

Consultation is a Dialogue not a Monologue: Peguis First Nation v Canada

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The recent Federal Court decision in *Peguis First Nation v Canada*¹ examines the application of the duty to consult to four different First Nations. In this case, the Court held that while Canada met its duty for three of the First Nations, Canada did not meet the standard of two way meaningful dialogue required to resolve Peguis First Nation's ("Peguis") concerns.

THE FACTS

This case involves the Manitoba-Minnesota Pipeline Project (the "Project"),² an international transmission line operated by Manitoba Hydro. The Project runs from Winnipeg to the Manitoba/Minnesota border, crossing over Treaty 1 territory and approximately 36 km of provincial Crown land. The Project has been built and is currently in operation.

The Project required a provincial license under *The Environment Act* of Manitoba and federal approval under the now repealed *National Energy Board Act*, as well as the *Canadian Environmental Assessment Act, 2012*.

There were three phases of consultation:

- 1 the provincial approval process and provincial Crown-Indigenous consultation
- 2 the National Energy Board ("NEB") hearing, which culminated in the NEB recommending that the Governor in Council ("GIC") issue a Certificate of Public Necessity and Convenience ("Certificate") for the Project. Canada relied on the NEB process to fulfil Canada's duty to consult,³ and

¹ 2021 FC 990 [*Peguis*].

² *Ibid* at para 1.

³ *Ibid* at para 20.

- 3 Canada’s supplementary consultation, which was intended to “identify any outstanding concerns regarding Project-related impacts to Aboriginal and Treaty rights that were not communicated to the NEB or not addressed to by the NEB, and to address incremental accommodation measures if appropriate.”⁴

Following Canada’s supplementary consultation process, the GIC issued an Order in Council approving the issuance of a Certificate by the NEB to Manitoba Hydro for the Project.

Peguis, Animakee Wa Zhing #37 (“AWZ”), Long Plain First Nation (“Long Plain”), and Roseau River First Nation (“Roseau River,” collectively, the “Applicants”) applied for judicial review of the GIC’s Order in Council. Peguis, Long Plain and Roseau River are signatories to Treaty 1, and AWZ is signatory to Treaty 3. Among other things, all of the Applicants challenged the adequacy of Canada’s consultation concerning the Project.

THE DECISION

The Court reviewed principles from *Haida Nation v British Columbia (Minister of Forests)*⁵ and *Coldwater First Nation v Canada*⁶ and explained that Canada had “to show that it considered and addressed the right claimed by Indigenous peoples in a meaningful way.”⁷ The Court also noted that “while there is a checklist of activities required for consultation, the guiding question is whether, in all of the circumstances, consultation maintained the honour of the Crown and promoted reconciliation.”⁸

The legal issues and the consultation framework in *Peguis* were very similar to what the Court considered in the *Coldwater* and *Tsleil-Waututh Nation v Canada (Attorney General)*⁹ cases concerning the Trans Mountain Pipeline.¹⁰

The Court found that to fulfil its duty to consult the Applicants, Canada would have had to provide the Applicants with an opportunity to make submissions and to formally participate in the decision-making process, and to provide written reasons for its decision.¹¹

The Court considered whether Canada’s consultation with each of the four First Nations was adequate. A review of the Court’s findings for each of the four First Nations provides guidance about the duty to consult.

⁴ *Ibid* at para 24.

⁵ 2004 SCC 73 [*Haida*].

⁶ 2020 FCA 34 [*Coldwater*].

⁷ *Peguis* at para 107.

⁸ *Ibid* at para 109.

⁹ 2018 FCA 153.

¹⁰ *Peguis* at para 115.

¹¹ *Ibid* at para 132.

Peguis First Nation

Peguis argued that Canada should have tried to secure Peguis' consent for the Project, or alternatively, explored accommodation measures with Peguis instead of proceeding without Peguis' participation in the supplementary consultation.¹² Specifically, Peguis argued that Peguis was thwarted in its efforts to participate before the final decision due to their lack of funding to set up community meetings.¹³

Canada argued that Peguis only focused on whether Canada's supplemental consultation was adequate, and did not account for the NEB process.¹⁴

The Court found that Canada failed to meet the substantive requirements of its duty to consult Peguis. The Court stated that while the supplemental process established was capable of satisfying Canada's duty to consult, its implementation did not.¹⁵

There was no indication that Canada and Peguis engaged in substantive consultation with a two-way conversation during the supplementary consultation process.¹⁶ There was no opportunity for Peguis to express its outstanding concerns, through correspondence, teleconferences, a community meeting, a meeting with leadership or otherwise.¹⁷ There was no effort by Canada to ascertain Peguis' outstanding concerns. Further, evidence showed that there was no input from Peguis about possible accommodation measures.¹⁸ In effect, the Court found that Canada's consultation with Peguis was a monologue not a dialogue.¹⁹

Animakee Wa Zhing

AWZ submitted that Canada failed to discharge its duty to consult and accommodate during supplementary consultation with respect to the Project's impact on Treaty rights to hunt, the Project's impact on AWZ's reserve land, and the First Nations' lack of benefit from the Project.²⁰

¹² *Ibid* at para 133.

