Aboriginal Rights and Wind Development in Canada

BY KRISTYN ANNIS

While aboriginal issues are considered a critical issue for infrastructure projects, they can be manageable if handled correctly.

Aboriginal rights relate to activities that are an element of a practice, custom or tradition that is integral to the distinctive culture of the aboriginal group claiming the right. Examples of aboriginal rights include hunting, fishing and trapping rights, as well as rights related to burial grounds.

Treaty rights are those rights expressly set out in treaties and agreements, or subsequently inferred as a result of judicial interpretation, between aboriginal people and the Canadian Government. Broadly speaking, treaties outline the promises made by the government in exchange for concessions from aboriginal people. With the exception of British Columbia, most of Canada is covered by treaties.

Overview of the Government's Duty to Consult

The legal status accorded to aboriginal peoples in Canada is unique in that existing aboriginal and treaty rights are protected by Canada's supreme law, the Canadian Constitution. Pursuant to Section 35 of the Constitution Act, 1982, "existing aboriginal and treaty rights are recognized and affirmed." Constitutional recognition and affirmation provides aboriginal and treaty rights protection from infringement by governments. Federal and provincial laws, acts or decisions that infringe existing aboriginal or treaty rights are of no force and effect, except where such laws, acts or decisions can be justified.

The Supreme Court of Canada has rendered many decisions interpreting the meaning and effect of Section 35. Out of these decisions developed what is arguably one of the most important common law doctrines affecting Canadian infrastructure development today - the government's duty to consult. According to the Supreme Court of Canada, the government has a duty to consult with aboriginal peoples if:

(i) the government has knowledge, real or constructive, of the potential existence of an aboriginal or treaty right; and

(ii) the government is contemplating conduct that might adversely affect the potential aboriginal or treaty right.

The duty to consult is very easily triggered. Effectively, the aboriginal or treaty right (referred to collectively herein as an aboriginal interest), does not need to be proven, but only reasonably claimed. Nor do the adverse effects on the aboriginal interest need to be

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proven for the duty to consult to be triggered. For the purposes of the second part of the test, any decision by the government (be it federal or provincial), including the issuing of permits, is generally deemed to be “conduct.”

However, while the duty to consult is easily triggered, the level of consultation (and in some cases accommodation) required depends on the strength of the right or claim being made by the aboriginal group and the potential magnitude of the effect the particular project may have on the aboriginal interest. In other words, the duty to consult is proportionate to the strength of the aboriginal claim and severity of the potential adverse effect the government's action or decision may have on the aboriginal interests. This produces a spectrum of consultation where weak aboriginal claims and minor infringements will not require much consultation and a notification may be sufficient. On the other hand, strong aboriginal claims and a potential for significant infringement on aboriginal interests that are non-compensable will require extensive consultation aimed at finding a satisfactory interim solution. The bulk of consultations will lie somewhere in the middle of this spectrum. If good faith consultation determines that the aboriginal interest may be adversely impacted by the project, then accommodation may be required.

The Practical Effect of the Duty to Consult on Infrastructure Development

As evidenced, it is clear that the duty to consult rests with the Canadian Government. So where does the developer fit it? The developer has a significant role to play since procedural aspects of the duty to consult can be delegated. In practical terms, this means that the developer will conduct the consultation on the ground (which makes sense given that the developer has the knowledge of the project) and the government will be responsible for assessing the consultation and ultimately signing off on the project.

The developer's role in these situations can be further explored by taking a look at a hypothetical wind project, but these same considerations apply to any infrastructure project.

Windco was looking to develop a wind farm in southern Ontario. The company had already conducted significant development work. It had secured option agreements with private land owners, obtained an approved connection agreement with the utility and had a draft engineering, procurement and construction contract in place. Furthermore, Windco had entered into a fixed 20-year term power purchase agreement with the Ontario Power Authority (OPA), a government agency responsible for generation procurement. OPA would pay 11 cents per kilowatt hour (kWh) for the electricity produced. Pursuant to the terms of the power purchase agreement, Windco had a three-year window to achieve commercial operation.

