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***Attorney General of Quebec v. Moses* - Supreme Court of Canada Decision on Environmental Assessments in Northern Quebec**

By: Charles Kazaz

On May 14, 2010 the Supreme Court of Canada handed down its long awaited decision in *Attorney General of Quebec v. Moses*.

The decision deals with issues related to the applicability of Federal environmental impact assessment ("EIA") legislation in the territory covered by the James Bay and Northern Quebec Agreement ("JBNQA").

In a 5-4 decision the Supreme Court of Canada concluded that the proponent of the Project could not proceed without a Federal fisheries permit and that the Quebec Court of Appeal decision should be varied to require compliance with the Federal EIA process rather than the JBNQA EIA process. The issuance of the Federal fisheries permit is also subject to the Crown's duty to consult with the Cree to the extent that it may adversely affect their rights under the agreement.

Background

The JBNQA is a modern treaty between the Government of Canada, the Government of Quebec and the Cree and Inuit of Northern Quebec. It establishes a specific environmental and social protection regime that applies to the territory covered by the agreement. The EIA process will differ depending on whether the Project is under federal or provincial jurisdiction.

Under the JBNQA, if a project is of provincial jurisdiction the EIA process is conducted through a committee composed of members of the Quebec government and the Cree and decisions are made by a Provincial Administrator. If a project is of federal jurisdiction the EIA process is conducted through a committee composed of members of the Federal government and the Cree and decisions are made by a Federal Administrator. In exceptional circumstances a review can be conducted by a joint federal-provincial panel.

The case involved a proposed Vanadium Mine (the "Project") in the vicinity of Chibougamau, Quebec. Given the Project's potential impact on fish habitat – a federal matter – a permit for the harmful alteration, disruption or destruction of fish habitat ("HADD permit") was required pursuant to section 35(2) of the Federal Fisheries Act. A HADD permit requirement triggers for an EIA pursuant to the *Canadian Environmental Assessment Act* ("CEAA").

The question before the Court was to determine whether the project triggers a federal EIA on JBNQA territory and if so, which of the EIA processes applies to the Project. The parties generally agreed that the Project falls within provincial jurisdiction and that the provincial EIA process under the JBNQA is applicable. However, there was disagreement as to the issue as to whether the Project also required a federal EIA.

The Attorney General of Canada took the position that because of the requirement for a HADD permit the Project should be subject to a second EIA under CEAA. The Cree were of the view that the Project should be subject to both the provincial and federal EIA under the JBNQA because the Project, which is of a provincial nature, has effects on matters falling under Federal jurisdiction. The Attorney General of Quebec argued that the Project should only be subject to one EIA; the provincial EIA process under the JBNQA.

Quebec Court of Appeal Decision

The Quebec Court of Appeal decided that the project is subject to a provincial JBNQA EIA because it falls within provincial jurisdiction. However, because the Project required a HADD permit under the Federal Fisheries Act a federal EIA process was triggered. As such the Project must be subject to two EIA processes, a provincial process and a federal process. The issue was whether a federal EIA must be conducted under the federal JBNQA process or the CEAA EIA process.

The Quebec Court of Appeal indicated that it was a practical incompatibility between CEAA and the JBNQA stemming from the privileged status given to Aboriginal peoples under the JBNQA. The Court concluded that under the JBNQA Aboriginal peoples have a very important role in the context of an EIA in order to protect their ancestral rights and their way of life.

As a result of the incompatibility between both instruments the JBNQA must be given precedence. The Court of Appeal held that the existence of an external trigger found in the federal law is not incompatible with the JBNQA.

An EIA process under the JBNQA could be triggered by provincial or federal environmental law. As a consequence, in JBNQA territory the JBNQA federal EIA process is to be followed when an EIA is triggered as a result of a HADD permit requirement.

The Judgment of the Supreme Court

It is interesting to note that although the JBNQA was signed in 1975 this is the first time that the Supreme Court has interpreted its terms.

In a judgment written by Mr. Justice Binnie, the majority of the Court emphasized that the JBNQA is a modern comprehensive treaty, that was meticulously negotiated by well resourced parties and that it should be interpreted similarly to a contract. The majority concluded that there was no doubt that the Project falls within provincial jurisdiction.

However, because it puts fish habitat at risk it cannot proceed without a HADD permit, which the Minister cannot issue except after compliance with CEAA. It was the majority view that any action that requires a HADD permit is not exempt from any independent scrutiny by the federal Fisheries Minister as a result of the JBNQA.

The Court rejected the position put forward by the Attorney General of Quebec that the federal Minister is bound to issue a HADD permit following the approval of the mining Project by the Provincial Administrator. If this were to be accepted this could lead to a situation where a HADD permit is based on an abbreviated fisheries EIA study that is simply unacceptable to the federal Fisheries Minister. Alternatively, the Quebec Cabinet could override the fisheries concerns and approve the mining project over the objection of the provincial Administrator it has appointed, or lighten the conditions designed to mitigate the adverse effects of the project on the fisheries. As a result, if the Quebec Attorney-General's position were accepted, the federal Fisheries Minister would be powerless to withhold the permit. According to the majority, such a result would not be consistent with the terms of the JBNQA.

