EQUIVALENCY AGREEMENTS, ENVIRONMENTAL ASSESSMENT AND ABORIGINAL CONSULTATION – IMPLICATIONS OF COASTAL FIRST NATIONS V. BRITISH COLUMBIA (ENVIRONMENT)

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Last week the BC Supreme Court released its decision in *Coastal First Nations v. British Columbia (Environment)*[1], holding the Province could not rely on a federal / provincial environmental assessment "equivalency agreement" that applied to (among other things) the Northern Gateway Project. Unless the decision is changed through appeal or addressed by legislative / regulatory amendments, it could have significant consequences not only for the Northern Gateway Project, but also for other projects for which governments have sought to streamline environmental assessment through a single decision-making process.

BACKGROUND

In 2008 and 2010, in an effort to streamline environmental assessment processes for projects that fell under both federal and provincial jurisdiction, the British Columbia Environmental Assessment Office and the National Energy Board ("NEB") signed equivalency agreements pursuant to sections 27 and 28 of the *BC Environmental Assessment Act*.[2] Under these agreements, the Environmental Assessment Office accepted that any NEB assessment of a project that required approval under the *Environmental Assessment Act* and the *National Energy Board Act*[3] constituted an "equivalent" assessment under the Environmental Assessment Act, and that these projects would not then require a separate assessment under the *Environmental Assessment Act*.[4]

The Northern Gateway Pipeline project is one such project. It is a federally regulated proposed oil pipeline stretching from Bruderheim, Alberta to Kitimat, British Columbia (the "Project"). The Project underwent a multi-year environmental assessment conducted by a joint review panel (jointly between the NEB and the Canadian Environmental Assessment Agency) after which the panel issued a report recommending the Project's approval. Following the recommendation, the federal government approved the Project in July of 2014.

In January of 2015, the Coastal First Nations filed a petition in the BC Supreme Court challenging the validity of the equivalency agreement to the extent that it removed the need for a provincial environmental assessment certificate issued under the *Environmental Assessment Act*. The petitioners also claimed that the Province had failed to adequately consult them prior to entering into the agreement (or in any decision not to terminate it) and were thus in breach of their constitutional duty to consult. The Province opposed these positions. The proponent, Northern Gateway Pipeline, opposed them as well, and also argued that the imposition of provincial conditions through an environmental assessment certificate would be unconstitutional as the Project was a federal undertaking.

KEY ISSUES AND DISCUSSION

Is the application of the BC Environmental Assessment Act to an interprovincial pipeline unconstitutional?

The Court held that while there was clearly federal jurisdiction over the matter, it was not exclusive and the application of the *Environmental Assessment Act* to the Project was not an unconstitutional exercise of Provincial power. The Court made these statements in the context of discussing conditions the Province could impose, but also noted that the Province would not have the power to render the Project inoperable through the refusal of an environmental assessment certificate or unduly onerous conditions. The Court held that the determination of what would be unacceptable conditions must be decided on a case by case basis with actual conditions under consideration.

There has been no prior case law specifically on the constitutional right of a province to conduct an environmental assessment in respect of federally regulated undertakings, but this line of reasoning is consistent with relevant constitutional principles and judicial trends.

Is the agreement permitted by s.27(3) of the BC Environmental Assessment Act?

The Court held that the authority to enter into an equivalency agreement pursuant to section 27 of the Environmental Assessment Act with respect to an "assessment" is not broad enough to displace the Province's need to make a decision regarding the Project (though it can rely in other respects on a federal assessment process and reports). Accordingly, the agreement was held to be invalid to the extent that it purported to remove the requirement for a certificate decision on the Project by the Province.

It is noteworthy that the Court indicates (at paragraph 93) that the Executive Director's interpretation of section 27 was neither correct "nor reasonable". That is to say that, the Court was not prepared to give the Executive Director any deference in interpreting his own highly specialized statute. Yet it took the Court 25 pages of detailed analysis to come to this conclusion.

Further, despite the lengthy reasons, the Court does not address certain key points.

