MacKenzie Valley Pipeline is put on hold

Development hearings for a Mackenzie Valley natural gas pipeline were put on hold by the Federal Court in Dene Tha' First Nation v. Canada (Minister of Environment).[1] The proposed 1,220-kilometre pipeline would transport gas from the Mackenzie Delta in the Northwest Territories to northern Alberta where it would connect into existing pipeline infrastructure. A "Cooperation Plan" was set up in 2002 to streamline the regulatory and environmental review process for the pipeline development. In designing this plan, government agencies consulted with aboriginal groups, provincial governments, and oil and gas companies. During this process, every aboriginal group affected by the project were consulted, except the Dene Tha'.[2]

The Dene Tha' are an aboriginal group with seven reserves in northern Alberta and "Traditional Territory" which extends into north eastern British Columbia and the Northwest Territories. In his decision, Justice Michael Phelan ruled that the Crown breached its duty to consult with the Dene Tha' throughout the development of the regulatory and environmental review processes, and continued to breach this duty up to the present time.[3] As their lands would be affected the same as any other group involved in the project, there was no reason to treat the Dene Tha' differently. Justice Phelan ordered the government to stop considering any aspect of the pipeline that affects the Dene Tha' lands or rights until a remedy can be worked out.[4]

When the federal government wants to do something that will affect aboriginal peoples, it has a duty to consult with them in good faith and make accommodations where necessary. The "honor of the crown" is the source of this duty to consult. Also, section 35 of the Constitution Act, 1982 protects the existing rights of aboriginal peoples in Canada.[5] This section of the constitution looks to reconcile "the pre-existence of aboriginal societies with the sovereignty of the Crown."[6] The Crown has a duty to protect aboriginal interests. Aboriginal rights are constitutionally protected, but not all of these rights have been dealt with through negotiation and treaties. This is the case with the Dene Tha'.

Justice Phelan stated that the duty to consult arises when two conditions are satisfied. "First, there must be either an existing or potentially existing Aboriginal right or title that might be affected adversely Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and contemplate conduct might adversely affect it."[7]

Sources

- Dene Tha' First Nation v. Canada (Minister of Environment) 2006 FC 1354 Date: November 10, 2006
- "Dene Tha' Victory: Lawsuit Stops MGP Hearings Through Federal Court

(2 Articles)” Mostly Water
- “Proposed Arctic pipeline could be delayed by ruling: Ottawa failed to consult Indians. Court blocks report to NEB” The Toronto Star (11 November 2006)
- David Ljunggren, “Court delays review of Arctic gas pipeline” Yahoo News (13 November 2006)
- “Court rules government didn't consult Dene Tha' over Mackenzie gas pipeline” CBC News (10 November 2006)
- David Ebner “More delays likely for Mackenzie pipeline” The Globe and Mail (10 November 2006)

Further Reading

- “Thomas Berger Revisits the North - Interview by Isaac Mabindisa” (July 2001)
- “Indepth: The Mackenzie Valley Pipeline” CBC News (24 January 2006)

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[1] Dene Tha’ First Nation v. Canada (Minister of Environment), 2006 FC 1354 Date: November 10, 2006 at para. 84. Online: Federal Court of Canada <http://decisions.fct-cf.gc.ca/en/2006/2006fc1354/2006fc1354.html>

[2] Ibid. at para. 75.

[3] Ibid. at para. 3.

[4] Ibid. at para. 133.

[5] Constitution Act, 1982, s. 35, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (“the Constitution”) online: The Department of Justice <http://lois.justice.gc.ca/en/const/annex_e.html#II>.

[6] Supra note 1 at para. 81

[7] Ibid. at para. 84.