Federal Court  Cour fédérale

Date: 20121119

Docket: T-300-12

Citation: 2012 FC 1336

Ottawa, Ontario, November 19, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GITXAALA NATION

Applicant

and

THE MINISTER OF TRANSPORT, INFRASTRUCTURE, AND COMMUNITIES AND NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application brought by the Gitxaala Nation seeking prerogative relief against the Minister of Transport, Infrastructure and Communities (Minister) and the Northern Gateway Pipelines Limited Partnership in connection with the ongoing National Energy Board (NEB) regulatory review of the Northern Gateway Pipeline Project (the Gateway Project). Gitxaala contends that the federal Crown's duty to consult has been breached because Gitxaala, an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5, was excluded from participating in a

federal interdepartmental review of marine safety factors relevant to the Gateway Project known as a TERMPOL Review or TRP.

[2] At the time of the hearing of this matter in Vancouver, the work of the TRP Committee had been completed and a report prepared. Gitxaala seeks an Order quashing the TRP report and directing the Respondent Minister to reopen the process to allow for a meaningful consultation. Gitxaala frames its consultation concern in the following passages from its Notice of Application:

> The proposed Gateway Project, and in particular its shipping component, has the potential to adversely affect Gitxaala's asserted Section 35 Rights. As such, the Crown has a constitutional duty to consult with Gitxaala prior to deciding whether to approve the Gateway Project.
>
> Although Gitxaala is participating in the Joint Review Panel process as an intervenor, this involvement does not fully discharge the Crown's consultation obligations towards Gitxaala in respect of the Gateway Project. The Gateway TRP, and particularly the Report that it will produce and distribute to the JRP and Responsible Authorities, is a critical component of the Gateway Project review insofar as the shipping routes are concerned. The work of the Gateway TRP will not be replicated by the Joint Review Panel. The JRP and Transport Canada will rely on the Report in deciding whether to approve the Gateway Project and if so, on what terms.
>
> In order to ensure that consultation with Gitxaala on the Gateway Project is meaningful and effective, the Crown must consult with Gitxaala as part of the Gateway TRP and in the development of the Report. Transport Canada's exclusion of the Gitxaala Nation from the Gateway TRP to date constitutes a breach of the Crown's duty to consult.

[3] The Respondents contend that the process for consultation is underway within the context of the ongoing work of a Joint Review Panel (JRP) established under the terms of the *Canadian Environmental Assessment Act*, SC 1992, c 37, and as contemplated by an aboriginal consultation framework created after discussions with First Nations affected by the Gateway Project. In the

result, the Respondents say that Gitxaala and all of the other First Nations affected by the Gateway Project will have ample opportunity to be heard and accommodated and it is premature for the Court to interfere at this relatively early stage of the process.

The Gateway Project

[4] The Northern Gateway Pipeline Limited Partnership (Gateway Partnership) proposes to build and operate dual oil and condensate pipelines along a 1172 km corridor running from Bruderheim, Alberta to Kitimat, British Columbia.

[5] At Kitimat the Gateway Partnership plans to construct a storage and marine terminal for the export of oil and the import of condensate to and from marine tankers. It is estimated that the cost of construction will exceed 5.5 billion dollars.

[6] Once completed, the Gateway Partnership expects that the Gateway Project will support the export of 30 million tonnes of crude oil and the import of 11 million tonnes of condensate requiring the annual transit of 250 oil tankers.

[7] There are two primary shipping routes into Kitimat. The southern intercoastal route begins at the entrance to Caamano Sound and proceeds in a northerly direction into Douglas Channel. The Northern intercoastal route enters Principe Channel at the northern end of Banks Island and intersects the southern route on the west side of Gil Island. The combined shipping route then proceeds north into Douglas Channel, at the head of which lies the proposed Kitimat terminal.

The Gitxaala Nation

[8] There is no doubt that the people of Gitxaala stand to be significantly affected if the Gateway Project goes ahead. Their elected Chief, Elmer Moody, has provided affidavit evidence describing their interests. That evidence stands unchallenged.

[9] The Gitxaala Nation has 21 *Indian Act* reserves located throughout a large archipelago southwest of Prince Rupert. Most of those reserves are immediately adjacent to the proposed marine shipping routes that will service the western terminus of the Gateway pipeline at Kitimat (see the map annexed to these Reasons).

[10] Gitxaala's main residential reserve (Lach Klan) is located on Dolphin Island adjacent to the shipping route entrance at the northern end of Principe Channel. According to Chief Moody, many of the other Gitxaala reserves are occupied at least seasonally to facilitate the harvesting of a wide variety of marine resources including halibut, cod, crab, abalone, salmon, seaweed, red snapper, clams, cockles, sea cucumbers, herring, roe and a variety of marine birds, eggs and mammals. In addition to providing sustenance, the ability to harvest and share these traditional food sources is the foundation for many of Gitxaala's ancient governance and cultural practices.

