Cassels

Crown Consultation with Aboriginal Peoples and Regulatory Tribunals: *Clyde River* and *Thames First Nation*

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On July 26, 2017, the Supreme Court of Canada released two decisions, *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*[1] and *Thames First Nation v Enbridge Pipelines Inc.*,[2] both relating to decisions of the National Energy Board (the NEB) and the Crown's duty to consult Aboriginal peoples. These decisions clarify the role and obligation of decision-making bodies, such as the NEB, when section 35 rights are potentially impacted and consultation is engaged, have the potential of providing greater predictability and stability for project proponents seeking NEB approvals, and set out a clear discussion of what constitutes reasonable consultation and accommodation and what does not.

Clyde River (Hamlet) v Petroleum Geo-Services Inc.

Facts

The proponents applied to the NEB in 2011 for authorization to conduct offshore seismic testing in Nunavut for oil and gas.[3] The testing was to occur in an area adjacent to where the Inuit possess treaty rights to harvest marine mammals.[4]

During a meeting in Pond Inlet, the proponent was unable to provide substantive answers to basic questions about the impacts of the proposed seismic testing, including how the testing would impact marine mammals.[5] When the proponent filed a 3,926 page document with the NEB purporting to answer these questions, little of the document was translated into Inuktitut and no efforts were made to determine whether the document was accessible to the impacted communities.[6]

Throughout the NEB review, the Clyde River Hamlet and "various Inuit organizations filed letters of [concern] with the NEB noting the inadequacy of consultation."[7] Letters of concern were also sent to the Minister of Aboriginal Affairs and Northern Development, stating that the duty to consult could be addressed by completing a "strategic environmental assessment"[8] before approving the environmental assessment.[9]

When granting the approval, the NEB concluded that the proponents had "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised and that Aboriginal groups had an adequate opportunity to participate" [10] in the approval process. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, no consideration was given in the

assessment to treaty rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.[11]

Issues

In reviewing the NEB's decision, the Court considered the following four questions:[12]

- Can an NEB approved process trigger the duty to consult?
- Can the Crown rely on the NEB's process to fulfill the duty to consult?
- What is the NEB's role in considering Crown consultation before approval?
- Was the consultation adequate in this case?

Can an NEB Approved Process Trigger the Duty to Consult?

As stated in *Haida Nation* the duty to consult occurs when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct.[13]

The Court clarified that agents, including independent authorities authorized by the Crown like the NEB, can trigger the Crown's obligations to consult. Where "a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown actions quickly falls away."[14] The NEB is a vehicle through which the Crown acts and therefore its decisions may trigger the duty to consult.[15]

Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?

The Crown can rely on steps taken by a regulatory agency to fulfill the duty to consult, however whether the Crown is capable of doing so depends on the duties and powers of the agency, and the duties required in the particular circumstance.[16]

The Court observed that the "NEB has a significant array of powers that permit extensive consultation"[17] and can conduct studies on project impacts and has broad powers to accommodate the concerns of Indigenous groups.[18] Given that the NEB has broad procedural powers to facilitate consultation, and remedial powers to accommodate claims of Aboriginal and treaty rights, the Court concluded that the Crown can rely on the NEB to completely or partially fulfill its duty to consult.[19]

However, the Court made clear that where the Crown relies on the processes of a regulatory body to fulfill its duty to consult, the reliance should be made clear to affected Indigenous peoples.

What is the NEB's Role in Considering Crown Consultation Before Approval?

A regulatory agency with the power to conduct consultation and to accommodate, may not necessarily have the requisite powers to evaluate whether adequate consultation occurred.[20]

Considering the adequacy of consultation and accommodation requires that the agency be empowered to consider questions of law. Unless the empowering statute expressly withheld the power to decide the adequacy of consultation, regulatory agencies with the authority to decide questions of law have both the duty and authority to consider constitutional matters such as the adequacy of consultation.[21]

The NEB, having the power to consider questions of law and no express restrictions on the evaluation of consultation, has the obligation to consider the adequacy of consultation. As a consequence, the NEB may only proceed to approve a project if consultation has been adequate. “Where the Crown’s duty to consult an affected Indigenous Group with respect to a project… remains unfulfilled, the NEB must withhold project approval.”[22]

The NEB will not “always be required to review the adequacy of Crown consultation by applying a formulaic *Haida analysis*.”[23] However, in practice, where affected Indigenous groups have squarely raised concerns about Crown consultation, the NEB must usually address those concerns in written reasons, and where deep consultation is required, the NEB will need to explain how it considered and addressed those concerns.[24]

Was the Consultation Adequate in this Case?

