

Federal Court provides guidance on adequacy of supplemental Indigenous consultation and appropriate remedies for operational projects

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The Federal Court of Canada recently released its decision in *Peguis First Nation v. Canada (Attorney General)*, 2021 FC 990 (the Decision). In the Decision, Justice McVeigh considered an application for judicial review brought by various First Nations of an Order-in-Council (OIC) directing the National Energy Board (NEB) to issue a Certificate of Public Necessity and Convenience (Certificate) for the Manitoba-Minnesota Transmission Project (the Project). In finding for the applicants, but refusing to quash the impugned OIC, the Court stated that, although the federal Crown did not adequately discharge its duty to consult, quashing the OIC would be an inappropriate remedy given the competing interests of the Project proponent.

The Decision provides important guidance on the scope of the duty to consult where the Crown undertakes consultation that is supplemental to that already undertaken by a regulatory body. The Decision also provides helpful insight into available and appropriate remedies for cases in which consultation was inadequate, but the project is already operational.

Background

The Project is an international transmission line currently operated by Manitoba Hydro that was constructed and completed in 2019-2020. In 2013, Manitoba Hydro began a coordinated provincial-federal approval process under the provincial The Environment Act and the federal National Energy Board Act and Canadian Environmental Assessment Act. Manitoba Hydro concurrently undertook delegated aspects of Indigenous consultation.

In 2018, the NEB concluded that the Project was and would be required for the present and future public convenience and necessity, and recommended that the Governor in Council issue a Certificate. During the course of the hearing process, the NEB facilitated certain Indigenous consultation activities, which included the participation of Indigenous intervenors at the hearing.

Following the NEB's decision, Canada conducted supplemental Indigenous consultation to identify outstanding concerns regarding Project-related impacts to Indigenous and treaty rights, and to discuss incremental accommodation measures (if appropriate).

The applicant First Nations, including the Peguis First Nation (Peguis), brought applications for judicial review, challenging the adequacy of the federal Crown's supplemental consultation and the reasonableness of the decision of the Governor in Council to issue the

OIC directing the NEB to issue a Certificate for the Project.

The Decision

The Federal Court granted the application for judicial review in part —finding that the Crown did not adequately consult Peguis and that, by extension, the Governor in Council's decision to issue the OIC was unreasonable. However, the Court declined to quash the OIC, instead granting declaratory relief to Peguis and issuing a request that the Crown conduct further consultation and, if necessary, accommodation.

With respect to the adequacy of consultation, the Court assessed the Crown's consultation with each of the applicant First Nations. In only one instance (with respect to Peguis) did the Court find that consultation was inadequate. The Court held that, "although the process established was capable of satisfying Canada's duty to consult, in execution it did not". In doing so, the Court reinforced the subtle difference between the level of consultation identified in form and the level of consultation undertaken in substance, as emphasized in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, regarding the Crown's Indigenous consultation on the Trans Mountain Expansion Project. Both cases emphasize the need for two-way dialogue between the Crown and affected Indigenous groups such that "[t]he Crown is required to do more than to receive and document concerns and complaints".

The Decision further clarified the inability of the Crown to entirely rely upon the consultation undertaken by a regulatory decision-maker —in this case, the NEB —where the Crown has established a distinct consultation phase outside of the regulatory process. The Court held that, given that the Crown initiated a supplementary consultation process, that process in and of itself was required to meet the requirements of adequate consultation—in other words, even if the NEB process was sufficient, the supplementary consultation must *also* be sufficient to discharge the duty to consult. In particular, the Court held that, despite the fact that the Crown reviewed and accommodated the concerns that Peguis had expressed during the course of the NEB process, this was inadequate because the Crown and Peguis did not engage in a two-way dialogue. The Court found that this act of "unilateral" accommodation at the supplemental consultation stage could not replace proper two-way consultation with Peguis.

Conversely, the Court held that the Crown adequately consulted the other applicant First Nations, despite their opposition to the Project, reinforcing the longstanding principle that the duty to consult does not create an effective "veto" over proposed projects. In determining that consultation had been adequate for those First Nations, the Court reiterated that consent is not required for consultation to have been adequate. It held that the fact that those applicants' views on the Project's impacts diverged from those of the Crown did not mean that those "views must be preferred or that Canada did not genuinely consider them". The Court confirmed that "the duty to consult does not require the Crown to ensure that impacted First Nations benefit from the contemplated activity [...] The fact that [the applicant] does not benefit from the Project is not an infringement of their Aboriginal or Treaty rights. Further, the fact that [the applicant] proposed certain accommodations does not mean that the Crown must accept those accommodations".

The Court found that, because of the failed consultation with Peguis, the conclusion reached by the Governor in Council that the Crown satisfied its duty to consult was unreasonable.

The Remedy

On the issue of remedy, the applicants submitted that the OIC should be quashed, the Court

should direct Canada to redo its supplemental consultation phase, and the proponent's license to export electricity should be halted until the completion of proper supplemental consultation.

The Court rejected the applicant's submissions, holding that, because the Project was already operational and the proponent was not at fault, quashing the OIC would not be reasonable. The Court remarked that:

In judicial review applications, the most common and just remedy ordered is to quash the decision and send it back to the decision-maker for redetermination. But on these facts given the line is constructed and operational, I will not grant this option as a remedy. Practically, that fact renders this remedy unworkable, and such that it does not truly fit why this Application is granted. My finding is that Canada did not adequately consult with Peguis and quashing the decision would unfairly halt the operations of Hydro, who is a party not at "fault" in this application. To take it even further, to have the line now deconstructed would likely cause more harm than rectify the breaches in this Application. Accordingly, I will not grant this as a remedy.

The Court further held that an order requiring further consultation would not be desirable as "it may necessitate the Court's supervision and possible further Court orders to ensure reasonable deadlines are met, as well as a supervisory role in dictating what is reasonable".

The Court instead issued the declaratory relief that "[i]n failing to substantively engage with Peguis during supplemental consultation, Canada did not adequately discharge its duty to consult" and remarked that it hoped Canada would undertake further consultation with Peguis to, among other things, determine if accommodation was necessary.

Implications

The Court's decision is important in several respects. First, it emphasizes that substantive consultation requires a meaningful two-way dialogue with potentially impacted Indigenous communities. While many regulatory processes are capable of satisfying the duty to consult, where the Crown has established a separate and direct consultation process, that process must be executed in a fashion that adheres to this principle of two-way dialogue. In so doing, the Decision provides helpful guidance for regulators, Crown agents, project proponents and their counsel on managing the risks associated with projects that may impact Indigenous rights and interests.

The Decision is also significant in relation to its comments on appropriate remedy where Crown consultation has been found to be inadequate. Although the principles discussed are not new, the Decision marks one of few instances where a regulatory approval was upheld despite the Crown failing to satisfy the duty to consult. The Decision thus emphasizes the need to consider the particular facts in a given case, including the harm that may be caused by revoking regulatory instruments, when crafting an appropriate remedy.