Date: 20080117

Docket: A-113-06
A-561-06

Citation: 2008 FCA 20

CORAM: **NOËL J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

MINISTER OF ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA, and MINISTER OF TRANSPORT

Appellants

and

DENE THA' FIRST NATION

Respondent

and

IMPERIAL OIL RESOURCES VENTURES LIMITED, on behalf of the Proponents of the Mackenzie Gas Project, NATIONAL ENERGY BOARD, and ROBERT HORNAL, GINA DOLPHUS, BARRY GREENLAND, PERCY HARDISTY, ROWLAND HARRISON, TYSON PERTSCHY AND PETER USHER, all in their capacity as panel members of a Joint Review Panel established pursuant to the *Canadian Environmental Assessment Act* to conduct an environmental review of the Mackenzie Gas Project

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Heard at Edmonton, Alberta, on January 16, 2008.

Judgment delivered from the Bench at Edmonton, Alberta, on January 17, 2008.

REASONS FOR JUDGMENT OF THE COURT

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on January 17, 2008)

[1] On May 17, 2007, the Dene Tha' First Nation applied for judicial review of certain decisions of the appellants (the Ministers) relating to the design and creation of the regulatory and

environmental review process for the Mackenzie Gas Pipeline. The basis of the application was the allegation that the Ministers had failed to fulfil their obligation under section 35 of the *Constitution Act, 1982* to consult with the Dene Tha' in relation to the creation of the process.

[2] On March 9, 2006, Justice Phelan rendered a judgment with elaborate reasons dismissing a motion by the Ministers to stay the Federal Court proceedings (2006 FC 307). On November 10, 2006, he rendered a further judgment again with elaborate reasons granting the application for judicial review (2006 FC 1354). The Ministers have appealed both judgments. The respondent Imperial Oil Resources Ventures Limited supports the appeal, as does the intervener, the Attorney General of Alberta.

[3] The parties have settled the dispute that led to the application for judicial review, rendering these appeals moot. However, this Court ordered on October 10, 2007, that the appeals would be heard on their merits despite being moot.

[4] Having considered the submissions in support of the appeal, we find no error on the part of Justice Phelan, in relation to either decision, that warrants the intervention of this Court.

[5] The first appeal (A-113-06) is an appeal of the decision to dismiss the motion to stay the proceedings. As that decision was discretionary, this Court will intervene only if the decision was based on an error of law or if the discretion was exercised erroneously (that is, if the judge did not place sufficient or any weight on relevant considerations), or if he had regard to irrelevant factors or failed to have regard to relevant factors (*Elders Grain Co. v. Ralph Misener (The) (C.A.)*, [2005] 3 F.C.R. 367, at paragraph 13). Applying these tests, we find no basis for intervention in this case.

[6] The second appeal (A-561-06) relates to the decision of Justice Phelan to allow the application for judicial review. He concluded that a duty to consult arose at some point between 2002 (during the development of the Cooperation Plan) and 2004 when the planning of the environmental and regulatory process was substantially completed by the execution of the Joint Review Panel Agreement. He also concluded that the Crown had failed to consult with the Dene Tha' during that period, with the result that concerns specific to the Dene Tha' in relation to the process were not considered.

[7] A number of submissions were made to the effect that the decision of Justice Phelan to grant the application for judicial review was based on one or more errors of law or fact. We do not consider it necessary to recount those submissions in detail. It is enough to say that we have been unable to detect any error of law, or any palpable and overriding error of fact.

[8] In our view, this case does not establish a new principle relating to the determination of when the duty to consult arises, or the content of the duty to consult. We do not agree with the suggestion that this case imposes on the Crown an obligation that is different or more onerous than is justified by the jurisprudence, including *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R 388.

[9] This case turns entirely on its own facts. Having regard to the evidence on the record, it was open to Justice Phelan to find as a fact that, given the unique importance of the Mackenzie Gas Pipeline, and the particular environmental and regulatory process under which the application for

approval of the Mackenzie Gas Pipeline would be considered by the Joint Review Panel and the National Energy Board, the process itself had a potential impact on the rights of the Dene Tha'. It was also open to him to find as a fact that, at some point during the period from 2002 and 2004, it was sufficiently certain that there would be an application for approval of the Mackenzie Gas Pipeline that the obligation to consult was triggered. He was not required, as a matter of law, to conclude that no consultation obligation arose until the formal application for approval was filed. The test framed by the Supreme Court of Canada in the cases cited above does not dictate such a rigid or inflexible approach.

[10] We do not accept the submission of counsel for the Ministers that Justice Phelan, in assessing whether there had been adequate consultation, applied a standard of correctness rather than reasonableness. That argument is based essentially on the proposition that Justice Phelan failed to appreciate the elements of the regulatory scheme, or the relevant facts relating to what was intended or expected to occur in the course of the proceedings before the Joint Review Panel and the National Energy Board. We find nothing in the record to support that argument. Once Justice Phelan found, as he was entitled to do, that the obligation to consult arose in relation to the development of the environmental and regulatory process, and that there had been no consultation at all in that regard, he was bound to conclude that the Ministers had not fulfilled their duty.

[11] We should not be taken to agree with every statement made by Justice Phelan in his reasons. For example, we do not agree with the suggestion (at paragraphs 53 and 61 of his reasons) that adequate consultation in relation to an asserted Aboriginal right cannot be achieved unless the person or agency representing the Crown is empowered to determine the validity of the right. Nor

do we agree that this case is “on all fours” with *Mikisew Cree* (paragraph 102 of his reasons), although the facts of that case are similar to the facts of this case, in that in both instances the Crown failed to respect the legitimate requests of the First Nation at the appropriate time. Counsel for the Ministers argued that the reasons also contain a number of examples of imprecise language. Any such errors are minor, and certainly are not serious enough to warrant reversing the decision.

[12] The appeals are accordingly dismissed.

“Marc Noël”
J.A.

“K. Sharlow”
J.A.

“C. Michael Ryer”
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-113-06
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PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	January 16, 2008
REASONS FOR JUDGMENT OF THE COURT:	(NOËL, SHARLOW, RYER JJ.A.)
DELIVERED FROM THE BENCH BY:	NOËL J.A.

APPEARANCES:

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Mr. Robert Janes Mr. Robert Freedman	FOR THE RESPONDENT – Dene Tha' First Nation
Ms. Mary Comeau Mr. Ray Chartier	FOR THE RESPONDENT – Imperial Oil Resources Ventures Ltd.
Mr. Andrew Hudson	FOR THE RESPONDENT – National Energy Board
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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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