The Court found that consultation had been inadequate.[25] While the NEB considered environmental factors, they failed to address Inuit treaty rights.[26] Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed to the Inuit fell at the highest end of the spectrum.[27]

While the Crown relied on the NEB to fulfill its duty to consult, that reliance was not made clear to the Inuit. Finally, the NEB process for consultation did not adequately fulfill the deep consultation requirements in this case.[28] Oral hearings were not held, efforts were not made to ensure the impacted community received responses to their questions, and funding was not provided to the participants to submit scientific evidence and test the evidence of the proponents.[29]

Chippewas of the Thames First Nation v Enbridge Pipelines Inc.

Facts

In November 2012, Enbridge applied to the NEB for approval to make modifications to a pipeline, including reversing the flow of part of the pipeline, increasing its capacity, and enabling it to carry heavy crude.[30] The

proposed modifications would have increased the assessed risk of spills along the pipeline.[31] As part of the pipeline ran through their traditional territory, the Chippewas of the Thames First Nation requested Crown consultation prior to the scheduled NEB hearings.[32] The Crown did not respond to the request prior to the public hearing conducted by the NEB for the purposes of gathering and reviewing information relevant to the assessment of the project. After the public hearing, the NEB approved the proposed modifications and made the determination that the potential impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated.[33]

It was not until after the conclusion of the NEB hearings that the Crown responded to the prior request for consultation. The Crown indicated that it would be relying on the NEB's regulatory review process and the public hearings in order to fulfill its duty to consult.[34] The Chippewas of the Thames appealed the NEB's decision, claiming that the Crown had not discharged its constitutional obligation to consult them prior to the NEB's decision.[35]

Issues

The issues considered by the Supreme Court of Canada in the *Thames First Nation* were substantially similar to the companion case of *Clyde River* (discussed above). Accordingly, in its reasons, the Court signalled that it would be relying on the principles articulated in *Clyde River*.[36] The Court stated that:

- A decision by a regulatory tribunal triggers the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision;[37]
- The duty to consult "does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB";[38]
- As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB had acted *on behalf of* the Crown in approving Enbridge's application, thereby triggering the duty to consult;[39]
- The Crown may rely on steps taken by an administrative body or regulatory agency (such as the NEB) to fulfill its duty to consult, so long as the statutory powers and/or agency granted to the decision maker are sufficient to provide adequate consultation and accommodation;[40] and
- Wherever a decision maker is potentially going to impact Aboriginal or treaty rights, written reasons should be provided to permit Indigenous groups to determine whether their concerns were adequately considered and addressed.[41]

Was the Consultation Adequate in this Case?

In the result, the Court concluded that based on the principles articulated in *Clyde River*, the NEB's statutory powers were capable of satisfying the Crown's constitutional obligation to consult the Chippewas of the Thames.[42] The Court concluded that the Crown was entitled to rely upon the process established by

the NEB, which had sufficiently satisfied the Crown's duty to consult.[43] The Court identified key distinctions between the present case and the circumstances considered in the *Clyde River* decision, and noted the efforts undertaken for the purposes of consultation in the present case, including that:

- The NEB had considered whether affected Indigenous groups had received sufficient information regarding the project and a proper opportunity to express their concerns to Enbridge;[44]
- The Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses; [45]
- The NEB had held an oral hearing, for which early notice had been provided and formal participation, by affected Indigenous groups, was sought;[46]
- Prior to the oral hearing, the NEB had held information meetings in three communities upon request;[47]
- The NEB had provided the Chippewas of the Thames with participant funding, which allowed them to review, prepare, and tender evidence including an expertly prepared preliminary land use study;[48]
- Unlike the companion case of *Clyde River*, the Court found that the Chippewas of the Thames had been given a sufficient opportunity to make submissions to the NEB;[49] and
- The Chippeas of the Thames were permitted to make closing oral submissions to the NEB at the oral hearing.[50]

The Court also noted that the NEB had provided written reasons which, unlike the reasons that were reviewed in *Clyde River*, dealt clearly with the issue of Aboriginal consultation.[51] The Court went on to draw a number of distinctions between the NEB's written reasons in both decisions, noting that in the present decision (and unlike *Clyde River*):

- The issue of Aboriginal consultation was not subsumed within an environmental assessment;[52]
- The NEB had reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake;[53]
- The NEB had assessed the risks that the project posed to those rights and interests, concluding they were minimal and could be adequately mitigated;[54] and
- The NEB had provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.[55]

