ABORIGINAL PEOPLES

Duty to consult — Judicial review of Order in Council (OIC) P.C. 2019-0784 issued by Governor in Council (GIC) directing National Energy Board (NEB) to issue Certificate of Public Necessity and Convenience (Certificate) for Manitoba-Minnesota Pipeline Project (Project), now built, in operation since July 2020 — Applicants each challenging adequacy of Canada's consultation for Project, reasonableness of GIC's decision — Project international transmission line operated by Manitoba Hydro running from Winnipeg to Manitoba/Minnesota border, crossing Treaty 1 territory — Project needed to be approved by both Manitoba, Canada — Consultation taking place in three phases: Manitoba approval process, NEB hearing, supplemental consultation — Purpose of supplementary consultation to identify any outstanding concerns regarding Project-related impacts to Aboriginal, Treaty rights not communicated to NEB or not addressed by NEB, to discuss incremental accommodation measures if appropriate — Documents sent to First Nations, including "Summary of Information Available and Preliminary Depth of Consultation Assessment" (DCA) summarizing Aboriginal, Treaty rights, potential project impacts on those rights, Canada's preliminary assessment of depth of consultation owed to each First Nation — Canada sending draft annex of Crown Consultation and Accommodation Report (CCAR) specific to each First Nation for their review, comment — Consultations held with Peguis First Nation, Animakee Wa Zhing (AWZ), Roseau River First Nation, Long Plain First Nation — Issue 1: Whether Canada properly assessed scope of its duty to consult, accommodate First Nations — AWZ's position that Canada incorrectly determined that Project's impacts on AWZ were low, therefore AWZ owed moderate degree of consultation — Because AWZ's right to harvest moose, to enjoy its reserve lands were impacted they were owed high level of consultation — Roseau River, Long Plain First Nations submitting that Canada pre-determined scope of duty to consult without conducting any consultation with Roseau River or Long Plain — Submitting further that Canada erred when it incorrectly determined that Roseau River was owed "medium" level of consultation, Long Plain was owed "low" level of consultation — Substance of consultation more important than its form — Canada owed AWZ moderate to high level of consultation — Fact that depth of consultation assessment changed as matter progressed demonstrating willingness to listen, to be flexible — Regardless of fact of varying assessments between three First Nations, three First Nations consulted on deep level — Issue 2: Whether, as matter of constitutional law, reasonable for GIC to conclude that Canada's consultation with Peguis, AWZ, Roseau River, Long Plain First Nations adequate — Canada failing to meet substantive requirements of duty to consult with Peguis — Process of supplementary consultation having to meet requirements of adequate consultation — No indication on record that Canada, Peguis engaged in substantive consultation with two-way conversation — Consultation framework capable of meeting requirements of duty to consult, however in substance duty not met — No opportunity for Peguis to express its outstanding concerns through correspondence, teleconference, community meeting, meeting with leadership or otherwise — No opportunity for Peguis to meet Canada either before draft CCAR or before finalizing CCAR to express their concerns — During supplementary consultation, AWZ raised issue of Project's impact on moose — Crown concluding in CCAR that potential impact of Project on ability of members of AWZ to exercise their Aboriginal, Treaty rights related to moose not significant — Here, Canada meeting requirements of deep consultation as described in case law — Supplementary consultation afforded AWZ opportunity to raise these issues — Not Court's role to weigh scientific evidence or to prefer one of First Nations' or Hydro's submissions; that is role of NEB, Crown — Neither *Bigstone Cree Nation v. Nova Gas Transmission Ltd*, 2018 FCA 89, 16 C.E.L.R. (4th) 1 (*Bigstone*) nor *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, [2010] 11 W.W.R. 752 standing for proposition that duty

to consult requiring species-specific study or mitigation plan — Fact that Canada's, AWZ's views diverged not meaning AWZ's views must be preferred or that Canada did not genuinely consider them — Consultation with AWZ on issue of water levels adequate — Duty to consult not requiring Crown to ensure that impacted First Nations benefit from contemplated activity — Fact that AWZ not benefiting from Project not an infringement of their Aboriginal or Treaty rights — GIC reasonably concluded that Canada met its duty to consult, accommodate AWZ — Regarding Long Plain, Roseau River First Nations, consultation not left too late, any delay in getting to substance of consultation attributable equally to both parties — Canada not ignoring or dismissing Long Plain, Roseau River's Treaty Land Entitlement concerns— While duty to consult requiring Crown to seriously consider accommodation, there is no guarantee of accommodation — Open to NEB, GIC to enact prospective accommodation measure — No duty to agree on accommodation measures — Issue 3: Whether, as matter of administrative law, GIC's decision reasonable — Relevant provision of *National Energy Board Act*, R.S.C., 1985, c. N-7, *Bigstone*, *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. 3 stating that GIC required to give reasons when deciding whether or not to issue certificate for pipeline — No corresponding statutory requirement when considering international power line — GIC may rely on reasoning in NEB report, CCAR — In context of duty to consult, deep consultation requiring provision of reasons explaining how First Nations' concerns considered, impacted outcome — Here, NEB report, CCAR fulfilling that requirement in this context — GIC properly considered Indigenous interests, consultation, accommodation — However, CCAR not showing how concerns heard from Peguis were considered in supplemental consultation, impacted outcome thereof because that process did not occur — Therefore, conclusion reached by GIC that Crown satisfied its duty to consult could not be based on underlying facts with respect to Peguis — GIC reasonable for other applicants — Reasons, record transparent, intelligible, reasonable regarding AWZ, Long Plain, Roseau River First Nations — As to remedy, declaration issued that in failing to substantively engage with Peguis during supplemental consultation, Canada not adequately discharging its duty to consult — Application in T-1147-19 allowed; applications in T-1141-19, T-1150-19, T-1442-19 dismissed.

PEGUIS FIRST NATION V. CANADA (ATTORNEY GENERAL) (T-1147-19, T-1141-19, T-1150-19, T-1442-19, 2021 FC 990, McVeigh J., reasons for judgment dated September 24, 2021, 94 pp.)