Aboriginal Law Bulletin

August 2007 Fasken Martineau DuMoulin LLP

The Chicot Decisions: Permit Set Aside in NWT Due to Exclusion of Aboriginal Group in Final Stages of Regulatory Process

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On July 20, 2007, Mr. Justice Blanchard rendered reasons in ***Chicot v. Canada***, 2007 FC 763 ("Chicot 1") and ***Chicot v. Minister of Indian and Northern Affairs***, 2007 FC 764 ("Chicot 2"). The Court quashed a land use permit issued in the Northwest Territories by the Mackenzie Valley Land and Water Board to Paramount Resources Ltd. on the basis of a failure to properly consult with the Ka'a'Gee Tu First Nation ("KTFN").

Although the KTFN had been adequately consulted through the regulatory process that resulted in recommended conditions for the permit being delivered to the responsible Ministers, the Ministers were not satisfied with the conditions and initiated a "consult to modify" process by which the Mackenzie Valley Environmental Impact Review Board and the Ministers collaborated to modify the conditions. The KTFN had an opportunity to comment on some of the Ministers' suggested modifications, but after the Indian and Northern Affairs Canada concluded that sufficient consultation had taken place, the KTFN were excluded from the "consult to modify process". The Court found that this exclusion was contrary to the Crown's duty to consult.

These decisions make clear that, although the process and actions undertaken in pursuit of the Mackenzie Valley environmental assessment may satisfy the Crown's duty to consult, if the Crown excludes aboriginal people from a part of the process that may affect the conditions of a licence, the process will be found to be flawed and any permit granted in reliance on the process may be quashed.

Background

The KTFN is a 60 member-community of the Deh Cho First Nations ("DCFN"). Paramount Resources Ltd. is a Calgary-based energy company that has explored and developed oil and gas reserves in the Cameron Hills area of the Northwest Territories since approximately 1979.

The KTFN claim stewardship over the Cameron Hills area though there is no agreement about this among the aboriginal groups who claim the same area.

The KTFN, as part of the DCFN, falls within Treaty 11, which contains provisions for the cession of land and surrender of rights, as well as guarantees to the Aboriginal signatories that they will be allowed to continue to pursue hunting, trapping and fishing through the land surrendered. There was no dispute between the parties that the KTFN retains treaty rights to hunt, fish, and trap in the Cameron Hills area. However, there is an ongoing dispute as to whether Treaty 11 extinguished aboriginal title. While Canada views Treaty 11 as an extinguishment treaty, the DCFN and KTFN view it as a peace and friendship treaty, which did not extinguish aboriginal title. It is also important to note that despite the requirements of Treaty 11, Canada never set aside reserve lands in the Northwest Territories under the Treaty.

Paramount obtained mineral rights to the Cameron Hills area in the early 1980s and its development in the area has proceeded in phases. This application for judicial review concerns what represents the beginning of oil and gas production in the area - the third and final phase of development - the "Extension Project".

Development in the Mackenzie Valley, including Cameron Hills, involves a complex regulatory approval process involving the National Energy Board ("NEB"), the Mackenzie Valley Land and Water Board ("Land and Water Board"), and the Mackenzie Valley Environmental Impact Review Board ("Review Board"). However, the *Mackenzie Valley Resource Management Act*, 1998 c. 25 ("*MVRMA*") provides that the final decision on the approval of development projects rests with the responsible Ministers.

In April 2003, Paramount applied to amend some of its existing land use permits and water licences in order to proceed with Extension Project. The Land and Water Board referred Paramount's application to the Review Board for an environmental assessment. Having conducted the requisite assessment, which included consultations with KTFN, the board issued its report on June 1, 2004. Seventeen recommendations and suggestions to mitigate the potential negative environmental impacts of the Extension Project were made.

The NEB and the Responsible Ministers expressed concerns about the recommendations set out in the Review Board's report. As a result on August 19, 2004, the Ministers began consultation with the board in accordance with the *MVRMA*. This part of the process was known as the "consult to modify" process, by which the Responsible Ministers, who had ultimate approval power over Paramount's application, may reject the board's recommendations or adopt them with modifications. Through the consult to modify process, the Responsible Ministers proposed modifications to the board's recommendations and submitted those proposals for the board's consideration. KTFN wrote to the board, providing comments regarding the proposed changes and submitting that the consult to modify process was in violation of the Crown's duty to consult with First Nations as per the Supreme Court of Canada decisions of *Haida* and *Taku*. INAC conducted a "Crown Consultation Analysis" and concluded that consultation and accommodation performed to date had been adequate in addressing the potential infringements on an Aboriginal Treaty and/or upon asserted Aboriginal rights.