The Constitutional Status of the JBNQA

The entire Court agreed that the JBNQA had Constitutional status and is a treaty covered by s. 35(1) of the Constitution Act, 1982.

Because of its Constitutional status it was important to determine if the CEAA EIA process is inconsistent with the JBNQA. Given its status, if there is inconsistency, it would be resolved in favour of the JBNQA.

The minority judgment written by Justices Lebel and Deschamps put much emphasis on a provision of the JBNQA that provides that there is to be one EIA under the JBNQA, therefore making the CEAA EIA process inconsistent with the JBNQA.

According to the majority, there is a distinction between processes that are "internal" to the JBNQA and those that are "external" to the JBNQA. Mr. Justice Binnie concludes that the provision for one "impact review" of the mine project under the JBNQA seeks to avoid duplication internal to the agreement. In interpreting the agreement, the majority concludes that a project proponent is also required to obtain any permits after completing the JBNQA EIA process and obtaining the decision of the Administrator. The JBNQA does not eliminate the post-approval permit requirements if it is imposed externally by a law of general application, such as the CEAA or the Fisheries Act.

According to the majority, under the JBNQA, all federal environmental laws of general application, which includes CEAA, apply insofar as they are not inconsistent with the Agreement. As such, there is no inconsistency between the CEAA and the Agreement.

According to the majority, once the project is approved under the JBNQA by the provincial Administrator or otherwise, the proponent would have to make an application for the HADD permit. As a matter of federal law, a CEAA assessment is obligatory prior to the grant of a HADD permit.

It is the view of the majority that the federal laws, the provincial laws and the Agreement fit comfortably together and a refusal by the federal Fisheries Minister to issue a HADD permit without compliance with the CEAA would neither be in breach of the Agreement nor be unconstitutional even if the project had been approved in accordance with the Agreement.

Cree Participation in the EIA Process

In answer to the minority decision emphasis on the lack of participatory rights for the Cree in the CEAA EIA process, the majority responded that those participatory rights are not at risk. It addresses the concern by stating that the CEAA procedure must be applied by the federal government in a way that fully respects the Crown's duty to consult the Cree on matters affecting their rights pursuant to the JBNQA in accordance with existing case-law. Even though the JBNQA is a modern treaty, the majority held that the government was required to engage in Haida duty consultation with the Cree.

The majority relies on common sense as well as the legal requirement to consult to conclude that the CEAA assessment will be structured to accommodate the participation of the Cree. The majority also points out that the CEAA allows the responsible federal authority to collaborate with another jurisdiction in order to promote uniformity and harmonization in the assessment.

Minority Opinion

It is important to note there was a very strong dissenting opinion written jointly by Madam Justice Deschamps and Mr. Justice Binnie. The minority concludes that the CEAA process is inconsistent with the JBNQA and given the JBNQA's status it is paramount.

Upon review of the Agreement, the minority concludes that the parties intended to resolve all outstanding issues between them and settle their respective rights and obligations. The minority emphasizes the provision within the JBNQA which provides that, as a general rule, a development project will be subject to only one environmental assessment process.

Because almost all projects will have effects on areas of federal jurisdiction, the minority notes that if a project's impact could trigger a separate environmental review process, the consequence would be to turn the exception into the rule.

The minority also emphasizes the role and participatory rights of the Cree in the environmental assessment process. The agreement sets out a substantive and a procedural role for the Cree throughout the EIA process and the CEAA does not. As a result the minority concludes that the CEAA, is inconsistent with the provisions of the Agreement and cannot apply. In light of the constitutional status of the established structure, the CEAA cannot prevail or impose a parallel process in addition to those provided for in the Agreement. According to the minority, to interpret the agreement otherwise would mean that the federal government can unilaterally alter what was intended to be a comprehensive, multilateral scheme and would subvert the constitutional structure the parties to the Agreement intended to establish.

Practically, the minority would require the federal Fisheries Minister to issue a HADD permit, if required, on the basis of the JBNQA EIA process and that no additional EIA process be undertaken pursuant to the CEAA.

Conclusion

The Supreme Court of Canada concludes that the proponent of the requirement for a federal permit, such as a HADD permit requires compliance with the CEAA EIA process. Interestingly, and without any depth of analysis, the Supreme Court also held that the issuance of the HADD permit is also subject to the Crown's duty to consult with the Cree in relations that may adversely affect their rights under the agreement – a modern land claim agreement. The modern nature of the agreement was an important fact in the Court's analysis, establishing that the interpretation of the treaty was to be done using modern contract interpretation principles, as opposed to the principles that have been developed for the interpretation of ancient treaties.

Given the Court's conclusion that a CEAA EIA is required after there is a decision by the provincial Administrator, it will be interesting to see how this will be carried out in practice and what effects it will have on the timing for project approval.

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