Government Fails To Consult Dene Tha’ on Mackenzie Gas Project

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In November, the Federal Court ruled in favour of the Dene Tha’ First Nation finding that the federal Ministers of the Environment, Indian and Northern Affairs Canada, Fisheries and Oceans, and Transport (the “Ministers”) breached their duty to consult the Dene Tha’ concerning the Mackenzie Gas Project (“MGP”). The Federal Court also ruled that the Joint Review Panel (“JRP”) assessing the project’s social and environmental impacts cannot review any aspect of the project affecting the Dene Tha’ lands until a hearing on permanent remedies takes place.¹

The project
The MGP is a massive industrial project. It proposes the creation of a 1220 km pipeline corridor originating in Inuvik in the far north of the Northwest Territories (“NWT”) and terminating 15 metres south of the NWT-Alberta border. Facilities will be built in northwestern Alberta (the “Connecting Facilities”) to connect the MGP with existing provincial pipelines in order to supply natural gas to the oil sands projects in northern Alberta, and to markets in southern Canada and the United States. Four major oil and gas companies and a group representing the aboriginal peoples of the NWT are partners in the MGP. Current estimates place the total project cost at over $7 billion.²

The regulatory process
The magnitude and cross-jurisdictional scope of the MGP and Connecting Facilities meant that a unique regulatory regime was established to guide the process. In 2000, planning began regarding the design of the regulatory regime. The discussions included delegates from four Aboriginal groups with land claim agreements, either in place or being negotiated, in the area affected by the MGP.³ The Dene Tha’ were not included in these discussions. The discussions culminated in 2002 with the Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project Through the Northwest Territories (the “Cooperation Plan”). The Cooperation Plan set in place the framework for the environmental and regulatory processes to follow, including the creation of the JRP which was tasked with conducting the environmental assessment for the MGP and the Connecting Facilities.

The JRP’s mandate was formalized in an agreement signed in 2004 (the “JRP Agreement”) by the Ministers and delegates from the four Aboriginal groups in the area. The Dene Tha’ were not signatories to this agreement. The JRP began public hearings in 2006, which were scheduled to continue into 2007. Once the hearings are complete, the JRP will issue a final report to the National Energy Board (“NEB”); this report will be used to inform the NEB’s decision whether to recommend that the MGP pipeline be constructed and operated. When the JRP issues its report, the NEB will stay its hearings.
in order to review the report and allow the public an opportunity to respond to the report’s contents.

Additionally, the federal government created a unique administrative body called the Crown Consultation Unit (CCU) to coordinate consultation with Aboriginal groups affected by the MGP. Despite its name, the CCU had no authority to consult, only to coordinate consultation by setting up meetings and directing issues to the appropriate bodies. In 2004, the CCU provided the Dene Tha’ with copies of the draft JRP Agreement and a draft terms of reference for the Environmental Impact Assessment ("EIA"), giving the Dene Tha’ a 24 hour deadline to provide comments. The Court found that this was the first time that the Dene Tha’ were formally made aware of these agreements and the JRP process.

**The Dene Tha’**

The Dene Tha’ are an aboriginal group with approximately 2,500 members, the majority of whom reside on seven reserves located in northwestern Alberta. The Dene Tha’ define their “traditional territory” as lying primarily in Alberta, but also extending into northeastern British Columbia and the southern NWT.

The Dene Tha’ are signatories to Treaty 8. Under the terms of this Treaty, the Dene Tha’ agreed to surrender part of their land (south of the 60th parallel) to the government in exchange for payment and various rights to hunt, trap and fish. The portion of the MGP stemming from the Alberta border to its southern terminus runs through territory of the Dene Tha’ defined by Treaty 8. The Connecting Facilities pass through a trap line owned by a Dene Tha’ member and the pipeline connecting the southern terminus to existing provincial pipelines also runs through territory covered by the Dene Tha’s Treaty 8 rights. In addition to treaty rights, the Dene Tha’ claim to have aboriginal rights in the southern portion of the NWT (north of the 60th parallel) which are affected by the MGP.

The Dene Tha’ argued that based on their treaty and aboriginal rights, the Ministers had a duty to consult with them with respect to the MGP and that the Ministers breached this duty. In particular, the Dene Tha’ argued that the breach occurred in the initial decision to exclude them from discussions and decisions relating to the *Cooperation Plan*.