[11] Keith Lewis is a member of Gitxaala who has lived most of his life in Lach Klan. He is a member of one of four Gitxaala clans, the Ganhada (Raven) clan. Mr. Lewis began to fish with his grandfather at the age of seven. Over the years he has acquired knowledge of Gitxaala traditions and harvesting practises. His affidavit describes the significance of the marine harvest to his family and to the Gitxaala people:

> 16. I have continued to harvest marine resources into my adult life to the present day. I still rely on a lot of the knowledge that was passed down to me by my grandfather, my grandmother and my father.
>
> 17. Marine harvesting is part of my identity as Gitxaala. While some of the technology has changed over the years, we are harvesting the same species in the same places as Gitxaala have for countless generations. It is common knowledge among Gitxaala that our ancestors have been using Gitxaala Territory before any other people; this is part of our *adawx* (oral history). Harvesting marine resources throughout our territory is one of the most important elements of our history and culture; it is how we survived and thrived as a Nation for so long. I practice our traditional culture through marine harvesting today for the same reasons that my grandfather and grandmother and their ancestors did before them. It is our way of sustaining ourselves and connecting with our history and with the natural world.
>
> 18. Over half of the food my family of four eats is the food that I harvest. Even though we live in Prince Rupert, we do not eat much food from the store, which can be very expensive and not as nutritious. My harvest also provides food for four other households. I am the only son of my family, so I provide food for my grandparents, my parents and two of my sisters' families. I also provide some of my harvest to some ladies in Lach Klan who do not have someone to go out for them.

[12] Matthew Hill is a member of the Gitxaala Lasgeek (Eagle) clan. His affidavit contains a rich personal history spanning more than 50 years of marine harvesting throughout the traditional Gitxaala territory. His evidence is consistent with the evidence of Mr. Lewis and Chief Moody.

[13] Mr. Hill's affidavit also contains a fairly detailed critique of the TRP report. Among other things, he identifies a number of omissions or deficiencies concerning the locations of at-risk fishing and harvesting grounds. He also identifies several known navigational hazards that, he claims, were overlooked in the TRP report. In addition, he is critical of the TRP report's treatment of the risks

associated with increased tanker traffic in the vicinity of active fishing grounds. Mr. Hill's affidavit makes a case for the importance of the local knowledge of First Nations residents for a full understanding of the marine risks that the TRP Committee was mandated to study.

[14] It is clear from the evidence before the Court that for thousands of years the Gitxaala Nation has occupied the lands and utilized the marine resources in the intercoastal area proposed for the transit of marine tankers servicing the Gateway marine terminal at Kitimat. In the result, the interests of Gitxaala stand to be significantly affected during the lifetime of the Gateway Project. They are naturally concerned about the potential pollution risks associated with the project and about the inherent conflicts that will be created by the encroachment of oil tankers into their areas of traditional use.

[15] Both of the Respondents acknowledge that Gitxaala's interest in protecting its traditional territory and practices is worthy of consideration. And both agree that that interest is of sufficient importance that the Crown's duty of deep consultation has been engaged.

The Regulatory Background

[16] It is clear from the record that the Government of Canada has designated the JRP process as a primary stage for consultation. Because the Governor in Council (GIC) is the ultimate decision-making authority over the Gateway Project, the Government of Canada also recognizes that its duty of consultation extends beyond the work of the JRP so that an end-stage comprehensive consultation with interested First Nations will be required. The sole issue to be resolved in this proceeding is whether these steps are sufficiently robust that meaningful consultation can still occur.

Gitxaala argues that it was entitled to an earlier consultation so that the deficiencies identified in the TRP report could have been addressed and remedied. According to Gitxaala the TRP report is so fundamental and influential that no engagement in a later stage of the review and consultation process can overcome the alleged deficiencies in the TRP Committee's analysis.

[17] In order to fully appreciate the arguments advanced by the parties, it is important to understand the regulatory processes that have been engaged in conjunction with the government's proposed framework for consultation with First Nations.

The TRP Process

[18] According to the affidavit of Michael Henderson, Regional Director (Pacific Region) for Transport Canada, the TRP is a non-statutory and voluntary technical review carried out by a number of federal departments and authorities and other designated advisors. The mandate of a TRP is described in the 2001 TERMPOL Code (TRP Code) in the following terms:

> The purpose of the TRP is to objectively appraise operational ship safety, route safety, management and environmental concerns associated with the location, construction and subsequent operation of a marine terminal system for the bulk handling of oil, chemicals, liquefied gases or other cargoes identified by TCMS, or of the designation and subsequent operation of any transshipment site for these or other substances which may pose a risk to public safety or the environment. Such an appraisal, using the procedures and methodologies described in the TRP, enables an inter-departmental committee to identify potential problems and to recommend appropriate ameliorative measures.

[19] According to the TRP Code, a TRP report is not a substitute for any applicable legislative requirements. The process is initiated by the project proponent and it follows a methodology

described in the TRP Code. The project proponent is required to provide surveys, studies and technical data that are responsive to a number of marine safety considerations including marine traffic, fishing operations, route analysis, navigability, clearances, ship specifications, cargo and transshipment systems, ship manoeuvring, anchorage, berthing, terminal operations and contingency planning. This information is then analysed and a report is issued.

