Cassels

# Regulatory Affairs: Lessons on Addressing Risk of Judicial Review Challenges in the Context of Regulatory Applications

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**December 7, 2021**

**Welcome back to our *Regulatory Affairs* series, developed to provide timely updates on hot topics across the vast world of regulatory law; strategic insights on regulatory fundamentals; and a look at environmental and Aboriginal law topics, which frequently intersect with regulatory matters. As always, we are here to help.**

Project proponents in the natural resource and energy sectors remain vulnerable to judicial review based on their need for regulatory approval and frequent triggering of the Crown's duty to consult. Where the Crown has failed to fulfil its consultation obligations, applications for judicial review have the potential to halt a project for years. To protect against this, proponents and decision-makers must work to ensure that there has been meaningful consultation with any Indigenous peoples that may have their Aboriginal or treaty rights infringed by a project.

## When and How does Judicial Review Apply?

The term 'judicial review' refers to a process by which decisions of administrative bodies are reviewed by Canadian courts to ensure the exercise of executive power is being done in a manner consistent with the rule of law. In particular, courts have the authority to review decisions made by administrative bodies to ensure the decision was arrived at through a fair process, and that the decision itself was reasonable and legal.

An application for judicial review may only be brought to challenge decisions of entities with state-delegated decision-making power.[1] Regardless of whether the decision has a public dimension, judicial review is not available for the decisions of private organizations or voluntary associations.[2]

Decisions can be challenged on judicial review (1) for a lack of procedural fairness or (2) based on a substantive challenge to the decision itself.

1. Decisions challenged for a lack of procedural fairness will be judged based on a correctness standard, and the level of procedural fairness necessary will be determined based on the context and informed by several factors, including the nature of the decision, the nature of the statutory scheme, the importance of the decision to the individuals affected, the legitimate expectations of the

party affected, and the nature of deference accorded to the decision-making body.[3]

2. In contrast, a court considering a challenge of a decision based on substantive grounds will look to whether the decision was reasonable, deferring to the decision-maker in most circumstances. A decision will only be overturned on substantive review where there is a lack of an internally coherent reasoning process or if the decision is untenable in light of the relevant facts and law.[4]

## Judicial Review and the Duty to Consult

Administrative decisions relating to projects in the natural resource and energy sectors are often challenged for judicial review based on an alleged failure of the Crown to fulfil its duty to consult. This is a substantive challenge considered on a reasonableness standard. Where such an application is brought, the court will look to whether the consultation process was sufficient to meet the Crown's consultation obligations and whether those obligations were actually met.[5]

In approving or making another decision related to a project, a key consideration is often whether the Crown successfully discharged its duty to consult. This duty is triggered where the Crown becomes aware, or ought to be aware, that its contemplated conduct may infringe upon Aboriginal or treaty rights.[6]

What the duty to consult requires is contextual and will depend on the nature of the Aboriginal or treaty rights in question and the risk that the project may pose to those rights.[7] At a minimum, consultation will require a discussion with potentially impacted Indigenous peoples of the proposed conduct. However, most cases will require more than "mere consultation" and may even require some form of consent from the Indigenous peoples affected.

## Case Studies: Failure to Consult and Recent Applications for Judicial Review

In the 2017 companion decisions of *Clyde River (Hamlet) v Petroleum Geo-Services Inc*[8] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*,[9] the Supreme Court reaffirmed that regulatory and administrative agencies, when exercising power delegated from the executive branch, owe a duty to consult potentially impacted Indigenous groups when authorizing actions that may impact their Aboriginal or treaty rights.[10]

In *Clyde River*, the Supreme Court found the consultation process had fallen short on two bases: (1) the consultation was misdirected by focusing on the overall environmental impact of the testing, rather than focusing on the direct impact on the Indigenous group's rights, and (2) the consultation process failed to provide the Indigenous group with sufficient opportunities to participate on an ongoing basis.[11] Conversely,

in *Chippewas* the Court found the consultation process had satisfied the duty owed by the Crown, noting that the potentially affected Indigenous groups had been given proper notice of the proposed project and had been given funding and opportunities to present their position and evidence.[12] The Court also pointed to several accommodations that had been made by way of conditions being imposed on the applicant company, as evidence that the potential impact on the rights of the Indigenous groups had been mitigated.[13]

However, as demonstrated by the Federal Court of Appeal's decision in *Tsleil-Waututh Nation v Canada (Attorney General)*,[14] merely having the proper process in place will not always guarantee the consultation process will be deemed reasonable. In *Tsleil-Waututh Nation*, the Court dealt with an application for judicial review of the Governor in Council's decision to approve the expansion of the Trans Mountain pipeline system. The consultation process was held to have been reasonable; the Indigenous Groups had been given early notice and were provided the proper means and opportunities to participate in the process.[15] However, the Court found that the Crown had fallen short in satisfying its duty to consult by failing to engage in a meaningful two-way dialogue with the affected Indigenous Groups.[16] In reaching its decision, the Court reaffirmed that the duty to consult requires going beyond merely listening to the concerns of the Indigenous groups and actually engaging in a meaningful dialogue wherein the concerns are genuinely considered.[17]

