

Federal Court of Appeal upholds Canada's post-Northern Gateway consultation process

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In *Bigstone Cree Nation v. NOVA Gas Transmission Ltd. (Bigstone)* [PDF], the Federal Court of Appeal upheld the Governor in Council's (GIC) decision to approve the 2017 NGTL System Expansion Project (the Project). In doing so, the Court had an opportunity to consider whether Canada's current approach to consultation is sufficient to discharge its duty to consult and, if necessary, accommodate First Nations on major resource projects. The decision in *Bigstone* confirms that Canada has taken steps to correct the flaws that led the Court to quash the federal approval of the Enbridge Northern Gateway Project in *Gitxaala Nation v. Canada* (2016) [PDF].

Background

Following a National Energy Board (NEB) environmental assessment and public interest review, the GIC approved the construction and operation of the Project. Bigstone Cree Nation (Bigstone) challenged the approval on judicial review, arguing that Canada had not fulfilled its duty to consult Bigstone regarding the Project. Bigstone asserted similar grounds of review to those that proved fatal in *Gitxaala*, including the adequacy of: (i) post-NEB report consultations (both in substance and in length); and (ii) the GIC's reasons for concluding that Canada had met its duty to consult.

Decision

The Court unanimously dismissed Bigstone's judicial review application, with costs. It concluded that Canada had adequately fulfilled its duty to consult and accommodate Bigstone, whereas Bigstone had failed to meet its reciprocal duty to engage in consultation in good faith.

Among other things, the Court found as follows:

- **Sufficiency of time for post-NEB report consultations:** The Court rejected Bigstone's argument that four months for post-NEB report consultations was insufficient. Indeed, the Court found that Bigstone itself was responsible for wasting three of those months by failing to respond to Canada's attempts to arrange a meeting.
- **Adequacy of funding for consultation:** Contrary to Bigstone's argument, the Court found that the Crown is not obligated to provide funding to Indigenous groups as part of its duty to consult. At best, it is one factor by which to assess consultation. Here, the over \$250,000

in total funding provided by Canada, the NEB and the proponent was more than sufficient.

- **Reliance on the NEB process:** The Court confirmed that the Crown could rely on the NEB process to partially or fully fulfill its duty to consult. Additionally, the Court found that conditions to a NEB certificate that require the proponent to submit further information for NEB review or approval at a later stage are lawful and appropriate, given the early stage of the process at which the environmental assessment and public interest review occur.
- **Adequacy of reasons:** The Court distinguished *Gitxaala* (where the Order in Council contained a single recital on consultation, stating it was pursued), and found that the reasons in this case were clearly adequate. Here, the Order in Council concluded that Canada had fulfilled its duty through the NEB review and subsequent Crown consultation. The Court noted that the GIC was not required to provide its own reasons on each and every issue raised by the parties, but was entitled to rely on and adopt the prior reports prepared by the NEB and the Crown.

Lessons for industry

The decision is a victory for project proponents and industry stakeholders relying on Canada to engage in meaningful consultation to ensure that federal project approvals are upheld. Importantly, the Court found that Canada's post-*Gitxaala* approach to consultation is capable of fulfilling Canada's duty to consult. Additionally, the Court reaffirmed two well-established legal principles: namely, that Indigenous groups (i) do not hold a veto over project development; and, (ii) must engage in all available consultation opportunities in good faith.