Implications of Both Decisions

Both decisions, taken together, help to clarify the Crown's duty to consult Aboriginal peoples generally, how the duty to consult applies to regulatory bodies and provide further insights into recent jurisprudence on similar issues from the Court. For the NEB, these decisions represent the Court's endorsement of its abilities in dealing with Aboriginal issues generally and related Aboriginal and treaty rights matters and

should be seriously considered in light of recent initiatives to restructure the NEB. For project proponents, Indigenous peoples, and the NEB itself, the Court's clear explanations and conclusions should create greater certainty and confidence about where the law relating to the duty to consult is going and, in the case of the NEB and other regulatory bodies and government decision-makers, should promote the development and implementation of more effective, transparent and reasonable processes for carrying out the honour of the Crown and related consultation obligations.

As with the SCC's decisions in *Haida Nation* and *Taku River*, the Court has effectively used two distinguishable fact patterns to further explain the Crown's duty to consult Aboriginal peoples. Sharing a single legislative and regulatory framework, the decisions provide useful bookends to help better understand the nature and obligations of the Crown's duty to consult as its applies to regulatory bodies and more generally other government decision-makers.

The Court elaborated on the balance between Aboriginal rights and the public interest and addressed concerns that "the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult."[56] The NEB is not in conflict when it evaluates Aboriginal rights and decides issues on the basis of the public interest since the Crown's fulfillment of its duty to consult is in the public interest.[57] The inclusion of the Crown's duty to consult as lying within the broader public interest underscores the fundamental deference seen from the Court in many of its other decisions on section 35 to governments' ability and duty to govern fairly and for all, albeit within the confines of the Constitution, including but not limited by section 35.

The Court reconfirmed that the scope of the Crown's duty to consult has limits. The duty to consult "does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage."[58] There is no "veto" over final Crown decision, but rather "proper accommodation stresses the need to balance competing societal interest with Aboriginal and treaty rights."[59] In *Thames First Nation*, the impacted First Nation was "not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in the process."[60] Finally, as noted in previous decisions of the Court, "the duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances."[61] Consultation is to be focused on the decision at hand.

The Court's decisions in *Clyde River* and *Thames First Nation* also provide new insight into existing jurisprudence. For example, the Court's decision in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,[62] which had described the obligations of regulatory decision-makers to consider the duty to consult, can now be viewed in relation to other factual scenarios, providing better insight into when and how a regulatory entity is responsible for conducting consultation.

The timing of these cases is significant, coming after the May 15, 2017 Expert Panel on the modernization of the NEB,[63] and nearly one month following the release of the Discussion Paper on the Review of Environmental and Regulatory Processes.[64] The Expert Panel report and the Discussion Paper proposed

significant revisions to the NEB and its processes including separating the consultation process from the NEB and instead designating specific government representatives for the purpose of conducting consultation and creating an "Indigenous Major Projects Office" for supporting and overseeing consultation.

These decisions should cause all involved to revisit all of the proposed amendments to the NEB in this respect. The Court noted that the "NEB [has] broad powers to accommodate Indigenous groups where necessary."[65] "The NEB has also developed considerable institutional expertise, both in conducting consultation and in assessing the environmental impacts of proposed projects… the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available."[66] This, along with the Court's general endorsement of the NEB in both decisions, suggests that not only does the NEB have the authority to conduct consultation activities, it is also *well positioned* to oversee meaningful consultation. Efforts to remove consultation processes from the oversight of the NEB may in fact reduce the effectiveness of consultation activities if the result is a fractured process that separates technical, environmental, social, and legal competencies.

The Court endorsed the existing structure of the NEB in relation to consultation in both decisions and the Court's specific suggestions and instructions should make the NEB a more effective decision-maker when dealing with Aboriginal-related matters and associated consultation. The Court has provided the NEB with clarity about its role in consultation and also set out how to conduct consultation effectively, including

(a) informing Indigenous peoples if the Crown will be relying on the NEB to fulfil its duty to consult;[67]
(b) providing written reasons;[68]
(c) in most cases applying a more transparent and functional approach rather than applying a formulaic "*Haida* analysis";[69]
(d) providing an opportunity to engage in oral hearings;[70] and
(e) providing funding for the evaluation and provision of scientific evidence.[71]

The failure of the NEB to adequately consult was not a result of the NEB's structure, competence, or delegated authority, and appears to have been the result of uncertainty regarding the NEB's appropriate role regarding consultation and a lack of diligence in carrying out consultation in the case of *Clyde River*. With the direction provided by the Court, the NEB should be positioned to more effectively fulfill the Crown's duty to consult.

