

Northern Gateway loss may be a win for industry

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Aboriginal issues and the duty to consult continue to be among the primary risks to resource development in Canada. While the basic legal principles that govern Aboriginal consultation in Canada are well established, consultation requirements for both project proponents and the Crown can be elusive in practice and execution. This was highlighted in the recent Federal Court of Appeal decision in *Gitxaala Nation v. Canada*, which overturned the federal government's approval of Enbridge's Northern Gateway Project – a multi-billion dollar pipeline system proposed to run from Edmonton, Alberta to Kitimat, British Columbia. The *Gitxaala* decision created additional hurdles for the Northern Gateway Project, which was ultimately rejected by the federal government on November 29, 2016. At the same time, *Gitxaala* provides helpful clarity in relation to the duty to consult that may allow future projects to avoid a similar outcome.

Gitxaala was the culmination of more than a dozen legal challenges commenced by Aboriginal groups and environmental organizations seeking to overturn the federal government's approvals for the Northern Gateway Project on the basis that (1) the Joint Review Panel assigned to review the project failed to properly consider environmental effects and (2) Canada failed to adequately consult with affected Aboriginal peoples concerning the project.

This litigation followed a nine-year regulatory process that commenced in 2005 and involved one-and-a-half years of public hearings before the Joint Review Panel. In December 2013, the Joint Review Panel released its report recommending that the project be approved subject to 209 conditions. The federal government then conducted additional direct consultation with affected Aboriginal groups over the first half of 2014. In June 2014, the federal Cabinet issued Orders in Council approving the project and directing the National Energy Board to issue certificates allowing the project to proceed. The Court in *Gitxaala* quashed these Orders in Council and the subsequent certificates on the basis that the federal government failed to fulfill its duty to consult with Aboriginal groups prior to issuing the Orders in Council. The matter was remitted to the Cabinet for reconsideration and additional Aboriginal consultation.

Due to the size and location of the project and the considerable local opposition, Northern Gateway's regulatory process was unique. In early 2009, before a Joint Review Panel had been appointed or any public hearings were held, the federal government released a project-specific Crown consultation plan for the project. This plan contemplated five separate phases of consultation, the first three of which would occur through the regulatory process. Phase IV would occur following the release of the Joint Review Panel's report and would involve direct consultation by the federal government to address project-related concerns outside the Joint Review Panel's mandate. Finally, Phase V would involve additional consultation regarding specific permits and authorizations for the project following the federal government's approval, assuming the project was approved.

The Federal Court of Appeal conducted a detailed factual analysis of each of the first four phases of the consultation process (the fifth phase had yet to occur) to determine whether the consultation was adequate. The Court concluded that Aboriginal groups were provided with ample opportunities to participate in the regulatory process, and that it was appropriate for Canada to rely on this regulatory process to fulfill aspects of its duty to consult. The Court also lauded Enbridge's efforts to consult with Aboriginal groups, including its extensive direct engagement with potentially affected groups and its provision of capacity funding to assist their participation in the process. As a result, the Court found that consultation through the first three phases of the consultation process was adequate.

With respect to Phase IV, however, the majority of the Court characterized Canada's consultation as "brief, hurried and inadequate." Among other things, the Court found that (i) Canada failed to fully discuss many specific concerns raised by Aboriginal groups or provide any direct response to their specific requests for information, including requests for Canada's assessment of the level of consultation that was owed; (ii) the Crown Consultation Coordinators mischaracterized the positions of several groups in the reports that were provided to Cabinet; and (iii) the Crown Consultation Coordinators were only tasked with collecting information from Aboriginal groups within prescribed timelines and had no authority to make decisions on behalf of the government. The Court found that this latter aspect of the Crown's consultation precluded meaningful two-way dialogue on matters of importance to the Aboriginal groups.

The majority of the Court stated that it would have taken Canada little time and little organizational effort to engage in meaningful dialogue on the subjects of prime importance to Aboriginal peoples, but this did not happen. As a result, the majority concluded that Canada's consultation was inadequate and the duty to consult was not satisfied.

Mr. Justice Ryer dissented, finding that in the context of the overall project-approval process, execution of the Phase IV consultation was adequate. Justice Ryer would have dismissed all applications and appeals challenging the project.

Both the federal government and Enbridge publicly announced in September that they did not intend to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. On November 29, 2016, the federal government announced that the Northern Gateway had been formally rejected.

While the *Gitxaala* decision was one of the final obstacles that ultimately led to the Northern Gateway Project's demise, there are several aspects of the *Gitxaala* decision that will be beneficial for future projects that trigger the duty to consult Aboriginal peoples:

1. *Gitxaala* confirms that the regulatory process can play an important role in fulfilling the duty to consult, and that the processes followed by the Joint Review Panel and the proponent for Northern Gateway were acceptable. This will provide useful guidance to regulators and proponents for future projects.
2. Both the majority and dissent rejected the challenges relating to consideration of environmental effects, affirming that the federal Cabinet has broad discretion to consider economic, environmental and cultural issues in its determination of whether to approve major pipeline projects. This aspect of the decision should make it more difficult to challenge future project approvals on environmental grounds.
3. While the details in *Gitxaala* are specific to the unique circumstances of Northern Gateway (and the Crown's five-phased consultation plan), the decision provides helpful guidance to

governments on how to conduct direct consultation with Aboriginal groups to ensure that the consultation is meaningful.

4. Despite the fact that the majority in *Gitxaala* concluded that Canada's consultation was inadequate, it suggested that adequate consultation could have occurred within the same time frame and that it should not take much additional time to remedy the deficiencies. This suggests that meaningful consultation does not necessarily require extensions to Canada's existing consultation processes.

In our experience, satisfying the legal requirements for Aboriginal consultation requires a robust strategy and execution plan to ensure compliance, as well as rigorous discipline to ensure the various parties charged with responsibility for consultation fulfill those obligations. The *Gitxaala* decision provides useful guidance for both proponents and governments on what is required to meet the legal requirements for Aboriginal consultation as well as pitfalls that must be avoided to ensure that project approvals withstand judicial review.