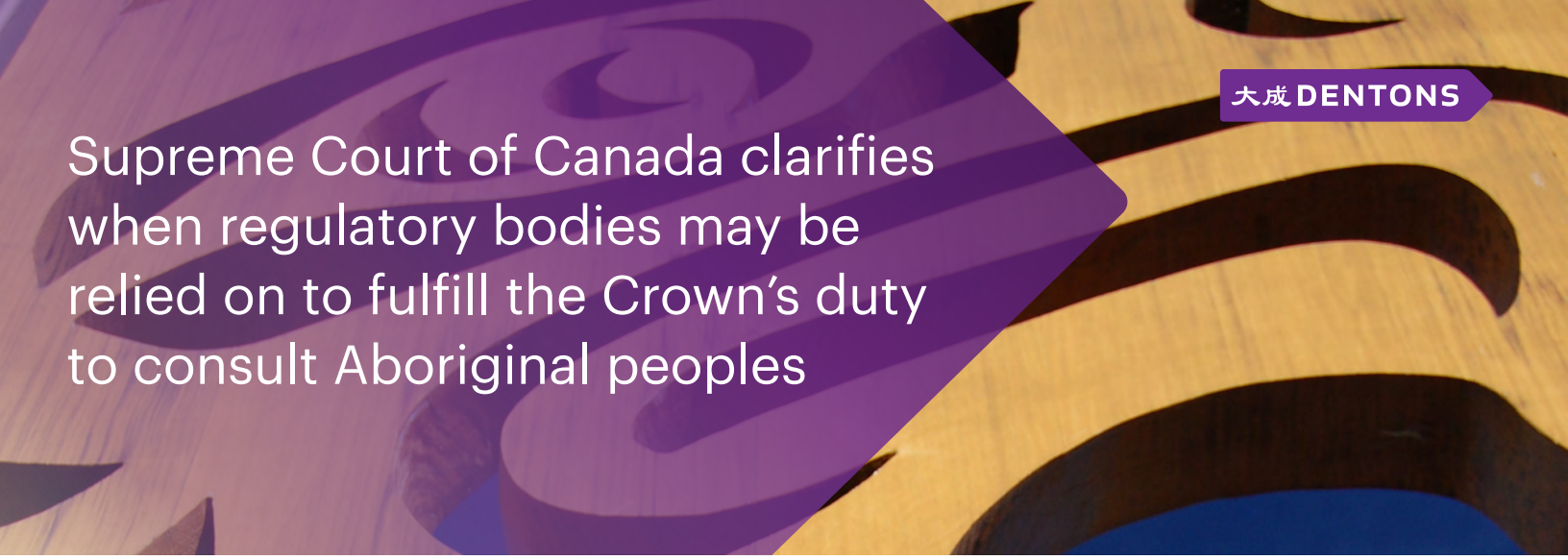

Supreme Court of Canada clarifies when regulatory bodies may be relied on to fulfill the Crown's duty to consult Aboriginal peoples

Overview

As the Supreme Court of Canada (SCC) explained in Haida[1] and Carrier Sekani[2] , it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult Aboriginal peoples. Carrier Sekani further clarified that, whether the Crown may rely, in whole or in part, on a regulator to fulfill the duty to consult depends on whether the regulator's statutory duties and powers enable it to do what the duty requires in the particular circumstances.[3]

After Haida and Carrier Sekani, it has been less clear – to the bar, resource project proponents, Indigenous groups and governments alike – how that controlling law is to be applied by tribunals and by courts of justice.

The SCC issued two landmark Crown consultation decisions on July 26, 2017, in Clyde River (Hamlet)[4] and Chippewas of the Thames First Nation.[5] In these companion appeals, the SCC affirmed the governing law from Haida and Carrier Sekani, applied it to two different legislative and factual contexts, and gave stakeholders meaningful guidance on when and how the Crown may rely on regulatory processes to fulfill the duty to consult.

Clyde River and Chippewas addressed the practical implications of Aboriginal consultation for modern governments. Both appeals concerned National Energy Board (NEB or Board) decisions approving activities in furtherance of developing Canada's natural resources. Both NEB decisions were upheld by the Federal Court of Appeal (FCA). The SCC heard the appeals consecutively and issued judgments concurrently delivered by Karakatsanis and Brown JJ. on behalf of an unanimous Court (9:0).

This article briefly summarizes the SCC's findings in Clyde River and Chippewas and considers implications of the legal framework on promoting reconciliation between the Crown and Indigenous peoples in cases going forward.

