Heavy Lies the Head that Wears the Crown: SCC Delivers Clyde River and Chippewas Judgments

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On July 26, 2017, the Supreme Court of Canada released its unanimous decisions in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*.[1] and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*.[2] The Court clarifies that while the duty to consult rests with the Crown, the decisions of administrative tribunals can constitute "Crown conduct" that triggers the duty to consult.

For a review of the Federal Court of Appeal (FCA) decisions in each of these cases, please click **here**. At issue in both of these cases are the obligations of the National Energy Board (NEB) in assessing and discharging the duty to consult when the Crown is not a party to the proceedings.

Overview of Cases

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

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

The NEB held meetings in communities in the area affected by the Project. Clyde River Inuit attended the meetings and asked several "basic" questions about the Project process that the Proponent was unable to answer. The NEB suspended the review process and waited until the Proponent filed a 3,926 page document in response to the questions. The document was mostly in English (not Inuktitut) and due to the limited internet bandwidth available to northern communities was functionally unavailable to the communities.[3] No oral hearing took place and no funding was provided to Clyde River Inuit to review the documents, or participate in the NEB process.

The Supreme Court allowed the appeal of the FCA decision and quashed the NEB approval. The Court found that although "the NEB is not, strictly speaking, 'the Crown'… as a statutory body

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1 2017 SCC 40. [*Clyde River*]
2 2017 SCC 41. [*Chippewas*]
3 Clyde River at 11.

holding responsibility under s. 5(1)(b) of COGOA… the NEB acts on behalf of the Crown when making a final decision on a project application". Since the NEB is the "vehicle through which the Crown acts", the approval process triggers the Crown's duty to consult.[4]

The Court found that when assessing harms arising from the project the NEB inappropriately focused on harm to the environment (which the NEB assessed as low) instead of assessing the harm to the Clyde River Inuit's section 35 constitutional rights. The NEB's proposed mitigation measures were not sufficient to address significant concerns about the impact of the Project on Inuit rights, particularly the right to harvest marine mammals.

The Court found that the circumstances of the case required deep consultation, as Clyde River Inuit's rights to harvest marine mammals are established under a modern land claim and the potential for harm to those rights is high. The Court found that although the Crown is entitled to rely on administrative processes, that Clyde River Inuit should have been given notice at the outset of the government's intention to rely on the NEB process to fulfill the duty to consult. And, despite the NEB's broad powers under COGOA to allow for significant opportunities for the Clyde River Inuit to participate in the hearing process, they were not accorded those opportunities (including the failure to hold oral hearings) that would have allowed for meaningful consultation in this context.[5] In addition, the information provided by the proponent was found to be inaccessible due to lack of translation into Inuktitut and, in any case, simply providing a 3,926 page document was insufficient on its own to meet the standard of deep consultation.

> …only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation…
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> …Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different.[6]

In the end, the Court criticized the NEB's failure in its reasons to address the source of Clyde River Inuit's rights, the required scope of deep consultation, and Clyde River Inuit's concerns about the inadequate consultation process.

Chippewas of the Thames First Nation v Enbridge Pipelines Inc.

In 2012, Enbridge Pipelines Inc. (Enbridge) applied for approval under the *National Energy Board 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 (Pipeline Project). Line 9 traverses the traditional territory of the Chippewas of the Thames First Nation and crosses the Thames River where the Chippewas assert Aboriginal and Treaty rights and carry out activities central to their identity and way of life.

The Chippewas participated in the NEB hearings as an intervenor. 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.

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4 Clyde River at 29.
5 Clyde River at 47.
6 Clyde River at 49 and 52.

The Supreme Court dismissed the appeal of the FCA decision and upheld the NEB approval. As with the *Clyde River* decision, the Court found that the NEB's approval constituted Crown action that triggered the Crown's duty to consult.