[20] The TRP Code also stipulates that a TRP report is not a statement of government policy and is non-binding. Instead, the report is said to represent the judgment of the departmental representatives who participated in its creation. The recommendatory nature of a TRP report is repeated throughout the TRP Code including the following passage:

> It must be understood, however, that DFO CCG and TCMS regulatory roles are separate and distinct from their roles in the TRP which is essentially a data and operational review process. The conclusions and recommendations contained in a TERMPOL report do not relieve a proponent from an obligation to fully comply with all applicable legislative and regulatory requirements promulgated, and as amended from time to time, by the various federal and provincial statutes and regulations which apply to shipping safety and to the protection of the environment. These Acts include but are not limited to:
>
> • the *Canada Shipping Act*;
> • the *Navigable Waters Protection Act*;
> • the *Arctic Waters Protection Act*;
> • the *Canadian Environmental Protection Act*;
> • the *Canadian Environmental Assessment Act*;
> • the *Transportation of Dangerous Goods Act*;
> • the *Fisheries Act*;
> • the *Oceans Act*; and
> • the *Canada Marine Act*.

The Gateway Project TRP

[21] The Gateway Project TRP was initiated in late 2004 and thereafter a TRP Committee was struck. In addition to federal departmental representatives, several technical advisors were invited to join the Gateway Project TRP Committee, including the Haisla First Nation and Kitamaat Village Council, the District of Kitimat, the British Columbia Coast Pilots, the Chamber of Shipping of British Columbia and the Council of Marine Carriers. Haisla Nation and Kitamaat Village Council occupy lands in close proximity to the proposed Gateway marine terminal.

[22] According to Mr. Henderson's affidavit, the Gateway Partnership submitted its TERMPOL studies to the TRP Committee in early 2010 and on February 23, 2012, the Committee issued its report entitled the *TERMPOL Review Process Report on the Enbridge Northern Gateway Project*. The Gateway Project TRP Committee ultimately concluded that there are no technical barriers to the Gateway Project proposal that cannot be effectively managed.[1]

[23] The TRP report has since been submitted to the JRP along with the supporting evidence. All of this now forms part of the JRP record.

[24] The record before me discloses that Gitxaala first communicated its desire to be included in the TRP process by a letter from its legal counsel to Transport Canada dated July 27, 2011. Gitxaala requested that it be permitted to participate on the TRP Committee, failing which it should

[1] The report states: While there will always be residual risk in any project, after reviewing the proponent's studies and taking into account the proponent's commitments, no regulatory concerns have been identified for the vessels, vessel operations, the proposed routes, navigability, other waterway users and the marine terminal operations associated with vessels supporting the Northern Gateway Project. Commitments by the proponent will help ensure safety is maintained at a level beyond the regulatory requirements. The Termpol Review Committee has identified several findings and recommendations where further action is proposed that would provide a higher level of safety for vessel operations. A complete list of the findings and recommendations is included in Appendix 1.

be consulted with respect to its environmental concerns. This letter went unanswered for almost three months but on October 12, 2011 the Minister of Transport advised Gitxaala by letter that its concerns should be addressed within the context of its participation before the JRP. The Minister's letter gave the following rationale for the decision:

> The TRP is not a regulatory instrument; its provisions are not mandatory, and federal regulatory roles are separate and distinct from their roles in the TRP. As such, the TRP does not replace the requirements of an environmental assessment process under the *Canadian Environmental Assessment Act* or navigation impact assessments under the *Navigable Waters Protection Act*.
>
> As you know, marine shipping has been included in the environmental assessment for the NGP project. The technical studies for the TRP have been completed and submitted to the Joint Review Panel for its consideration in making recommendations on the project. As an Intervenor in the ongoing Panel process, you have the opportunity to make your views known about these technical studies, including questioning the information therein. The Termpol Review Committee will also produce a report based on its review of the studies, and submit this report to the Panel. These documents will be made publicly available, and can be queried or commented on through the Panel process.
>
> Membership on the Committee is typically limited to government departments and agencies involved specifically in the proposed project, or more generally in marine shipping; however, persons or groups with technical information related to marine transportation can contribute to the process. In the case of the NGP project, the Haisla Nation was invited to participate in the Committee as the marine terminal is in close proximity to Haisla reserve lands. The membership list of' the Committee is enclosed for your information.
>
> With respect to your concerns, they are all appropriate concerns to bring to the Panel's attention. The Panel is the primary mechanism for Aboriginal groups to learn about the project and present their views to the federal government on matters pertaining to the potential impacts of the project related to traditional use and Aboriginal rights. The Panel's mandate includes the assessment of all of the factors described in your list of concerns (see, in particular the document issued by the Canadian Environmental Assessment Agency entitled *Scope of the Factors — Northern Gateway Pipeline*

> *Project. August, 2009*). I would encourage Gitxaala Nation to bring its concerns forward for the Panel's consideration.
>
> With respect to the procedural questions listed in your letter, the TRP is in its final phase, and the Committee is in the process of preparing its report. Once the report is complete, as stated above, it will be made available to the public through the Panel, as well as through Transport Canada's website. With respect to studies, no additional studies have been requested; however, the Committee has asked Enbridge to increase the number of vessels considered in the Quantitative Risk Assessment to account for the cumulative effects of shipping traffic.
>
> With respect to consultation, the Panel will offer the opportunity for comments and questions related to all studies and reports conducted as part of the TRP. Transport Canada would encourage Gitxaala Nation to forward any questions or comments on the Termpol studies, or the report of the Committee to the Joint Review Panel when it becomes available, so that they may be fully considered and accounted for in the review and assessment of the NGP project.

