



Trans Mountain, Site C, and BC LNG: Is it Time for a Sea Change?

- Duty to consult
- Roles of project proponent and regulator
- Consultation in the EA and post-EA process
- BC examples: Site C, Trans Mountain Expansion, Pacific Northwest LNG
- Federal government changes

Duty to Consult

- Crown's obligation to consult with First Nations whose Aboriginal rights may be adversely affected by Crown decisions
- Grounded in the “honour of the Crown”
- Arises when “the Crown has knowledge, real or constructive of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it” (*Haida Nation*, 2004 SCC 73, para. 35)

Duty to consult

- Scope and content of duty varies depending on:
 - Preliminary assessment of strength of claim
 - Seriousness of potential adverse effect upon the rights or title claimed
- Spectrum:
 - Low: weak claim, little or no potential for serious impact
 - High: strong claim, potential adverse impacts are serious

Duty to consult

- Duty to accommodate:
 - “Taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the claim”
- No duty to agree; no veto
- Title and consent (*Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44)
- Justification (*R. v. Sparrow*, [1990] 1 SCR 1075)
 - Compelling and substantial objective
 - Crown’s fiduciary obligation to the group.

Role of Project Proponent

- Procedural aspects of consultation
 - > Providing notice and project information
 - > Capacity funding
 - > Meeting with communities
 - > Obtaining and discussing information about specific community interests that may be affected
 - > Considering modification to plans to avoid or mitigate impacts
 - > Documenting engagement, specific Aboriginal interests that may be impacted, and any modifications to address concern
 - > Relaying community feedback to the Crown
 - > Proposing accommodation measures

- What cannot be delegated?
 - > Determining whether DTC is triggered
 - > Identifying communities owed a consultation duty
 - > Required “depth” of consultation
 - > Assessing adequacy of consultation
 - > Determining what accommodation, if any, is required

Role of Regulator

- *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43:
 - [55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: ... the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
 - [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. ...
 - [57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
 - [58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them.

Environmental Assessments

- Regulators:
 - Canadian Environmental Assessment Agency (“Crown consultation coordinator”)
 - BC Environmental Assessment Office
 - National Energy Board
- Public hearing process
- Post-EA consultation

Challenges to Adequacy of Consultation: Site C



Source: CBC, Vancouver Observer

Challenges to Adequacy of Consultation: Site C

- Joint Review Panel report submitted May 2014; BC gov't approval: Dec 2014
- Challenges from BC Treaty 8 First Nations* (Prophet River First Nation, West Moberly First Nations) in BC Supreme Court and Federal Court
- Related: Blueberry River First Nations action – treaty infringement claim
- Appeal to United Nations to intervene

Challenges: Trans Mountain Expansion Project

- 15 month NEB process extended to 27+ months:
 - NEB process started July 2013
 - Oral hearing completed Feb 2016
 - 4-month extension of legislated time limit for gov't decision until December 2016
 - > GHG emissions
 - > Further First Nations consultation
- Tsleil-Waututh action in Federal Court

Challenges: Pacific Northwest LNG Project

- Federal EA:
 - CEAA process started April 2013
 - Paused March 19, 2016
 - 3-month extension of legislated time limit for gov't decision
- IBAs or term-sheets with 4 of 5 First Nations: Metlakatla, Kitselas, Kitsumkalum, Gitxaala

Challenges: Pacific Northwest LNG Project

- Lax Kw'alaams First Nation:
 - Rejected \$1.2B offer of cash and land from PNW LNG and BC in August 2015
 - Seeking title declaration in BC Supreme Court
- Gitga'at First Nation challenge

Next Steps: Federal Government

- Additional steps to existing EA processes
- Review and overhaul of *CEAA 2012*?
- “Implementation” of the UN Declaration on the Rights of Indigenous Peoples
 - “free, prior and informed consent”

Questions?

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