The Responsible Ministers then continued the consult to modify process for an additional three months, *excluding* KTFN from the process. On March 15, 2005, the Review Board adopted the substantially revised versions of its

recommendations and put them forward to the Responsible Ministers. By letter of July 5, 2005, the INAC Minister adopted the recommended mitigating measures on behalf of the Responsible Ministers, citing numerous letters from KTFN, among other reasons, as the basis for the measures. In all, 12 of the 17 recommendations had been modified during the consult to modify process.

Subsequent to the Ministers' approval of the Extension Project, the Land and Water Board proceeded with Paramount's application for land and water permits, seeking input from stakeholders - including the KTFN. The Land and Water Board exercised its powers to investigate whether the Crown had fulfilled its duty to consult and, as part of the investigation, requested that the INAC Minister provide a detailed summary of the consultations with the KTFN. The Minister responded that it believed the duty to consult had been fulfilled but that it could not provide further information due to the ongoing litigation (in *Chicot 1*). The KTFN later wrote and requested that the Land and Water Board not issue the amended land use permit until the board was adequately satisfied that the appropriate consultation had been done. Subsequently, on September 22, 2005, the Land and Water Board issued the land use permit which was challenged in *Chicot 2* as well as a water use permit not subject to challenge.

The Actions

In *Chicot 1*, the KTFN challenged the decision of the Responsible Ministers to approve the Extension Project after the consult to modify process. In *Chicot 2*, the KTFN challenged the decision of the Land and Water Board to issue the land use permit to Paramount. The KTFN argued that not only had the Crown failed to meet its duty to consult, but also that the INAC Minister had acted illegally and *ultra vires* his powers in appointing the then-current chair of the Land and Water Board and that the Land and Water Board had breached the rules of procedural fairness and natural justice in multiple ways during the license approval process.

The Decisions

Both decisions, released concurrently, turned on whether the Crown's consultation with the KTFN with respect to the Extension Project was sufficient in order to discharge its duty. Mr. Justice Blanchard began by noting (para. 100) that the determination of the content and scope of the Crown's duty to consult and accommodate is proportionate to "a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects upon the right or title claimed." Blanchard J.'s analysis of the scope and content of the Crown's duty for both decisions is found in *Chicot 1*.

In assessing the strength of the claims to rights and title, Blanchard J. considered the KTFN's rights under Treaty 11 to hunt, trap and fish, which were acknowledged by the Crown, as well as the claims process regarding the KTFN's asserted claim to aboriginal title. In 1998, the Federal Crown, the Government of the Northwest Territories, and the KTFN had begun the "Deh Cho Process" in an attempt to resolve the dispute with respect to their asserted aboriginal title. Blanchard J. stated (para. 106) that "[w]hile not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the [KTFN's] asserted claim." Without deciding the issue, Blanchard J. noted that the Crown's unfulfilled obligation under Treaty 11 to set aside reserve lands, in addition to its acceptance of the land claim

process, lent credence to the strength of KTFN's claim to title and therefore suggested a broader and more onerous duty to consult on the part of the Crown.

Blanchard J. then considered the seriousness of the potentially adverse effect of the intended Crown conduct upon the rights or title. He cited the reports developed by the Review Board created during reviews of the Gathering and Pipeline Project – Phase Two of the development - and the Extension Project, as well as the evidence that led to those reports. This evidence led Blanchard J. to conclude (para. 112) that "the Extension Project will have a significant and lasting impact on the Cameron Hills area and, consequently, on the lands over which the [KTFN] assert Aboriginal title" as well as on KTFN's "broad harvesting rights to hunt, trap and fish". In sum, Blanchard J. concluded (para. 117) that the Crown's duty in this case "must…involve formal participation in the decision-making process [by KTFN]."

Blanchard J. went on to examine the actual consultation process provided for by the *MVRMA*. Although the mere fact that it was prescribed by statute was not sufficient evidence to show the Crown had discharged its duty to consult, he held (para. 119) that generally the process was comprehensive and allowed KTFN the benefit of "formal participation in the decision-making process". However, he further held (para. 123) that the Crown's use of the consult to modify process was offensive to its duty to consult and accommodate:

> It is true that the Review Board via a long hearing process which involved the KTFN undertook the task of investigating the [KTFN's] concerns and eventually made recommendations to address some of those concerns. However, by engaging the "consult to modify process" which resulted in a substantial revision of certain key recommendations of the Review Board…without consulting the [KTFN], the Ministers essentially decided not to rely on the investigative and fact finding role of the Review Board. It is not good enough for the Ministers, at this stage, to argue that as a consequence of prior consultation they were made aware of the concerns of the [KTFN]. The difficulty is that the [KTFN] were not made aware of subsequent proposals by the Ministers that changed the recommended mitigating measures of the Review Board … They were simply not consulted.