Counsel for Gitxaala responded to the Minister by asking when the TRP report would be released and whether that would occur before the JRP's final hearings. This letter appears never to have been answered and it is unclear whether Gitxaala, at that time, accepted or acquiesced to the Minister's position. In any event Gitxaala was not invited to participate in the work of the Gateway Project TRP Committee and it is that failure that is at the root of this application.

The JRP Process

[25] As noted above the Gateway Project requires federal approval in the form of an environment assessment under the *Canadian Environmental Assessment Act*, SC 1992, c 37, and a determination under the *National Energy Board Act*, RSC, 1985, c N-7, as to whether the project is or will be required by the present and future public convenience and necessity.

[26] The ultimate authority to approve the Gateway Project and to authorize the issuance of a Certificate of Public Convenience and Necessity rests with the GIC acting on the advice of the National Energy Board (NEB). The task of assessing these considerations at first instance has been assigned to the Gateway JRP.

[27] In February 2009 the Canadian Environmental Assessment Agency (CEAA) issued a statement of the government's approach to First Nations consultation for the Gateway Project (the Scope of Consultation Statement). That Statement describes the scope of consultation as follows:

> The Government of Canada will take a whole-of-government approach to Aboriginal consultation; federal departments will work together in a coordinated manner that is integrated with the environmental assessment process. The approach for federal Crown consultation with Aboriginal peoples for major resource projects was created in accordance with "Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult" (INAC/Department of Justice; February, 2008, http://www.ainc-inac.gc.ca/ai/mr/is/acp/intgui-eng.asp)
>
> For the Northern Gateway Project, the Crown will rely on the consultation efforts of the proponent and the Joint Review Panel (JRP) process, to the extent possible, to meet the duty to consult. More specifically:
>
> - The project proponent will contact Aboriginal groups potentially affected by the project and provide them with information about the project and its potential impacts. It will document their concerns, accommodate those concerns in the project planning stage and initial design of the project and include information on unresolved concerns in its application. The JRP can require the proponent to gather more information about impacts, Aboriginal concerns and/or mitigation, if necessary.
> - The JRP, as a recommendation body under the *Canadian Environmental Assessment Act*, will submit an Environmental Assessment Report to the Minister of the Environment and the relevant federal departments; the response to the report will be considered by the Governor-in-

Council and if approved would subsequently inform all federal permitting/authorisation decisions.

- The JRP, as decision maker under the *National Energy Board Act*, will consider all evidence provided by the proponent, Aboriginal groups and other third parties in order to determine whether the project should be permitted to proceed and if so, to include mitigation or accommodation where necessary through imposition of conditions on the project approval.

It is important for Aboriginal groups with concerns about the project to participate in the JRP process to ensure that their concerns are considered by the decision-makers responsible for the project. There is no separate or parallel process to deal with issues within the JRP mandate.

The JRP is the key assessment and decision-making body for the project and has a broad mandate under both the *National Energy Board Act* and the *Canadian Environmental Assessment Act* to examine project-related issues. The JRP will consider and address all project-related Aboriginal issues and concerns within this mandate. The Canadian Environmental Assessment Agency (Agency) representing the Crown, will lead the initial consultation on the JRP Agreement as well as consultation on the Environmental Assessment Report issued by the JRP. The response to the report will be considered by the Governor-in-Council and if approved, would subsequently inform permitting and authorisation decisions by federal authorities. The Agency will be the contact for the Crown for project-related matters raised by Aboriginal groups that are outside the mandate of the JRP.

The phases for Crown consultation for the Northern Gateway Project are summarized below:

Phase I: Preliminary Phase

The Agency will consult on the JRP Agreement and the Agency and the National Energy Board (NEB) will provide information on their respective mandates and the JRP process.

Phase II: Pre-Hearing

The Agency and the NEB will continue to provide information on the JRP process and encourage Aboriginal groups to participate in the JRP process. The Agency will be the contact for the Crown for

> project-related matters raised by Aboriginal groups that are outside the mandate of the JRP.
>
> **Phase III: Hearing**
>
> Aboriginal groups and federal agencies with regulatory responsibilities in the project will participate in the hearing. The Agency will be the contact for the Crown for project-related matters raised by Aboriginal groups that are outside the mandate of the JRP.
>
> **Phase IV: Report/Decision**
>
> Crown consultation will be carried out on the JRP Environmental Assessment Report prior to consideration of the response by Governor-in-Council. The Agency will be the contact for the Crown for project-related matters raised by Aboriginal groups that are outside the mandate of the JRP.
>
> Under the *National Energy Board Act*, the JRP will take into consideration all relevant Aboriginal issues and concerns brought forward in the hearing process and consider them in its decision making. If the project is approved, the JRP may impose conditions on the project to mitigate any potential adverse impacts.
>
> **Phase V: Regulatory/Permitting**
>
> If it is determined that additional consultation about the project is required on permits or authorizations which other federal departments are requested to issue, the Crown will appoint a federal department to lead any consultations that may be required after the environmental assessment phase is complete.

