

## **No Delegation, No Inadequacy = No Injunction**

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### **Sapotaweyak Cree Nation v. Manitoba**

Who must consult with First Nations in connection with a development project? According to the Manitoba Courts, not a Crown Corporation.



On March 2, 2015, the Manitoba Court of Queen's Bench issued its reasons for decision denying an injunction application made by Sapotaweyak Cree Nation against Manitoba Hydro and the Government of Manitoba in relation to tree clearing to facilitate the construction of a northern high-voltage transmission line.

Manitoba Hydro's 500 kV HVDC transmission line corridor consists in part of an 11.2 km<sup>2</sup> tract of Crown land and approximately 2 km<sup>2</sup> of privately owned land that passes through what Sapotaweyak maintains are its traditional lands. None of the land is Reserve land, nor is any of the land subject to Treaty Land Entitlement selection.

Manitoba Hydro began the study of the potential environmental impacts of the transmission line in 2008. Public input was sought through a four-round environmental assessment and consultation program, discussions with First Nations and with the Manitoba Métis Federation. Engagements with First Nations included workshops, open houses, meetings and providing funding to Aboriginal groups, including First Nations, to create Aboriginal traditional knowledge reports. All of this information was assembled by Manitoba Hydro and presented and filed at an environmental assessment hearing held before the Manitoba Clean Environment Commission. The Commission conducted a 35 day hearing which was open to the public, including First Nations, and issued a report to the Minister recommending approval of the project. The approval contained over 600 conditions and requirements to address the potential adverse effects on affected First Nations.

Consultation meetings with Sapotaweyak Cree Nation began in 2011. By mid-2013, Manitoba completed and issued a Consultation Report, which listed specific concerns identified by potentially affected First Nations, including Sapotaweyak.

Cutting and clearing operations commenced in December 2014. At that time, Sapotaweyak issued a statement of claim and brought a motion seeking, among other things, an injunction to prevent any further work and orders requiring Manitoba Hydro and the Government of Manitoba to engage in proper consultation with the First Nation. Sapotaweyak also claimed that it was entitled to be consulted by Manitoba in the development of its consultation

protocol and consultation funding arrangements.

Sapotaweyak argued that because Manitoba Hydro is a Crown Corporation and that its board is appointed by the Lieutenant Governor in Council, it shared in the Crown's positive duty to consult with Sapotaweyak. Sapotaweyak also claimed that certain promises and representations as to the consultation process were not fulfilled. Manitoba acknowledged its duty to consult and said that it did so. Manitoba Hydro denied any legal duty to consult grounded in the "honour of the Crown" but said that it did nonetheless engage with potentially impacted First Nations.

Manitoba Hydro provided funding to facilitate Sapotaweyak's participation in consultation. In the context of the environmental hearings, Hydro advanced significant funds to Sapotaweyak for the purposes of the preparation of an Aboriginal traditional knowledge report, which was never delivered in final form. Manitoba Hydro also offered to pay the salary of a Sapotaweyak member who would be engaged as a community liaison person for two years. It also appeared that Sapotaweyak received funds for participation in the environmental assessment hearing.

The Court agreed with Manitoba Hydro that, as a Crown Corporation, it did not have a duty to consult in the absence of some delegation of that duty by Manitoba. "Crown Corporation" does not equal "Crown" for consultation purposes. There was no separate duty on Hydro in addition to Manitoba's duty and Manitoba had not delegated any of its duty to Hydro. Notwithstanding that there was no duty, the Court considered the funding made available to Sapotaweyak by Manitoba Hydro. A big piece of that was for engagement and for preparation of an Aboriginal traditional knowledge report. The Court noted that by failing to deliver the report that it agreed to prepare, Sapotaweyak had deprived itself of the ability to receive additional consultation funding. Sapotaweyak did not persuade the Court that the available funding was inadequate.

Manitoba and Hydro maintain detailed consultation records. Although Sapotaweyak filed an affidavit in support of its application, the Court found that its supporting materials were lacking. The Court found that Sapotaweyak failed to provide any meaningful evidence to support the allegation that the consultation process was inadequate. The Court also noted that only a tiny fraction of Sapotaweyak's "traditional lands", 0.0005%, was even potentially affected by the transmission corridor and that Sapotaweyak had not identified any specific adverse effects. The duty to consult was therefore found to be at the "lower end of the spectrum".

Applying the traditional test for issuing interim injunctions, the Court found that, under some grounds, Sapotaweyak had failed to identify any serious issue for trial, and on others that it had failed to demonstrate both that an injunction was necessary to prevent irreparable harm and that the balance of convenience favoured granting the injunction.

For developers, including Crown Corporations, the case stands for the proposition that it is the Province that bears the duty to consult. Unless that duty has been delegated by the Province, it is the Province's responsibility to discharge that duty. Aggrieved Aboriginal groups must take up their issues with the Province. Where there has been specific delegation of the duty to consult, then the party to whom the duty has been delegated will have to meet those responsibilities.

The case also highlights the importance of maintaining detailed consultation records in order to support or defend any claim based on adequacy of consultation. In this case, the detailed records kept by the Province and the proponent helped to meet and deflect the criticisms regarding funding, process and adequacy of both.

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