Blanchard J. also offered his views on several issues raised by the parties, which, despite being obiter dicta, offer useful tips for others engaged in similar processes. First, with respect to a meeting held between the Responsible Ministers and Paramount during the consult to modify process but prior to the final decision, Blanchard J. suggested that while a Minister's decision is pending, it is advisable that representatives of a government ministry do not hold meetings with any particular party to proceedings without the presence of the other party(ies). This is a curious ruling in light of regulatory processes which involve some give and take between proponents and regulators. However, in this case, the evidence belied no reasonable apprehension of bias, as had been alleged by KTFN.

Second, KTFN had argued that they had been unable to fully and meaningfully participate in the consultation process due to inadequate resources. Blanchard J. stated that the evidence showed that the Crown had provided substantial funding for KTFN to participate and that KTFN had failed to show what additional resources they required in order to fully participate in the process.

He declined to decide whether or not the resources provided by the Crown were sufficient, since the Crown had already been held to have failed to discharge its duty to consult.

Finally, KTFN had argued that its own failure to participate in Paramount's Traditional Knowledge study had been prompted by concerns over protecting sensitive and confidential traditional knowledge. Blanchard J. acknowledged the concerns of KTFN in this regard, but suggested that other means of protecting such sensitive information must be looked at, which would have allowed KTFN to participate in the Traditional Knowledge study while protecting its traditional knowledge.

As a result of the Crown's failure to sufficiently consult the KTFN with respect to the Extension Project, Blanchard J. ordered that the parties engage in a process of meaningful consultation, which will involve taking account of KTFN's concerns and, if necessary, accommodating them.

In *Chicot 2*, Blanchard J. addressed a preliminary challenge to his jurisdiction, then turned to the first of KTFN's main arguments, which relied on section 62 of the *MVRMA*: "A board may not issue a licence, permit or authorization…unless the requirements of [Part 5] have been complied with…" KTFN argued that the Crown's failure to discharge its duty to consult and accommodate equated with a failure to comply with Part 5 of the *MVRMA*, and so the board was not permitted to issue the Land Use Permit. It appears that KTFN based its argument on a reading into the *MVRMA* of the Crown's duty to consult and accommodate per section 35 of the *Constitution Act, 1982*.

In holding that the Land Use Permit should be overturned, Blanchard J., at para. 66, rejected KTFN's argument and unsurprisingly relied squarely on the provisions of the *MVRMA*:

> Section 114 of the Act sets out the purpose of Part 5 which is "to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for development,…" to, among other objectives, "ensure that the concerns of the Aboriginal people and the general public are taken into account in that process."

Blanchard J. then stated, at para. 68, that:

> Inherent in the Crown's duty to consult is the obligation to ensure that the concerns of the Aboriginal people are taken into account. In my view this is the central purpose of the obligation. By failing to meet its duty to consult and accommodate in the circumstances of this case, the Crown cannot, therefore, be said to have taken into account the concerns of the Aboriginal people, as required by section 114 of the Act, before making its decision to approve the Extension Project.

Blanchard J. then held that it was unnecessary for him to consider any of the other issues raised by the case because the amended Land Use Permit would be set aside.

Conclusion

In *Chicot 1*, the Court could not countenance the exclusion of the KTFN from the final "consult to modify" process, and concluded that the consultation was insufficient due to that exclusion. More significant however, was Blanchard J.'s strong endorsement of the *MVRMA*'s consultation process up to that point. The Court clearly endorsed the statutory process as capable of discharging the duty to consult at paras. 118-9:

> The consultation process provided for under the [*MVRMA*] is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups…[Prior to the consult to modify process] the process … provided an opportunity for the Applicants to express their interests and concerns, and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action…[T]he [KTFN] benefited from formal participation in the decision-making process.

Blanchard J. stated that the problem in this case was not with the statutory process itself, but rather with the manner in which the Ministers engaged the process. It appears then that, absent the KTFN being excluded from the consult to modify process, the Crown's duty to consult would have been fulfilled under the circumstances.

Further, in determining the scope of the duty to consult, the fact that the Crown is engaging with the claimants in land claim negotiations will lend credibility and strength to a claim for aboriginal title. This may complicate the terms under which the Crown is willing to enter into such negotiations in the future.

Further still, the decisions reiterate the requirement of First Nations that they participate in the consultation process, and, when making a claim of insufficient funding, justify must that the actual funding provided was insufficient. First Nations may also be required to justify their failure to participate in parts of the consultation process where there are options available to address their concerns around, for example, the confidentiality of traditional knowledge.

These cases again demonstrate the impact on private sector firms that can be occasioned by the Crown's failure to discharge its duty to consult. Paramount's development of the Extension Project will be delayed by the requirements of further consultation between the Crown and KTFN and by the invalidation of the Land Use Permit.

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