**Arguments of the Ministers**

The Ministers justified their exclusion of the Dene Tha’ from consultation on two grounds. First, the Ministers argued that, unlike other Aboriginal groups which were consulted, the Dene Tha’ did not have a settled land claim agreement and their uncontested territory was south of the NWT-Alberta border. Settled land claim agreements not only recognized Aboriginal rights in the area but also established a means by which Aboriginal peoples could provide ongoing input into what was done on the land. Input was provided through the creation of various Aboriginal regulatory boards which were able to consult meaningfully with the Ministers on the anticipated effects of the MGP. These Aboriginal boards provided input on agreements such as the *Cooperation Plan* and the *JRP Agreement*. Second, the Ministers argued that since the Dene Tha’ were parties to Treaty 8, their aboriginal rights and title north of the NWT-Alberta border had been extinguished.
In any event, the Ministers argued that they fulfilled the duty to consult by including the Dene Tha’ in a single media release inviting public consultation and by giving them a 24 hour deadline to comment on the draft *JRP Agreement* and EIA terms of reference.

**The court decision**

The core issue before the Court was whether there was a duty to consult the Dene Tha’ and when that duty arose. The Court stated that the duty to consult arises when the Crown possesses actual or constructive knowledge of an aboriginal or treaty right that might be adversely affected by its contemplated conduct. In this case, the Court found that the Ministers had, at the very least, constructive knowledge of the fact that the setting up of the *Cooperation Plan* to coordinate the environmental and regulatory processes was an integral step in the MGP, a project that the Crown admitted had the potential to adversely affect the rights of the Dene Tha’. Accordingly, the Court found that the duty to consult crystallized some time during the contemplation of the *Cooperation Plan* between 2000 and 2002. At the very latest, the duty to consult crystallized before the *JRP Agreement* was executed in 2004.

The Court found that the fact that the Dene Tha’ had no settled land claim agreement was not sufficient to exclude them from the duty to consult. As a signatory to Treaty 8, the Ministers had constructive knowledge of the existence of the Dene Tha’s treaty rights in an area affected by both the MGP and the Connecting Facilities.

The Court took particular issue with the Ministers’ submission that their consultation began when it asked for comments on the draft *JRP Agreement*. The Dene Tha’ were only given 24 hours to provide comments. The Court held that such a short time frame did not constitute meaningful consultation and that the Dene Tha’ had been deprived of the opportunity both to participate and to have their specific concerns incorporated into the environmental and regulatory processes.

**The remedy**

The Court noted that it would be a challenge to fix the issue of consultation since the environmental review process is already underway. The Court therefore decided to hold a remedies hearing where the following issues will be addressed:

- whether the Crown should be required to appoint a Chief Consulting Officer (similar to a Chief Negotiator in land claims) to consult with the Dene Tha’;
- the mandate for any such consultation;
- provision of technical assistance and funding to the Dene Tha’ for consultation;
- any role the Court should play in the supervision of the consultation; and
- the role that any entities including the JRP and the NEB should have in any such consultation process.

To preserve the current situation until the final remedy is issued, the Court stayed the JRP from considering any aspect of the MGP which affects either the treaty lands of the Dene Tha’ or the aboriginal rights claimed by the Dene Tha’. The JRP is also stayed from issuing any report of its proceedings to the NEB.
In response to this case, the JRP has already delayed or modified selected scheduled hearing dates by sending letters to the parties. The JRP indicated that some hearing dates may proceed as scheduled, but that such hearings would not address matters involving the Connecting Facilities in Alberta or the traditional territory in which the Dene Tha’ has asserted aboriginal or treaty rights. One of the public hearings postponed includes the hearing that was scheduled to be held in Edmonton on December 11, 2006.

Conclusion
This case should remind us of the Berger Inquiry that looked at similar issues in the 1970s. Justice Thomas Berger was appointed to assess the social, environmental and economic impact of a proposed pipeline which would have run through the Yukon and the Mackenzie Valley of the NWT. In 1977, the Berger Inquiry recommended that no pipeline be built through the northern Yukon and that a pipeline through the Mackenzie Valley should be delayed for ten years because the pipeline posed significant environmental risks while providing few long-term economic benefits to northern communities. The Inquiry also expressed particular concern about the role of Aboriginal peoples in development plans and recommended any development in the area be preceded by land claim settlements with local Aboriginal peoples.

It has now been almost 30 years since the Berger Inquiry delivered its final report and the federal government has still failed to adequately consult with Aboriginal peoples on the development of this pipeline. Perhaps this signals that the time is still not right to open up the north to this type of development.

1 Dene Tha' First Nation v. Canada (Minister of Environment) 2006 FC 1354.
3 The Inuvialuit, Gwich’in and Sahtu First Nations all have land claims agreements with the Government of Canada, while the Deh Cho First Nation is the process of negotiating such an agreement; see supra note 1 at paras. 70-71.

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