Interestingly, the Court uses the term "Indigenous peoples" throughout both cases instead of the term "Aboriginal peoples." The term "Aboriginal peoples" comes directly from section 35 of the *Constitution Act, 1982*, while the term "Indigenous peoples" was used in *Daniels v Canada*[72] by the Court to refer to peoples included in section 91(24) of the *Constitution Act, 1867* which also includes non-section 35 rights bearing peoples.[73] The Court's apparent efforts in *Clyde River* to distinguish between a constitutional duty to consult and a legal duty to consult,[74] when viewed in connection with the use of the term "Indigenous peoples" raises interesting, and potentially meaningful questions about if and how the duty to consult applies to non-

section 35 rights-holders.

These decisions should increase certainty and confidence for project proponents and Indigenous peoples when dealing with the NEB. Both decisions mean that, from a practical perspective, proponents should not need to worry about "what other" consultation obligations exist and should be able to approach the NEB with confidence that, in most situations, the NEB will be in a position to adequately address section 35-related matters, including Crown consultation. The decisions also provide clarity regarding who is the "Crown" for the purposes of regulatory reviews, confirm that consultation must always be meaningful and that decision-makers will be held accountable ultimately when, regardless of how well-structured or well-intentioned they may be, consultation requires a high degree of diligence by decision-makers in every instance.

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[1] 2017 SCC 40 [*Clyde River*].
[2] 2017 SCC 41 [*Thames First Nation*].
[3] *Clyde River, supra* note 1 at para 3.
[4] *Ibid*
[5] *Ibid* at para 10.
[6] *Ibid* at para 11.
[7] *Ibid* at para 12.
[8] *Ibid* at para 13.
[9] *Ibid*
[10] *Ibid*
[11] *Ibid at para 15.*
[12] *Ibid at para 18.*
[13] *Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73 at para 35.*
[14] *Clyde River, supra note 1 at para 29.*
[15] *Ibid*
[16] *Ibid at para 30.*
[17] *Ibid at para 31.*
[18] *Ibid*
[19] *Ibid at para 34.*
[20] *Ibid at para 38.*
[21] *Ibid at para 36.*
[22] *Ibid at para 39.*
[23] *Ibid at para 42.*
[24] *Ibid at para 47.*
[25] *Ibid at para 4.*
[26] *Ibid at para 52.*
[27] *Ibid at para 44.*
[28] *Ibid at para 47.*
[29] *Ibid at paras 47, 52.*
[30] *Thames Fist Nation, supra note 2 at para 4.*
[31] *Ibid*
[32] *Ibid*
[33] *Ibid at para 5.*
[34] *Ibid at para 4.*
[35] *Ibid at para 5.*
[36] *Ibid at para 29.*
[37] *Ibid*
[38] *Ibid at para 36.*
[39] *Ibid at para 31.*
[40] *Ibid at para 32.*
[41] *Ibid at para 47.*

[42] *Ibid at para 51.*
[43] *Ibid at para 44.*
[44] *Ibid at para 53.*
[45] *Ibid at para 52.*
[46] *Ibid*
[47] *Ibid at para 16.*
[48] *Ibid at para 52.*
[49] *Ibid*
[50] *Ibid*
[51] *Ibid at para 64.*
[52] *Ibid*
[53] *Ibid*
[54] *Ibid*
[55] *Ibid*
[56] *Clyde River, supra note 1 at para 40.*
[57] *Ibid at para 40.*
[58] *Thames First Nation, supra note 2 at para 59.*
[59] *Ibid at para 59.*
[60] *Ibid at para 60.*
[61] *Ibid at para 41.*
[62] *2010 SCC 43.*
[63] *Canada, Expert Panel on the Modernization of the National Energy Board, Forward, Together: Enabling Canada's Clean, Safe, and Secure Energy Future, Catalogue No M4-149/2017E-PDF (Online), retrieved from: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf*
[64] *Canada, Environmental and Regulatory Reviews: Discussion Paper, June 2017, retrieved from: https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf*
[65] *Clyde River, supra note 1 at para 32.*
[66] *Ibid at para 33.*
[67] *Thames First Nation, supra note 2 at para 44.*
[68] *Clyde River, supra note 1 at para 41.*
[69] *Ibid at para 42.*
[70] *Ibid at para 47.*
[71] *Ibid at para 47.*
[72] *Daniels v Canada (Minister of Indian Affairs and Northern Development), 2016 SCC 12.*
[73] *Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.*
[74] *Clyde River, supra note 1 at para 19.*

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