For example, it does not address the significance of the word "required" in section 27(3)(d) which allows such agreements to:

> provide for a means to accept another party's or jurisdiction's assessment as being equivalent to an assessment **required** under this Act, [emphasis added]

If the Legislature did not intend for these agreements to displace the need for a provincial assessment entirely (in cases where the province so chooses) then why would the *Environmental Assessment Act* allow agreements that "accept" other assessments "as being equivalent to an assessment *required* under this Act"? If, as the Court says, the term assessment is to be read in its narrow sense (i.e. the preparation of the report but not the ultimate decision of ministers) then there would be no meaning given to the word "required". Because nowhere does the *Environmental Assessment Act* "require" anyone to complete an assessment per se – it is only a certificate that is "required" to build a reviewable project. As such, the Court's view that the section 27(3) agreement cannot affect the certificate decision under section 17 is difficult to understand.

Similarly, the Court gives little discussion to section 28 – which contains some very powerful language:

> **28** Effective on the date of an agreement under section 27, and for as long as the agreement remains in effect, both this Act and the regulations are by this section deemed to be varied, **in their application to** or in respect of a reviewable project that is the subject of the agreement, to the extent necessary to accommodate that agreement. [emphasis added]

This seems to make clear that section 27 agreements can have the effect of displacing the application of the *Environmental Assessment Act* to a reviewable project, in whole or in part, and such agreement need not be limited to using other government's environmental assessment processes to prepare a report for decision-makers.

Finally, the Court does not address the question of how the term "equivalency" is understood and commonly applied as between the federal and provincial governments in the context of environmental assessments. As is reflected in the *Canadian Environmental Assessment Act, 2012* ("CEAA 2012")[5] and various reports and legislative studies and debates preceding it, "equivalency" refers to a situation where the parties agree one level of government need not undertake an assessment and make a decision. By contrast, in cases where one government relies on the other's assessment report but then still makes its own decision, that is typically referred to as "substitution". The Court seems to have misunderstood this point, when it states:

> [174] It is noteworthy that the federal government, when taking recommendations to streamline the assessment process and create provisions in the CEA Act to allow for recognition of equivalent

assessments, maintained their ultimate decision-making authority. Section 36 of the CEA Act requires the responsible authority to consider the relevant report from the substituted assessment when making decisions in accordance with s. 52(1).

In fact, section 36 of the CEAA 2012 speaks to the situation of *substitution* (where final decision making remains). Section 37 (not mentioned by the Court) deals with equivalency and in that case it is clear no federal decision is required at all.

But, as in any case involving statutory interpretation, there will of course always be different arguments and perspectives and ultimately it is up to the courts to reach conclusive determinations on such matters.

Did the Province breach its duty to consult with the Coastal First Nations?

The Court concluded that the Province was entitled to enter the 2008 and 2010 agreements without any aboriginal consultation.

However, despite this, the Court *did* ultimately find that a breach of the duty to consult existed in this case. It did so on the basis that the Province was aware the petitioners had concerns with the Project (concerns which echoed those stated by the Province itself in the Northern Gateway joint review panel process, but not resolved there) and did not engage with the petitioners on those issues. More specifically, the Court noted that the Province (having such concerns and knowing the First Nation concerns) could have terminated the equivalency agreement but chose not to.

Normally, the duty to consult attaches to government *decisions* or *actions* that can adversely affect the exercise of aboriginal right. To extend the duty to consult to "failing to terminate" an agreement that the Court expressly says would not itself give rise to a duty to consult is extraordinary indeed.

When read as a whole, it seems clear that the root of the Court's concern is that the Province was, on the one hand, avoiding a decision-making and condition-imposing role under the *Environmental Assessment Act* by accepting the federal process as equivalent through the agreement, while at the same time, publicly expressing concerns about the Project and taking positions on conditions that differed from those the federal government had imposed. But whatever one's views on the Province's positions on this specific project, it is important to bear in mind that the consequences of this decision are not limited to it.

WHAT NOW?

What does the decision mean for the Project?

This chapter is not yet written. If the decision is not appealed or addressed through regulatory / legislative change it would appear that a provincial environmental assessment decision will still be required, given the

Court's very clear declarations regarding the need for a section 17 decision and an equally clear declaration that no other provincial approvals under any enactment can be issued until that occurs. This raises complex and unprecedented questions about how provincial ministers would make a decision under section 17 of the *Environmental Assessment Act* at this time (as discussed further below).

What will provincial ministers need to do to adequately consult when relying on a federal environmental assessment process?

