Coastal First Nations v. British Columbia (Environment), 2016 BCSC 34, Supreme Court of British Columbia (Koenigsberg J.)

January 13, 2016

Overview

The Coastal First Nations — Great Bear Initiative Society and the Gitga'at First Nation (collectively, the "Petitioners") were successful on an application to the Supreme Court of British Columbia to set aside a portion of the Equivalency Agreement (the "Agreement") entered into by the Province of British Columbia, by way of the Environmental Assessment Office (the "EAO"), and the National Energy Board (the "NEB"). Part of the Agreement allowed for the abdication of the EAO's authority to NEB to both assess and approve (or deny) a project. The first project to qualify under the Agreement was the Northern Gateway Project, which received NEB's approval despite not having four of the five environmental provisions recommended by the EAO.

The Minister of Environment for the Province of British Columbia (the "Minister"), the Executive Director of the EAO, the Minister for Natural Gas Development, the Minister Responsible for Housing, the Deputy Premier, and the Northern Gateway Pipelines Limited Partnership ("Northern Gateway") were Respondents.

The Petitioners sought to invalidate the portion of the Agreement which allowed the Northern Gateway Project to be approved by the NEB with the same approval from the EAO. The arguments were made on the following legal basis: 1) improper interpretation of the *Environmental Assessment Act* and 2) failure to consult.

The Respondents argued that the Northern Gateway Project was within Federal jurisdiction because of its interprovincial design.

Judicial Findings

Jurisdiction

The court disagreed with the Respondent and found that because the Northern Gateway Project is largely within the borders of British Columbia, the Province had some right to regulate it.

"To disallow any provincial environmental regulation over the Project because it engages a federal undertaking would significantly limit the Province's ability to protect social, cultural and economic interests in its lands and waters." (at para. 53)

In the interest of co-operative federalism, the court found that the Province, through the EAO, could issue additional restrictions on the Norther Gateway Project, so long as it was not contradictory to those issued by the NEB.

"The mere existence of a condition does not amount to a prohibition. The conditions placed on the Project by the NEB are imposed in accordance with environmental protection legislation in an effort to balance the economic interests of the Project with important environmental protection concerns. Further conditions imposed by the Province that seek to advance environmental protection interests would therefore fall squarely in line with the purpose of federal environmental protection legislation governing the Project." (at para. 72)

Validity of the Agreement

The Agreement was made pursuant to sections 27 and 28 of the *Environmental Assessment Act*, which allows for the Minister to enter into an agreement regarding any aspect of environmental assessment with another jurisdiction. In the Agreement, "the EAO accepted that any NEB assessment of [the] project constitutes an equivalent assessment under the EAA, and that [those] projects do not require an additional assessment under the EAA".

The portion of the Agreement at issue was Clause 3, which purported "to remove the need for an environmental assessment certificate" by the EAO (an "EAC"). Accordingly, an NEB-approved project could proceed without an EAC.

Based on a review of the *Environmental Assessment Act*, the court found that the portion of the agreement that purported to remove the need for an EAC was invalid.

"Finally, it is important to reflect again on the objectives of the EAA, and to consider the interpretation and finding that best advances the will of the legislature. I have previously identified one important objective as the need to balance environmental protection with economic development, and from *Hansard* it is clear that the legislative intent behind this objective relates to the high standards of protection set by this government, and the need to stimulate this province's investment climate. I find that none of these objectives has any chance of being met, or even considered, if British Columbia is giving up its decision-making authority before it has a chance to review a project..." (at para. 177)

Duty to Consult

The petitions argued that the Agreement is inconsistent with the Province's constitutional obligation to consult with First Nations before engaging in any government action that may adversely affect them. The Agreement's terms allowed for the Province

to avoid its obligations under the *Environmental Assessment Act* and, as a result, avoid its consultation obligations.

In response, the Province argued that the duty to consult can be fulfilled by either level of government. As the Province had delegated the environmental assessment authority to the federal level, consultation was satisfied by Canada during the NEB's Joint Review Panel.

"...where action is required on part of the Crown in right of the Province or federal government, or has been undertaken by either — the manifestation of the honour of the Crown, such as the duty to consult and accommodate First nations, is clearly divisible by whichever Crown holds the constitutional authority to act. In this case, where environmental jurisdiction overlap, each jurisdiction must maintain and discharge its duty to consult and accommodate." (at para. 196)

Despite the ability of one crown entity to assign the duty to consult to the other crown entity, the court found that the Province had failed to meet its duty to consult. By entering into the Agreement, the Province gave up its ability to provide accommodation to First Nations. All the Province could do was ask the Federal government and the NEB to protect First Nations. This was not enough.

Remedies

The court declared that the portion of the Agreement purporting to remove the need for an EAC was invalid. The court also declared that the Province has a duty to consult for the Northern Gateway Project and other projects like it. Accordingly, the Northern Gateway Project will go back to the EAO for consideration and review.

By

Ramsey Glass

Expertise

Indigenous Law

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.