[28] In August 2009 the CEAA issued a Scope of Factors document.[2] That document offered guidance concerning the marine based environmental effects of the Gateway Project with specific reference to Aboriginal Rights and Interests:

> Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the proponent will identify the lands,

[2] "Scope of Factors – Northern Gateway Pipelines Project, Guidance for the Assessment of the Environment Effects of the Northern Gateway Pipeline Project."

> waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups, including Métis, that assert Aboriginal rights, including title and treaty rights or in relation to which Aboriginal rights, including title and treaty rights have been established and that may be affected by project components.
>
> The proponent must identify traditional activities, including activities for food collection, social, ceremonial and other cultural purposes, in relation to such lands, waters and resources. The focus of this discussion shall be on the current use of lands, waters and resources for traditional purposes, and the sites and features of the landscape associated with such uses. The proponent shall provide information that would include a description of dependence on country foods and harvesting for other purposes, including harvesting of plants for medicinal purposes. The proponent will identify any effects on Aboriginal rights and interests, including treaty rights and current land uses for traditional purposes, and outline the proposed methods to manage and mitigate any such effects to an acceptable level. The proponent will include a discussion of the archaeological findings in the study area that are of particular interest to Aboriginal peoples. In particular, the proponent will describe the findings of any preliminary archaeological field reconnaissance work completed as a component of a traditional use study.
>
> Aboriginal peoples that may be affected by the Project, including the marine components, will be identified. Potentially affected Aboriginal peoples include those where any component of the proposed project will be located within their traditional territory.
>
> The geographic limits of the analysis undertaken to address considerations of Aboriginal peoples will be provided, supported with maps as required. The study area will take into consideration the traditional territories of each Aboriginal group, relative to the proposed footprint of the marine project components.
>
> A summary of the completed, ongoing and proposed consultation with Aboriginal peoples will be provided. The proponent will provide a detailed description of the consultations, indicating the concerns raised, how those concerns were addressed, and any outstanding concerns.

[29] In October 2009 interested federal departments and agencies (including the NEB and the Department of Indian and Northern Affairs) entered into a Project Agreement to facilitate all aspects

of the federal review process including the discharge of the Crown's duty to consult with Aboriginal groups. That Agreement incorporated the CEAA's Scope of Consultation Statement and it identified the roles and responsibilities of a variety of federal agencies and departments in fulfilling the Crown's consultation obligation.

[30] On November 5, 2009 the CEAA wrote to the First Nations affected by the Gateway Project inviting their participation in the JRP process. This communication went to the Chiefs of the First Nations' bands affected by the Gateway Project including Chief Moody on behalf of Gitxaala. This letter also included a proposal for funding.

[31] In Hearing Order OH-4-2011 issued on May 5, 2011 the JRP expressly recognized its role in the process of federal consultation with Aboriginal groups.

[32] The record before me discloses that Gitxaala has been fully engaged in the JRP process as a formal Intervenor and to that end has, as of April 2012, received federal funding of $238,500.00.[3] As an Intervenor, Gitxaala has the right to challenge the evidence submitted by other parties and to present its own case in favour of the preservation of its interests and rights. In mounting its case in opposition to many aspects of the Gateway Project, Gitxaala has commissioned or elicited evidence bearing on a number of the issues reviewed by the TRP Committee. These include concerns about pollution, emergency response, conflict with tanker traffic, noise and anchorages. Many other interested First Nations have been similarly engaged in the JRP process. Collectively those groups and their supporters represent a substantial force that cannot easily be ignored.

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[3] See paragraphs 27, 28 and 31 of the Affidavit of Kenneth MacDonald (Application Record of the Respondent Gateway Partnership, volume 1 at pp 7-9).

[33] The JRP process is ongoing with final hearings scheduled to commence in April 2013.

Issues

[34] Gitxaala maintains that the process of consultation is deficient because of the Crown's failure to invite its participation in the work of the Gateway TRP Committee. Gitxaala also asserts that this deficiency occurred after the Crown's duty to consult had been engaged and that the problem cannot be remedied by its subsequent engagement in the JRP process or later when an overarching consultation with the federal government is planned. According to Gitxaala the solution is to reopen the TRP process to allow it to make submissions. Gitxaala acknowledges that such an intervention would not necessarily lead to changes to the TRP report but it argues that it is legally entitled to make its case before the TRP Committee.

Analysis

[35] As noted above, the Respondents acknowledge that the Gateway Project has engaged the Crown's duty of deep consultation with Gitxaala and with the other First Nations whose interests stand to be similarly affected. What remains in contention is whether the proposed framework for consultation is legally sufficient.