¹³ *Ibid* at para 134.

¹⁴ *Ibid* at para 135.

¹⁵ *Ibid* at para 138.

¹⁶ *Ibid* at para 139.

¹⁷ *Ibid* at para 144.

¹⁸ *Ibid* at para 150.

¹⁹ *Ibid* at para 147.

²⁰ *Ibid* at paras 152-153.

The Court found that Canada met the requirements of deep consultation with AWZ as described in the case law.²¹ Further, the Court found that Canada made a genuine effort to ascertain, consider, and take into account AWZ's key concerns through two-way communication, and considering accommodation.²²

AWZ raised concerns that fluctuating water levels caused by development were affecting its ability to fish, harvest wild rice, and travel. On the concerns with water level, the Court found that Canada heard AWZ's concerns and made additional inquiries beyond accepting the NEB and Manitoba Hydro's conclusions.²³ The Court determined that Canada genuinely considered the issue and based its conclusions on all of the evidence. The Court found Canada's conclusion on AWZ's concern with water levels to be reasonable.

On the issue of economic accommodation, AWZ asserted that Canada should have compelled the proponent to provide economic accommodation to AWZ, especially because their territory would be used to export power to Minnesota where AWZ must acquire power from Minnesota at a marked up rate.²⁴ The Court found that "the fact that AZW does not benefit from the Project is not an infringement of their Aboriginal or Treaty rights."²⁵ Further, the duty to consult does not require the Crown to ensure impacted First Nations benefit from the contemplated activity.²⁶

Long Plain and Roseau River

Long Plain and Roseau River argued that Canada's consultation was inadequate because: 1) Canada deferred direct consultations on outstanding project-specific issues until too late, 2) Canada failed to meaningfully consider Project impacts on Aboriginal and treaty rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*, 3) Canada did not give reasons to show that the Applicants' rights were considered and how, and 4) Canada failed to accommodate the Applicants.

The Court determined that Canada did not intentionally try to delay or avoid consultation and that consultation was not left too late.²⁷

On impacts to s. 35 rights, the Court found that a review of the available evidence and case law did not support Long Plain's and Roseau River's argument. The NEB found that any impact to the traditional use of land was minimal because of the route selection for

²¹ *Ibid* at para 168.

²² *Ibid* at para 168.

²³ *Ibid* at para 184.

²⁴ *Ibid* at para 185.

²⁵ *Ibid* at para 189.

²⁶ *Ibid* at para 187.

²⁷ *Ibid* at para 206.

the Project,²⁸ and that the consultation process was not to be a forum for the final determination and resolution of Aboriginal claims to rights and title.²⁹ Regarding funding, the Court found that while the amount of funding provided may not have been as much as the Applicants wanted, they were provided funding and absent evidence of how it rendered the consultation inadequate, the issue of lack of funding was not determinative nor did it make the decision unreasonable.

CONCLUSION

The Court dismissed Long Plain's, Roseau River's and AWZ's applications for judicial review, but granted Peguis' application.³⁰

The Court granted a declaration stating: "In failing to substantively engage with Peguis during supplemental consultation, Canada did not adequately discharge its duty to consult."³¹

This decision has echoes of the Trans Mountain litigation. While the Crown can in some instances rely on administrative tribunals' processes, like the NEB's (now the Canadian Energy Regulator's) process, to fulfil its duty to consult, the Crown is ultimately responsible for the adequacy of consultation. Where the Crown initiates consultation to supplement an administrative tribunal's process, the Crown's supplementary process must be adequate. Adequate consultation requires two way meaningful dialogue. The facts and process for consultation will vary from project to project. However the benchmark of meaningful, two-way dialogue is constant.

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²⁸ *Ibid* at para 211.

²⁹ *Ibid* at para 213.

³⁰ *Ibid* at para 250.

³¹ *Ibid* at para 268.

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