Faint Hope?: Benga Mining and First Nations Seek Permission to Appeal the Grassy Mountain Decision

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Today Benga Mining, the Piikani Nation, and the Stoney Nakoda Nations will appear before Justice L. Bernette Ho of the Alberta Court of Appeal to seek permission to appeal the Grassy Mountain decision. In June the Alberta Energy Regulator categorically rejected Benga's applications for the Grassy Mountain Coal Project.

Benga maintains the AER erred in law and contravened procedural fairness when it rejected Grassy Mountain. The requests of the Piikani and Stoney Nakoda Nations rest heavily on the claim that government did not fulfill its constitutional duty to consult and accommodate First Nations.

These claims are both weak and ironic. As Professor Bankes notes "Justice Ho can only grant permission to appeal if she concludes that Benga's application raises a point of jurisdiction or a severable point of law. She cannot grant permission to appeal if all that Benga can show are mixed questions of fact and law (for example, the application of the law to evaluating the impact of selenium contamination). In my opinion it will be difficult for Benga to show that its grounds for appeal raise pure questions of law. They are at best mixed questions of fact and law. At worst they simply show that Benga disagrees with the Panel's conclusion or that Benga is trying to blame the Panel for its own failure to make its case. And insofar as Benga seeks to rely on an alleged failure to consult with First Nations, I don't think that it lies in Benga's mouth to make that claim."

The First Nations' claim about government failure to fulfill the duty to consult and accommodate also is weak. The Supreme Court of Canada has affirmed the legitimacy of government environmental assessment or regulatory processes as means of fulfilling the duty to consult. The courts also have stated that the duty to consult "gives rise to corresponding obligations on the part of Indigenous groups." In part, this means that First Nations should communicate "their concerns in the clearest possible way."

The Grassy Mountain record shows that the Piikani and Stoney Nakoda Nations decided not to participate fully in this process. "By failing to participate fully in the hearing process," said Dr. Ian Urquhart, AWA's Executive Director, "the Piikani and Stoney Nakoda Nations didn't take advantage of the meaningful, legitimate, consultation opportunity provided by the Grassy Hearing process."

Adam North Peigan, Piikani Nation member and a former Nation councillor, sees much irony in the Nation leadership's unhappiness with the consultation about Grassy Mountain. To North Peigan, his nation's leadership consulted poorly, insufficiently, with Nation members. Little to no efforts were made to reach out to the 40% of Nation members who live off-reserve. "Grass-roots Piikani Nation members were left out of any kind of serious consultation about the Grassy Mountain project," he said. "There should have been much better government-to-community consultation."

Professor Bankes notes that "while the First Nations' permissions to appeal do raise questions of law, there is little point in the Court granting permission to appeal on duty to consult and accommodate grounds if the Court does not first grant permission to appeal on any of the other grounds raised by Benga. This is because the First Nations will never be able to enjoy the alleged economic benefits associated with the project if the project cannot go ahead for any of the other reasons given by the Panel. Any alleged shortfall in the duty to consult does not pertain to the Panel's findings with respect to the effect of the project on surface water quality and westslope cutthroat trout and habitat."

There are no reasons for Justice Ho to grant leave to appeal in this case.

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