[36] Relying on the Federal Court of Appeal decision in *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, [2008] FCJ no 946, Gitxaala argues that the standard of review for the existence and scope of the duty to consult is a question of law reviewable on a threshold standard of correctness. This point is drawn from the decision at para 34:

> 34 …the determination of the existence and extent of the duty to consult or accommodate is a question of law and, hence, reviewable on a standard of correctness. However, when the Crown has correctly determined that question, its decision will be set aside only if the process of consultation and accommodation is unreasonable…

[37] The Respondents maintain that the appropriate standard of review is reasonableness and they rely upon the following passage from the Supreme Court of Canada decision in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 62, [2004] 3 SCR 511 [*Haida Nation*]:

> 62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness…

[38] Interestingly all of the parties maintain that whatever the standard of review may be, the outcome is unchanged. For Gitxaala the Crown's conduct was both incorrect in law and unreasonable. The Respondents assert the opposite.

[39] It seems to me that the authorities stand for the proposition that if the question for determination is whether a duty to consult has arisen, it is, as a point of law, reviewable for correctness. But if the question is whether the framework established for consultation is sufficient, (ie meaningful), it must be assessed on the reasonableness standard. Here the Respondents concede that a duty to consult was engaged at least as early as the request by the Gateway Partnership for federal Crown assessment and approval for the project. The only issue that is left for determination is, therefore, whether the consultation framework proposed by the Crown and presently being followed is a sufficient platform for consultation. That is a question of mixed fact and law

reviewable on the standard of reasonableness: see *Yellowknives Dene First Nation v Canada*, 2010 FC 1139 at paras 65-68, [2010] FCJ no 1412.

[40] Gitxaala's argument is based on the recognized principle that meaningful consultation must be timely consultation. The duty to consult may, therefore, arise in advance of preliminary decisions if a clear momentum to move forward would arise. This point was made by Justice Anne Mactavish in *Sambaa K'e Dene Band v Duncan*, 2012 FC 204 at paras 164-166, [2012] FCJ no 216.

> 164 I would start by noting that the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the disputed lands or resources may not be immediate: *Rio Tinto*, above at para. 44.
>
> 165 If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.
>
> 166 Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, 303 F.T.R. 106, negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

[41] Justice Michael Phelan came to the same conclusion in *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, [2006] FCJ no 1677, where he observed that the duty to

consult can apply to strategic planning decisions that may affect Aboriginal rights: also see *Haida Nation*, above, at para 76.

[42] In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 the Supreme Court of Canada described in detail the types of decisions or processes that can trigger a duty to consult. At the heart of this question is whether the conduct at issue has the potential to adversely affect Aboriginal claims or rights:

> 42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that [page 673] engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.
>
> 43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> 44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for

> another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.
>
> …
>
> 47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, [page 675] a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

What is also noteworthy about this decision is the recognition that past breaches of the duty to consult "may be remedied in various ways".

[43] Gitxaala asserts that the TRP report has "set the stage" for the federal Crown's approval decision over the Gateway Project and for the adoption of any mitigation measures that may ultimately be imposed by the JRP. Because the TRP Committee concluded that the inherent risks of the project can be managed a "clear momentum" was created. Gitxaala says that it has lost the opportunity to contribute to this highly influential process and, as a consequence, the TRP Committee made several mistakes that are not effectively open to correction. This failure to include Gitxaala is also described as "disrespectful" and not in keeping with the honour of the Crown.

[44] There are a number of fundamental weaknesses to Gitxaala's claim to relief.

[45] It is true that the Crown's duty to consult deeply in connection with the Gateway Project arose at least as soon as the process of review was initiated and, therefore, in advance of the work of the TRP Committee.

[46] The question, though, is whether that consultation duty gave rise to a legal obligation on the part of the Crown to invite Gitxaala to participate in the work of the TRP Committee, or whether the duty can be fulfilled by the recognized opportunities available to Gitxaala to fully engage in the JRP process, and later, directly with the federal Crown.

[47] The Crown's duty of consultation is required to be timely and meaningful and it must contribute to the ultimate goal of reconciliation. The process need not be perfect and it is not the subject of a strict template or protocol.

[48] Gitxaala has identified a number of alleged deficiencies or misconceptions in the TRP report that it says it would have been able to correct had it been consulted.

[49] The suggestion that it is now too late in the process to have these concerns addressed requires the Court to assume that the JRP will not keep an open mind about errors or deficiencies in the TRP report. In other words, Gitxaala's argument is based on an assumption that the JRP will

not fulfill its legal obligations and that Gitxaala's representations, however valid, will fall on deaf ears.

[50] In fact, the record does not support the drawing of such an inference. The Crown has, from the beginning, acknowledged its consultation obligation to all of the Aboriginal groups that may be affected by the Gateway Project including Gitxaala. It also consulted the affected First Nations before it established the consultation framework that it is now relies upon to fulfill its consultation obligations. Gitxaala and other First Nations' participants have been the beneficiaries of substantial federal funding to ensure their effective intervention and many of them, including Gitxaala, have participated in a significant way in the JRP process. The Crown has also committed to a final consultation with Aboriginal groups in response to the JRP report and in advance of a GIC decision with respect to the issuance of a Certificate of Public Convenience and Necessity.

