December 3, 2010

Supreme Court of Canada and Federal Court of Appeal Decisions

Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc., 2009 FCA 308: and Supreme Court of Canada files: 33462; 33480; 33481; and 33482

On December 2, 2010, the Supreme Court of Canada dismissed leave to appeal from the Federal Court of Appeal's decision in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308. Lawson Lundell acted for the Respondent, the Canadian Association of Petroleum Producers (CAPP), and took an active role in successfully defending the appeal proceedings.

The Supreme Court's decision to not hear the appeal leaves intact the Federal Court of Appeal decision from October 2009, which in turn upheld the decisions of the National Energy Board (NEB) that had been challenged by various First Nations. The following discussion outlines the Federal Court of Appeal's Reasons for Decision and briefly comments on the implications of the decisions.

The Appeals

The Standing Buffalo Dakota First Nations (Standing Buffalo) brought three separate challenges arising from three decisions of the National Energy Board to issue Certificates of Public Convenience and Necessity (CPCN) for three pipeline projects: Keystone Pipeline, Southern Lights Pipeline and the Alberta Clipper Pipeline. The Sweetgrass First Nation and the Moosimin First Nation brought an additional challenge arising from the NEB's Alberta Clipper decision. The Federal Court of Appeal heard and decided all four appeals together. The Supreme Court of Canada refused to grant the First Nations leave to appeal.

Background – The NEB Hearings

During the NEB hearings, the Board considered a motion made by Standing Buffalo that sought determinations that 1. the NEB had no jurisdiction to consider the CPCN applications without first determining whether Standing Buffalo has a credible claim to Aboriginal rights and title and 2. the Crown was required to attend the hearing and respond to Standing Buffalo's claim. The NEB denied the motion and held that its mandate was to consider the application before it in accordance with the public interest. In doing so, the NEB stated that Aboriginal concerns were taken into account because the applicant was required to consult with affected Aboriginal groups and mitigative accommodations of Aboriginal concerns could be ordered.

The Issue

The Court of Appeal identified the issues to be decided as follows:

(a) *The Jurisdictional Issue*: Before considering the applications for Project approvals, was the NEB required to determine

  (i) whether the Crown had a duty to consult, and if appropriate, accommodate the appellants in relation to the Projects; and

  (ii) if the Crown had such a duty, whether that duty had been discharged; and

(b) *The Constitutional Issue:* Does section 52 of the NEB Act violate subsection 35(1) of the Constitution?

Analysis

The Court of Appeal reviewed the law in respect of the Crown's duty to consult as described in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, and emphasized the finding by the Supreme Court of Canada in *Haida* that, where agreement on any or all of these matters cannot be reached, "the matter may go to the courts for review."[1]

The Jurisdictional Issue

The Court found that the NEB itself does not have a duty to consult:

> "The NEB is a quasi-judicial body … and, in my view, when it functions as such, the NEB is not the Crown or its agent." (para. 34)

The Appellants argued that while the NEB's mandated consultation by the project proponents may have addressed potential infringements of Aboriginal rights by those proponents, the failure of the NEB to undertake the *Haida* analysis means that potential infringements of those rights by the Crown would not be addressed (thereby breaching subsection 35(1) of the Constitution). Further, the appellants argued that whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB.

[1] Since the Federal Court of Appeal's decision in October 2009, the Supreme Court of Canada has twice expanded on its discussion of the duty to consult. See *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53. Lawson Lundell acted for the Appellants in both of these cases. See our summary of these decisions at: http://www.lawsonlundell.com/Resources

The Court rejected the appellants' arguments for four reasons:

1. The application for a Certificate under section 52 "focuses on the applicant, on whom the NEB imposes broad consultation obligations." By ensuring that the applicant respects Aboriginal rights, the NEB demonstrates that it is exercising its decision-making function in accordance with s. 35(1) of the Constitution;
2. No provision of the NEB Act prevents the Board from issuing a section 52 Certificate without first undertaking a *Haida* analysis or empowers it to order the Crown to undertake *Haida* consultations;
3. The NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty is the Crown in right of a province; and
4. A determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making a decision does not preclude the adjudication of those matters by a court of competent jurisdiction.

The Court concluded with the following endorsement of the NEB process:

> "…the ability of an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty…should not be taken as suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application.…That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it. … it would be unfortunate if the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited." (para. 44)

The Constitutional Issue

Sweetgrass and Moosimin argued that the NEB Act or portions thereof are invalid on the basis that they violate subsection 35(1) of the Constitution. The Court concluded that the assertion that the entire NEB Act infringes an existing Aboriginal or treaty right of the SFN/MFN was "entirely unsubstantiated."

> "It is clear from the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)* that the NEB is required to conduct its

> decision-making process in a manner that respects the provisions of subsection 35(1) of the Constitution. In my view, the failure of the NEB Act to specifically refer to this requirement in section 52, or elsewhere in the NEB Act, is insufficient to invalidate that provision." (para. 48)

Conclusion

The decision clearly endorses the NEB's current approach to section 52 applications. It confirms that the process is one that "focuses on the applicant" and provides "a practical and efficient framework" for addressing First Nations' concerns with respect to the impact of a particular project. It also confirms that NEB is *not* the appropriate forum for First Nations to pursue outstanding grievances against the Crown unrelated to the project such as land claims or treaty land entitlement claims.

Key Contacts

- **Keith Bergner**
  P: 604.631.9119
  E: kbergner@lawsonlundell.com
- **Lewis Manning**
  P. 403.781.9458
  E. lmanning@lawsonlundell.com