



INDIGENOUS PEOPLES

DUTY TO CONSULT

Related subjects: Energy; Environment

Appeals from Federal Court decision (2021 FC 990, [2021] 3 F.C.R. D-7) dismissing appellants' applications for judicial review of Order in Council P.C. 2019-0784 (Order) — Order directed National Energy Board (NEB) to issue Certificate of Public Necessity and Convenience for international transmission line (Project) crossing Treaty 1 territory — Appellants seeking to quash Order — Canada heavily relied upon thorough NEB process to satisfy duty to consult — After hearings before NEB, Canada engaged in supplemental consultations with Indigenous groups — Project completed in 2020, now in operation — Review of Governor in Council's decision done in two separate steps: (1) examination of Governor in Council's compliance with administrative law principles; (2) examination of Crown's compliance with duty to consult principles under *Constitution Act, 1867*, s. 35, honour of Crown — Whether Federal Court properly finding that Order reasonable in administrative law sense — Whether Crown satisfied duty to consult based on honour of Crown, *Constitution Act, 1982*, s. 35 — Federal Court properly found that Order reasonable in administrative law sense — In making Order, Governor in Council assessed polycentric, subjective, amorphous, indistinct criteria, applying its view of economics, cultural considerations, societal costs and benefits — Given large margin of appreciation that must be accorded to Governor in Council when it makes this sort of public interest decision, Order in Council must be found reasonable on its merits — Outcome, reasons of NEB, Crown-Indigenous Consultation and Accommodation Report showing justification, transparency, intelligibility — Reasonable for Governor in Council to rely upon process before NEB to consult, accommodate Indigenous groups — Well established that Governor in Council, Crown may rely on steps undertaken by regulatory agency to fulfil duty to consult in whole or in part, accommodate — This was the case here — No indication that NEB process deficient or that NEB not attentive to issues before it — Order itself showing that Indigenous interests, adequacy of consultation, accommodation front and center in Governor in Council's consideration — Evidence showing that informational, response components of duty to consult with appellants fulfilled — Appellants' concerns, interests taken on board, genuinely considered through two-way dialogue, some accommodation made — Appeals dismissed.

ROSEAU RIVER FIRST NATION V. CANADA (ATTORNEY GENERAL) (A-280-21, A-281-21, A-284-21, 2023 FCA 163, Stratas J.A., reasons for judgment dated July 24, 2023, 30 pp.)