The adequacy of the consultation in the Trans Mountain Pipeline Expansion Project was revisited in a judicial review application at the Federal Court of Appeal in *Coldwater First Nation v Canada (Attorney General)*,[18] this time with the Court finding that the process had been adequate. The Court distinguished the Crown's level of consultation in *Coldwater* from that in *Tsleil-Waututh Nation* on the basis that the parties had shown a genuine effort to take into account the key concerns of the claimants, and had engaged in a two-way communication with the claimants, pointing to accommodations that had been made.[19]

## Key Takeaways for Project Proponents

Our key takeaways from the reviewed judicial review cases are as follows:

- **Reliance on Statutory Decision-makers**. The reviewed case law demonstrates the potential vulnerability to judicial review for project proponents who rely heavily on statutory decision-makers where the Crown's consultation obligations are triggered. Where the consultation process is found insufficient, the Court will be willing to overturn an administrative decision on judicial review based on the fact that the decision was unreasonable for lacking the requisite justification, transparency and intelligibility. To avoid this outcome, proponents and those responsible for consultation must do all they can to ensure there is evidence of meaningful consultation with potentially affected Indigenous peoples and a thorough consideration of any concerns they raise.
- **The Ongoing Susceptibility to Judicial Review Attacks.** As demonstrated by the variety of contexts in which the above applications for judicial review arose, the duty to consult can be triggered at various points throughout the lifespan of a project and is more than a simple preliminary

hurdle. Proponents are best advised to see the duty as an ongoing one and continue to take steps throughout the lifetime of the project to engage with the potentially affected Indigenous groups.

- **The Adequacy of the Dialogue in the Consultation Process**. At issue in several of the recent cases[20] is the adequacy of the consultation process in satisfying the duty to consult. In each instance, the court noted that the framework in place for the consultation process was reasonable within the circumstances, with the parties providing the necessary means for the Indigenous Groups to communicate their concerns. However, the manner in which the parties implemented the process, failing to engage in a meaningful dialogue with the concerns of the groups, was insufficient. Conversely, the consultation process in *Coldwater* and *Chippewas* consisted of a real dialogue between the parties, as evidenced by accommodations being made to address the concerns that had been raised. This level of dialogue should be seen as a requisite to satisfying the duty owed.

Read other articles in this series here:

- Best Practices for Working with Counsel on Corporate Renewable Energy Deals
- Best Practices for Contractual Allocation of Environmental Liability Following Resolute FP Canada Inc v Ontario (AG)

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[1] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,* 2018 SCC 26 at para 13 [*Highwood*].

[2] *Highwood* at para 13.

[3] *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at paras 21-28.

[4] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 1999 CanLII 699 paras 100-107.

[5] 2018 FCA 153 at paras 513-557 [*Tsleil-Waututh Nation*].

[6] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 [*Haida Nation*].

[7] *Haida Nation* at paras 39-40.

[8] 2017 SCC 40 [*Clyde River*].

[9] 2017 SCC 41 [*Chippewas*].

[10] *Clyde River* at para 30; *Chippewas* at para 32.

[11] *Clyde River* at paras 45, 47-52.

[12] *Chippewas* at paras 16 & 18.

[13] *Chippewas* at paras 51 & 57.

[14] *Tsleil-Waututh Nation*.

[15] *Tsleil-Waututh Nation* at paras 548-549.

[16] *Tsleil-Waututh Nation* at paras 558, 564, 601 & 754-756.

[17] *Tsleil-Waututh Nation* at paras 753-763.

[18] 2020 FCA 34 [*Coldwater*].

[19] *Coldwater* at para 76. See also *Eabametoong First Nation v Minister of North Development and Mines* and *Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office)*. In *Eabametoong*, the Ontario Superior Court of Justice found that the parties had listened to the Indigenous groups concerns, but failed to engage in a meaningful two-way dialogue, as evidenced by an absence of accommodations or changes made in response to the expressed concern. As a result, the consultation process didn't fulfill the duty to consult, even at the 'lower end of the spectrum'. In contrast, in *Wet'suwet'en Treaty Office Society*, the British Columbia Supreme Court refused to overturn a decision of the Environmental Assessment Office (EAO) that was challenged on an application

for judicial review on both substantive and procedural fairness grounds. In upholding the EAO's decision, the Court noted that the decision reached wasn't the result of an adversarial adjudicative process, the applicant company had sought comments from the affected Indigenous groups and addressed any sufficiently addressed any worries that were raised, the procedural process that was afforded didn't fall short of any statutory requirements, and that no representation regarding the procedure had been made that remained unfulfilled.

[20] Including *Clyde River*, *Tsleil-Waututh Nation*, *Coldwater*, and *Eabametoong*.

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