# *Aboriginal Consultation and Administrative Proceedings: Two Cases Heard by the SCC in November*

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For Indigenous law watchers, November 30, 2016 was a notable day. The Supreme Court of Canada (SCC) in a day long sitting heard *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)* and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*[1]

Both cases are on appeal from the Federal Court of Appeal (FCA) and should clarify the role of administrative tribunals in satisfying the Crown's duty to consult and accommodate. The SCC will consider whether administrative boards may discharge the Crown's duty or simply have an obligation to assist in the consultation process conducted by the Crown.

**Hamlet of Clyde River**

In May 2011, TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geoservices Inc. (PGS) and Multi Klient Invest (MKI) (the Proponents) applied to the National Energy Board (NEB) for authorization to conduct offshore seismic testing associated with oil drilling off the east coast of Baffin Island. The Hamlet of Clyde River and the Nammautaq Hunters and Trappers Organization – Clyde River (the HTO) raised concerns about the project's impact on marine life and Inuit harvesting. HTOs are, mandated by the Nunavut Land Claim Agreement to protect and regulate the rights of their members relating to wildlife harvesting. The Inuit of Clyde River depend on marine mammals including bowhead whales, narwhals, seals and polar bears for food security and economic, cultural, and spiritual well-being.

In June 2014, following an environmental assessment under the *Canadian Environmental Assessment Act, 1992*, the NEB issued authorization for the proponents to proceed with seismic testing.[2] In the environmental assessment, the NEB acknowledged the project's potential adverse environmental effects but concluded that:

> "with the implementation of [the project operator's] commitments, environmental protection procedures and mitigation measures, and compliance with the Board's regulatory requirements and conditions included in this [Environmental Assessment] Report, the Project **is not likely to result in significant adverse environmental effects**." [emphasis added]

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1 2015 FCA 179 ["*Hamlet*"]; 2015 FCA 222 ["*Chippewas*"].

2 *Canadian Environmental Assessment Act* (SC 1992, c 37) [*CEAA* 1992].

Following the NEB decision, the Hamlet of Clyde River and the HTO applied to the FCA for judicial review of the NEB's decision asserting that the Crown failed to discharge its duty to consult. The appellants asserted that given the project's potential impacts on Inuit treaty rights, the Crown's duty to consult was at the high end of the spectrum.

The Crown relied entirely on the NEB process to fulfill its consultation requirements, and did not take any independent or additional steps to consult the Inuit appellants. The FCA found that the Crown "properly and adequately" discharged its duty to consult through the NEB-led environmental assessment process.[3]

The FCA concluded that the Crown may rely, at least in part, on the NEB's mandated consultation process to satisfy the duty to consult. However, while relying on the NEB's process the Crown retains the obligation to consider whether further consultation or accommodation may be necessary.

**Chippewas of the Thames First Nation**

In 2012, Enbridge Pipelines Inc. (Enbridge) applied for approval under the *National Energy Board Act* (*NEB Act*) to reverse the flow of Line 9, a pipeline used to transport oil, and to increase Line 9's capacity to transport heavy oil. Line 9 traverses the traditional territory of the Chippewas of the Thames First Nation and crosses the Thames River. The Chippewas have Aboriginal and treaty rights along the Thames watershed.

The NEB acknowledged the potential impacts of Line 9 on Aboriginal rights. However, based on Enbridge's representations, the NEB was satisfied that any impacts would be minimal and appropriately mitigated. The Chippewas appealed the NEB decision to the FCA.

The FCA considered whether the NEB had an obligation to consider the Crown's consultation activity and whether the duty to consult had been discharged. The majority found that the NEB did not have an obligation to assess the Crown's consultation.

The FCA majority decision followed the decision in *Standing Buffalo*, a case concerning an NEB decision made under s. 52 of the *NEB Act*.[4] Section 52 provides for an extra level of review by the Governor in Council of the NEB's recommendations, and the Chippewas of Thames First Nation argued that this distinguished *Standing Buffalo* from decisions under s. 58 of the *NEB Act*, which is a final decision made by the NEB. The FCA majority found that this factor was insufficient to distinguish the cases, and that the NEB could not make a determination about consultation when the Crown (for reasons unknown) was not a party to the proceedings before it.

The dissent in *Chippewas* disagreed with the assertion that the NEB was not required to determine whether consultation took place because the Crown was not present. The dissent agreed with the Appellant that *Standing Buffalo* was distinguishable because the NEB was the final decision-maker under s 58. Without an assessment of consultation, there is a loophole in the process. The dissent found that the NEB had the power to assess whether a duty to consult had been triggered, and if so, whether it had been discharged.

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[3] *Hamlet*, *supra* note **Error! Bookmark not defined.** at para 70.

[4] *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308, [2010] 4 FCR 500 [*Standing Buffalo*].

**Arguments before the SCC**

The Inuit of Clyde River and the Chippewas of the Thames appeared jointly before the Supreme Court to argue that the Crown's duty to consult was not met through the NEB hearing process.

These cases touch once again on an area in our jurisprudence which has been actively developed over the last decade. The Crown itself owes the duty to consult and can only delegate procedural aspects of consultation. However, the courts have never explained what can be included in the "procedural aspects" of the consultation process conducted by administrative tribunal nor have they ruled on what is beyond "procedure" and the limits of the Crown's delegation. Generally, the Crown must identify which Aboriginal groups to consult, can delegate components of consultation to tribunals and proponents, and then assesses whether consultation was adequate before making its decision. In these cases, the NEB determined whether consultation was met.

Clyde River and the Chippewas argue that the NEB is not the "Crown", did not sign treaties with Indigenous people, and could not be delegated the full duty to consult.

The Crown side-stepped this argument and argued that the ultimate arbitrator of whether the duty is met is the court and is available to Indigenous people regardless if it is the NEB or Cabinet making a decision.

This would require Aboriginal rights-holders to use scarce resources to bring a separate proceeding before the courts every time they felt that the duty to consult had not been met following an NEB (or tribunal) decision.

The SCC's decision in *Hamlet of Clyde River* and *Chippewas of the Thames First Nation* should clarify the role of the NEB and other regulatory tribunals in meeting the Crown's duty to consult. We suggest, however, rather than leaving Aboriginal peoples to wage battle in the courts, following this SCC decision, Parliament should (as part of its review of the role and mandate of the NEB) clarify the role of federal regulators in light of the duty to consult while ensuring the Honour of the Crown is upheld in regulatory proceedings.

We will review the Supreme Court's decision once it is released.

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