Windco had begun its environmental screening review process (ESR) under Ontario's Environmental Regulation 116/01. As part of the ESR, Windco was required to consult with the local community as well as aboriginal groups whose interests could potentially be impacted by the project. The consultations with these groups were necessary as part of the ESR, and also needed to help the government meet the duty to consult. The duty to consult was triggered in this instance by the government's decision to approve the ESR, as it would be deemed conduct that could adversely affect aboriginal interests.

Windco sought the advice of several provincial ministries to determine which aboriginal groups needed to be consulted. Pursuant to the government recommendations, as well as its own due diligence, Windco initiated consultations with several aboriginal groups located in relative proximity to the project site. The majority of the groups were satisfied with being kept informed of project developments, however two groups held that their aboriginal rights would be impacted by the project. Their rights in this case were not proven, and it was even possible that, had the claims been assessed, some of the claimed aboriginal rights had been extinguished.

However, project timelines are always tight, and companies do not generally have the time or resources to determine the strength of the claim, as was the case with Windco. Therefore, Windco entered into in-depth consultations with the two aboriginal Communities (community A and Community B) to determine their needs. Windco reached an agreement with Community A to involve them in the archaeological assessment of the project site and implemented a process whereby the native community participated actively in mitigating any impacts to burial sites discovered throughout project development. Consultations with Community B showed higher potential for impact on their claimed aboriginal rights. Windco therefore agreed to the same concessions that

were made with Community A and, in addition, started an education fund that would be partly funded by project revenues to help train a member of Community B in wind power development.

Windco kept a complete record of all consultations and accommodation extended to the aboriginal groups and submitted this as part of their ESR, as prescribed along with an archaeological assessment and aboriginal baseline characterization report (ABCR). The ABCR was drafted by environmental consultants and identified the aboriginal communities in the area, their claimed interests, histories and practices, as well as demographic and socioeconomic information. Windco was diligent in its consultation efforts and respectful of potential aboriginal interests. In this case, the Director of Approvals of the Ministry of Environment was the Crown decision-maker and reviewed the consultation record and deemed it to be sufficient. The ESR was approved and the decision was not appealed by any aboriginal groups.

However, this story could have had a very different ending.

For example, the project could have been delayed by the threat of blockades or political pressure, as the government can be hesitant to issue permits and approvals in cases where it deems that the consultation was insufficient. If the Director of Approvals had deemed the consultation and accommodation efforts to be insufficient, they might have denied approval. Even if the Director of Approvals had approved the ESR, an aboriginal group that was unsatisfied with the consultation and/or accommodation could have appealed to the Minister of Environment. Failing to have the appeal reviewed by the Minister, the aboriginal group may seek judicial review of the Minister's decision at the Ontario Court of Appeal. While recourse to both the Minister and the Court of Appeal is equally available to non-aboriginals, the fact that aboriginal interests are constitutionally protected buttresses an aboriginal claimant's request to, at the minimum, have their case heard, which could lead to significant delays in the project.

Risks and Opportunities

Identifying and addressing aboriginal issues up front can go a long way in ensuring project success. From a lender's perspective, the risk can be evaluated with reasonable accuracy. There are also opportunities to be gained from working closely with aboriginal groups on wind projects.

For example, the OPA is set to introduce its feed-in-tariff program in Summer 2009, in which it is proposed that "Eligible Aboriginal Projects" will receive premium pricing for the power produced from wind power projects. Furthermore, the provincial government is considering implementing mechanisms aimed at funding such aboriginal energy projects. If structured correctly and managed diligently, partnerships between wind developers and aboriginal communities could prove lucrative for both parties and should be encouraged. Development in the energy sector could set an example for other sectors. ✪

Reference

[1]The feed-in-tariff program (or FIT) provides a fixed term, fixed price contract for certain types of renewable generation. The author has substantive knowledge of the FIT program and is available to comment on the program and the opportunities presented to wind developers if desired.

[2]The OPA has yet to define "Eligible Aboriginal Interest," however it will contain an element of aboriginal ownership.