In the provincial environmental assessment process, aboriginal consultation does not occur simply in relation to the "report" or the "findings". Rather, aboriginal groups are consulted every step of the way. They are consulted on the initial decision under section 10 as to whether to require an assessment for a project that meets the regulatory thresholds. They are consulted in the development of the section 11 order which sets out the terms of reference for the environmental assessment process. They are consulted in the identification of "valued components" that are deemed worthy of study. They are consulted on the establishment of the "application information requirements" document which specifies the information that must be obtained and studies and analysis that must be presented by the proponent. They are integral members of the working group, which is the table at which issues and concerns are addressed and real time project design modifications can occur. The decision, however, provides no guidance as to whether there would be any need for provincial ministers to afford consultation on any of these earlier steps.

When are provincial conditions too much?

While the Court is clear that the Province is not devoid of constitutional authority in relation to environmental assessment of federally regulated projects, it is equally clear that authority is limited and cannot be used to go so far as to render federal projects inoperable. Determining at what point potentially onerous conditions would render a project "inoperable" will be extremely difficult. This is particularly true in the context of complex infrastructure projects that can have hundreds of conditions, and for which the viability of the project can depend on many things including the cost and complications of conditions. Administering the environmental assessment process and making related decisions are already tough. Adding this further degree of uncertainty will make it significantly harder.

What does the decision mean for other federally regulated projects?

At paragraph 30, the Court mistakenly says this is "the first project to which the agreements apply". In fact, the are other NEB regulated projects in BC to which these agreements have been applied.[6] Further, as noted earlier, a similar agreement was used in respect of the Prince Rupert Fairview Terminal Phase II Facility Expansion Project.

What does this decision mean for federal decisions to accept provincial assessments as equivalent or on a substituted basis?

As noted earlier, important changes were introduced in CEAA 2012 to allow the federal government to accept provincial environmental assessments on an "equivalent" or "substituted" basis. The former would remove entirely the need for any federal decision-making, the latter would expressly allow reliance on the provincial process and report but reserving federal decisions at the end. While not the focus of this case, the decision raises questions in this context as well, particularly about the timing and nature of any federal duty to consult aboriginal groups that may be required when the federal government accepts a provincial assessment as equivalent or substituted. A review of the federal agreements respecting substitution used to date does not however provide much information as to whether and how this question is entertained. Instead, they appear to simply focus on the utilization of a "Whole of Government approach to consultations".[7]

Will this be the end of equivalency agreements?

For many years, governments have talked about minimizing duplication and overlap between provincial and federal environmental assessment processes – usually with very little action. In recent years, however, significant advances have been made through provincial exercise of existing powers, and through the incorporation of new substitution and equivalency provisions in federal legislation. This did not happen without a great deal of thought and effort. It is always challenging to explore new and creative solutions to longstanding problems.

If the effect of this decision is to set back that laudable goal it will be unfortunate, given that environmental assessments often cost tens of millions of dollars and take years to complete. This is especially true when (as is the case in BC) both of the overlapping federal and provincial environmental assessment processes are *preliminary* review processes that precede - but do not in any way replace - other environmental permitting and related aboriginal consultation.

It will be interesting to see whether this decision is appealed, and where these matters ultimately land.

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[1] 2016 BCSC 34.[ps2id id='1' target='/]

[2] S.B.C. 2002, c. 43; It should be acknowledged that one of the authors (Robin Junger) was the Executive Director under the BC *Environmental Assessment Act* when the 2008 equivalency agreement was signed with the National Energy Board.[ps2id id='2' target='/]

[3] R.S.C., 1985 c. N-7.[ps2id id='3' target='/]

[4] Although not mentioned by the Court, a similar equivalency agreement was entered into between federal and provincial governments respecting the Prince Rupert Fairview Terminal Phase II Facility Expansion Project. The project did not fall under the purview of the NEB and therefore required a separate agreement pursuant to section 27 of the Environmental Assessment Act. See http://www.eao.gov.bc.ca/pdf/MOA_Prince_Rupert.pdf.[ps2id id='4' target='/]

[5] 2012, SC 2012, c 19, s 52.[ps2id id='5' target='/]

[6] See http://www.eao.gov.bc.ca/EAO_NEB.html.[ps2id id='6' target='/]

[7] See, for example, Project Agreement for the Woodfibre LNG Project In British Columbia http://mpmo.gc.ca/projects/242.[ps2id id='7' target='/]

A Cautionary Note