[51] It seems to me that the JRP process is sufficiently robust that any weaknesses in the TRP report can be addressed by Gitxaala and, where appropriate, accommodated by the JRP or later by the Government of Canada. I do not accept Gitxaala's argument that the TRP findings and recommendations are so compelling and indispensable to the final outcome that any challenge to them cannot be effectively mounted. This is not a case where too much momentum has built up around the issues considered by the TRP. Nor is the TRP report a high level strategic decision of the sort that may have an impact on Gitxaala's long-term interests. The TRP findings and recommendations are based on evidence submitted primarily by the Gateway Partnership and they are open to being challenged and contradicted by other evidence or under cross-examination. The weight attributed to the TRP findings and recommendations is expressly limited by the TRP Code

and if mistakes or omissions have occurred Gitxaala is well placed to point them out and to demand corrections. The TRP report is, after-all, mainly a technical analysis based on objectively verifiable data. If the TRP Committee has ignored or overlooked material evidence, it should not be difficult to effectively impeach its findings.

[52] In the end Gitxaala's position seems to be that the environmental risks of the Gateway Project cannot be effectively managed when measured against the profound losses that would arise from a major marine oil spill. That essentially qualitative question lies at the very heart of the JRP mandate and it is unlikely to be determined on the basis of Gitxaala's concerns about the type of technical errors that it has identified in the TRP report.

[53] The process that has been followed may not be perfect, and one can question the wisdom of declining to open up the TRP process when asked by Gitxaala, but it does represent a reasonable way to address First Nations' concerns.

[54] I also agree with the Respondents that it is premature for the Court to intervene in this process before it has reached a conclusion. As noted above, Gitxaala's argument is based on an assumption that the JRP will not listen to its concerns and will remain unmoved by any evidence that it receives in contradiction to the findings of the TRP Committee, however compelling that evidence might be. It seems to me, however, that the Court should not act on the basis of assumptions. There is nothing before me to suggest that the JRP will not listen fairly to Gitxaala's concerns, weigh all of the available evidence and come to its own conclusions. If it does not act fairly or if the Crown ultimately fails to fulfill its overarching duty to consult with affected First

Nations, including Gitxaala, the Court can intervene. And even if there was a breach of the duty to consult with Gitxaala in the context of the TRP review, there is no basis for the Court to conclude that the breach cannot be remedied by the JRP or later by the federal Crown. As the Supreme Court of Canada noted in *Haida Nation*, above, there are a variety of remedies available for a failure to consult not the least of which is the opportunity at later stages in the process to engage in meaningful dialogue and, where necessary, to accommodate First Nations concerns. The effective end-point in the process of consultation has not been reached and there is no way of knowing today how effective First Nations will be in achieving their desired outcome. Gitxaala's additional concern that the Government of Canada's commitment to a final overarching consultation is too constrained to be meaningful remains to be seen. If the process proves to be deficient or perfunctory, Gitxaala and other affected First Nations will have the opportunity to be heard again.

Conclusion

[55] For the foregoing reasons, this application is dismissed. Having regard to the position of the parties, there will be no Order for costs.

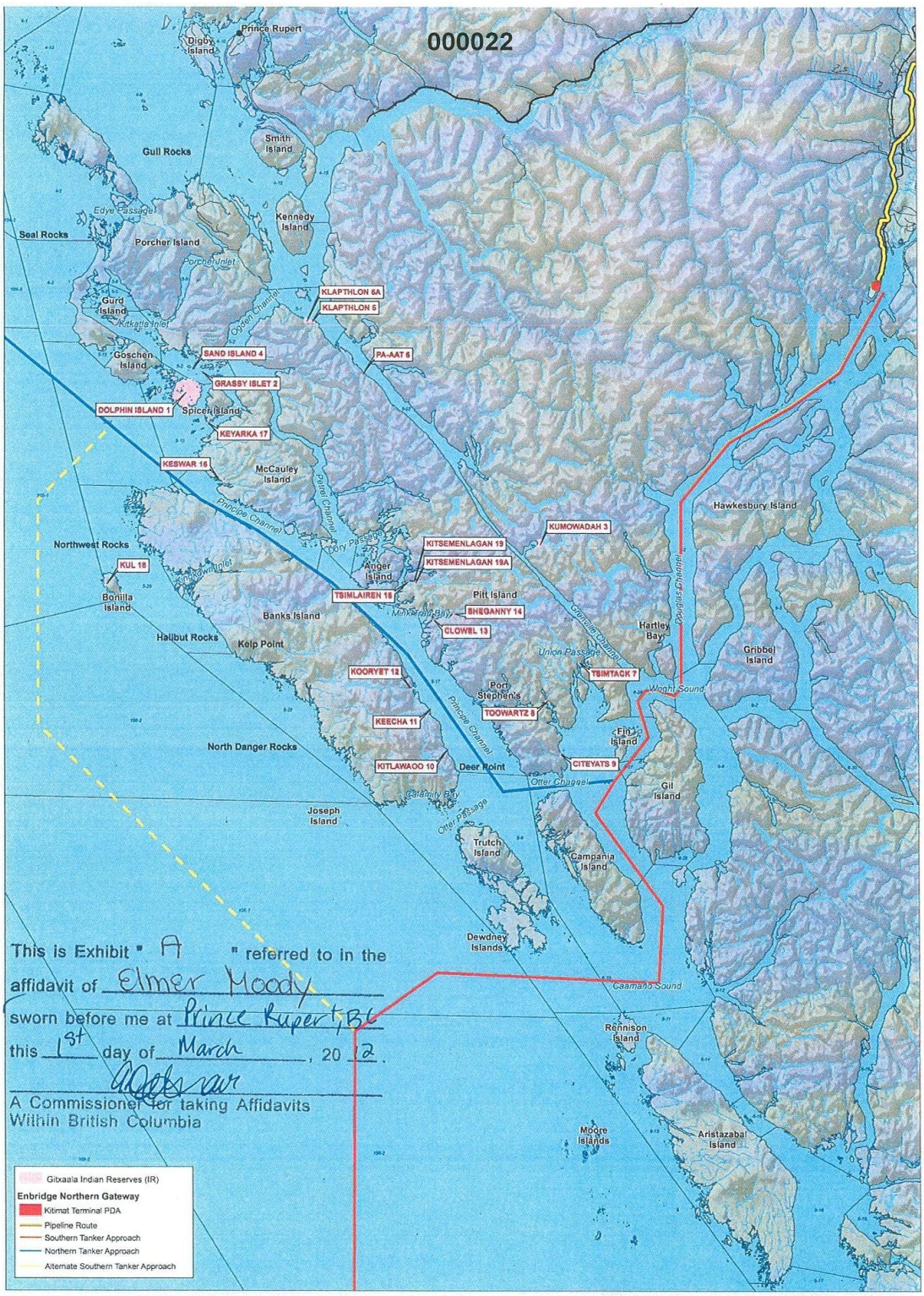
JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed.