However, unlike the *Clyde River* case, the Court held that the NEB process had provided procedural protections that included early notice from the NEB to the Chippewas, oral hearings, submissions, final argument and participant funding. The Court found that the Pipeline Project would take place largely on lands that were already being used for the pipeline, and so the impacts to the Chippewas would not be extensive. Further, the NEB imposed conditions on the Pipeline Project that the Court judged were appropriate mitigation for the concerns raised by the Chippewas during the hearing process.

Impacts on the NEB & Other Tribunals/Boards

"Crown conduct" that can trigger the duty to consult goes beyond the direct exercise of executive power or actions of an agent of the Crown. The Supreme Court in *Chippewas* and *Clyde River* extends the definition of "Crown conduct" to include power to exercise decision-making that has been statutorily delegated to an independent tribunal:

> …Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. … It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in Chippewas of the Thames, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105).…[7]

The judgments provide greater clarity about the roles and responsibilities of regulatory tribunals and agencies in relation to Crown consultation. The Supreme Court in both judgments maps out a process for Crown reliance on tribunals to fulfill its obligations, including early notice of the Crown's intent to rely on the administrative process, and clear communications about the form of the consultation process.[8] The Crown can rely on the administrative process to the extent that the administrative body has the statutory authority to "do what the duty to consult requires in the particular circumstances".[9] In considering the public interest, affected tribunals will need to satisfy themselves that project authorisations do not breach constitutionally protected rights of Indigenous peoples. Where the administrative process falls short, additional consultation from the Crown will be required.

The Court also places responsibility on the administrative tribunal to delay issuing an approval until it assesses that the duty to consult has been discharged. If tribunals issue approvals before the duty has been discharged, then the courts may quash that tribunal's decision. Accordingly the Court finds, "where the Crown's duty to consult… remains unfulfilled, the NEB must withhold project approval".[10]

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7 *Clyde River* at 29.
8 *Clyde River* at 23.
9 *Chippewas* at 32.
10 *Clyde River* at 39.

It is important to note, however, that the requirements for Crown consultation set out in *Clyde River* for the NEB could also be construed as procedural fairness requirements that are not unique to Crown consultation per se. Further, it should be remembered that the implications underlying these decisions need to be analysed in the distinct legislative context of the many administrative bodies across Canada.

With respect to the NEB, it bears noting that the federal government is in the midst of considering ways to "modernize" the tribunal. An expert panel issued a report on May 15, 2017 addressing this very issue. The government followed up by releasing a Discussion Paper on June 29, 2017 seeking views of the public on various regulatory reforms, including those relating to the NEB. In light of these Supreme Court decisions, it will be interesting to see how the government ultimately addresses Indigenous consultation processes conducted by the NEB going forward.

In Ontario, the Ontario Energy Board (OEB) has powers to make decisions independently of the Crown. The OEB will need to assess the extent to which the OEB may be required to assess and discharge the provincial Crown's Indigenous consultation duties, when making final decisions about resource projects.

In the north, co-management boards have independent decision-making responsibilities within the framework of land claims. Each of these bodies will need to carefully analyze the decisions to assess the implications for them going forward. At a minimum, they will require resources and training to respond to this new judicial understanding of their responsibilities regarding Indigenous consultation.

With respect to review processes that are currently underway, it may be prudent for government(s) and the relevant administrative tribunals to consider how each will meet their respective duties to engage in the Crown's duty to consult. Independent of these Crown obligations, project proponents will still need to ensure early engagement with Indigenous groups in advance of submitting an application for an approval.

Finally, if the issue of Crown consultation is squarely raised before an administrative tribunal, the tribunal will need to ensure that the matter of consultation is addressed in its reasons. While a full *Haida* analysis will not always be necessary, demonstrating how concerns have been heard and addressed is a requirement, particularly in cases of deep consultation.[11]

While the Supreme Court of Canada has offered a good measure of clarification on the Crown's duty to consult, it is obvious that more needs to be done by governments, tribunals and boards to clearly spell out their respective duties for meeting Indigenous or Aboriginal consultation requirements.

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[11] *Clyde River* at 42.

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