any new relevant information.

It remains uncertain how the Government of Canada will respond to the remittal Order. As the result of a general election held on October 19, 2015, the Government of Canada changed. The general election was after the Project approval by the Governor in Council (June 17, 2014), but before the decision of the Federal Court of Appeal (June 23, 2016). The general election process resulted in the new Government taking office after making statements with implications for its consideration of the Enbridge Northern Gateway Project. This note identifies some of the key statements bearing upon the Government's reconsideration of the approval of the Enbridge Northern Gateway Project.

First, the new Government has committed to reconsideration of the changes to environmental laws introduced by the former Government via the omnibus legislation referred to as Bill C-38 and C-45.[8] That process is now underway.[9] Pending the completion of the review process, which may take some time, the new Government listed several principles intended to provide greater certainty as to how the Government would be guided in the application of its

[8] Government of Canada Moves to Restore Trust in Environmental Assessment http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=1029999.

[9] Review of Environmental and Regulatory Processes https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html.

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discretionary decision-making. The fourth of these principles is particularly germane given the findings of the Federal Court of Appeal:

> "4. Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated."

This, also, may take some time.

Second, during the general election, the following statement was made:

> "A Liberal government will ... Formalize the moratorium on crude oil tanker traffic on British Columbia's North Coast – including the Dixon Entrance, Hecate Strait, and Queen Charlotte Sound – and ensure that ecologically sensitive areas and local economies are protected from the devastating impacts of a spill."[10]

None of the details of this proposed moratorium, including any exceptions it may contain, are as yet public.

The Project Proponent and its Aboriginal equity partners have expressed commitment to the cause of Aboriginal consultation. The Proponent's announcement that it would not seek to appeal the Federal Court of Appeal Decision also stated, in part: "We look forward to working with the government and Aboriginal communities in the renewed consultation process. We believe the government has a responsibility to meet their Constitutional legal obligations to meaningfully consult with First Nation and Métis. It also reflects the first priority of Northern Gateway and the 31 Aboriginal Equity Partners to build meaningful relationships with First Nation and Métis communities and ensure their voice is reflected in the design of the project."

[10] Trudeau announces plan to protect Canada's oceans, September 10, 2015 https://www.liberal.ca/trudeau-announces-plan-to-protect-canadas-oceans/.

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