"R.L. Barnes"

Judge

Annex A


000022
Prince Rupert
Digby Island
Smith Island
Gull Rocks
Edye Passage
Seal Rocks
Porcher Island
Porcher Inlet
Kennedy Island
Gurd Island
Kakatle Inlet
Otter Channel
KLAPTHLON 5A
KLAPTHLON 6
Goschen Island
SAND ISLAND 4
PA-AAT 6
GRASSY ISLET 2
DOLPHIN ISLAND 1
Spicer Island
KEYARKA 17
KESWAR 16
McCauley Island
Parrel Channel
Principe Channel
Hawkesbury Island
KUMOWADAH 3
Northwest Rocks
KITSEMENLAGAN 19
KITSEMENLAGAN 19A
KUL 16
Anger Island
Dory Passage
Bonilla Island
TSIMLAIREN 16
Pitt Island
Banks Island
Monkton Bay
SHEGANNY 14
Douglas Channel
Halibut Rocks
Kelp Point
CLOWEL 13
Hartley Bay
Gribbel Island
Union Passage
Grenville Channel
KOORYET 12
TSIMTACK 7
Wright Sound
Port Stephens
TOOWARTZ 8
KEECHA 11
Fin Island
North Danger Rocks
KITLAWAOO 10
Deer Point
CITEYATS 9
Otter Channel
Gil Island
Calamity Bay
Otter Passage
Joseph Island
Trutch Island
Campania Island
Dewdney Islands
Caamaño Sound
Rennison Island
Moore Islands
Aristazabal Island
This is Exhibit " A " referred to in the
affidavit of Elmer Moody
sworn before me at Prince Rupert, BC
this 1st day of March, 2012.
A Commissioner for taking Affidavits
Within British Columbia
Gitxaala Indian Reserves (IR)
Enbridge Northern Gateway
Kitimat Terminal PDA
Pipeline Route
Southern Tanker Approach
Northern Tanker Approach
Alternate Southern Tanker Approach
Gitxaala Nation Use Study
Study Area
THIS MAP SHOULD NOT BE CONSIDERED A SUBSITUTE FOR CONSULTATION. USE NOTATIONS ARE NOT EXACT LOCATIONS OF USE SITES. THIS MAP IS THE EXCLUSIVE PROPERTY OF THE GITXAALA NATION. ANY REPRODUCTION OR DISTRIBUTION WITHOUT WRITTEN APPROVAL IS STRICTLY PROHIBITED. THIS MAP WAS CREATED FOR SINGLE USE RELATED TO THE ENBRIDGE NORTHERN GATEWAY PROJECT. ANY OTHER USE IS PROHIBITED.
0 3 6 9 NM
0 5 10 15 KM
Prepared For: GITXAALA ENVIROMENTAL MONITORING
Prepared By: Calliou Group
Date: 08/11/2010
Revised: 02/07/2012
Figure Number: 2-1
Map Information: Base Data: NTDB Topographic Mapsheets (Department of Natural Resources); Pacific Fisheries Management Areas (Department of Fisheries and Oceans); Digital Elevation Model (GeoBase); Enbridge Northern Gateway Data (Enbridge); Use Data and Place Names (Gitxaala Nation)
1

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-300-12
STYLE OF CAUSE:	GITXAALA NATION v THE MINISTER OF TRANSPORT ET AL
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	September 11 and 12, 2012
REASONS FOR JUDGMENT:	BARNES J.
DATED:	November 19, 2012

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