Dentons represented Enbridge Pipelines Inc. (Enbridge) before the Supreme Court of Canada in the Chippewas case.

The Clyde River appeal

In Clyde River, TGS-NOPEC Geophysical Company ASA, Multi Klient Invest AS and Petroleum Geo-Services Inc. applied to the NEB to conduct offshore seismic testing for oil and gas resources in Baffin Bay and the Davis Strait in Nunavut, adjacent to the area where Inuit have treaty rights[6] to harvest marine mammals. It was not disputed that this testing could adversely affect the treaty harvesting right of the Inuit of Clyde River, who rely on marine mammals for food, and for their economic, cultural and spiritual well-being. After a period of consultation among the project proponents, the NEB and affected Inuit communities, the NEB concluded an environmental assessment (EA) report and granted the requested authorization,[7] which was a final decision.

Clyde River applied to the FCA for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) dismissed the review[8] and held that the Crown was entitled to rely on the NEB to undertake consultation with the Inuit, and that the nature and scope of the NEB's processes fulfilled the Crown's duty[9] of deep consultation.

The SCC reversed the FCA judgment and held that the NEB process carried out the COGOA was not adequate to fulfill the Crown's duty to consult and reasonably accommodate the Inuit of Clyde River about adverse impacts of the offshore seismic survey program on the treaty right to harvest marine mammals.

---

[1] *Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511 at para. 51 [Haida].*

[2] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 SCR 650 at para. 56 [Carrier Sekani].*

[3] *Carrier Sekani, at paras. 55 and 60.*

[4] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc., 2017 SCC 40 [Clyde River].*

[5] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41 [Chippewas].*

[6] *Under the Nunavut Land Claims Agreement (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.*

[7] *Exploring or drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut, is prohibited without an operating licence under the Canada Oil and Gas Operations Act, RSC 1985, c O-7 [COGOA], s. 5(1)(a) or an authorization under s. 5(1)(b).*

[8] *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS), 2015 FCA 179, 474 NR 96.*

[9] *The FCA held that a Crown duty to consult was triggered because the NEB could not grant the authorization without the minister approving (or waiver approval of) a benefits plan for the project: ibid, at para. 39.*

The NEB was held to possess, under COGOA, the procedural powers necessary to implement consultation and the remedial powers to, where appropriate, accommodate (e.g., impose requirements for authorization) affected Aboriginal claims, or Aboriginal and treaty rights. The Inuit's established treaty rights to hunt and harvest marine mammals were acknowledged as "extremely important to" their economic, cultural, and spiritual well-being. The SCC also noted that there was a high risk that the proposed seismic testing could increase the mortality risk of marine mammals, cause permanent hearing damage, and change migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the Crown consultation duty owed was held to fall "at the highest end of the spectrum". [10]

However, the SCC held that the NEB's consultation with the Inuit was inadequate based on the specific facts of the case, given that: (1) the NEB misdirected its assessment to the significance of adverse project effects on the environment[11] instead of impacts on the treaty harvesting right; (2) it was not made clear to the Inuit that the Crown would rely on the NEB's processes to fulfill the duty to consult; and (3) most importantly, the NEB offered the Inuit only limited opportunities for participation and consultation, as no oral hearing was held, no participant funding was given, and the proponents' answers to many of the Inuit's concerns were given in a 3,926-page document submitted to the NEB, but which was not completely translated into Inuktitut or easily accessed by the Inuit. The SCC concluded that "[n]o mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here." [12]

The NEB's requirements for authorization included, commitment to ongoing consultation, the placement of community liaison officers in affected communities, the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study, and installation of passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals. The SCC held that these were "insignificant concessions in light of the potential impairment of the Inuit's treaty rights."[13] Accordingly, there was no adequate, reasonable accommodation of the Inuit's treaty rights in the authorization of the seismic testing.

In conclusion, the SCC held that the Crown breached its duty to consult the Inuit in respect of the proposed testing, allowed the appeal and quashed the NEB's authorization.

The Chippewas appeal

In Chippewas, on the other hand, the SCC found the NEB process carried out under s. 58 of the NEB Act[14] was "manifestly adequate"[15] to fulfill the Crown's duty to consult the Chippewas of the Thames First Nation (Chippewas of the Thames) regarding potential adverse impacts of the Enbridge Line 9B Reversal and Line 9 Capacity Expansion Project (Line 9B project).

Line 9 is an existing pipeline that was constructed in 1975 and began operating in mid-1976, transporting crude oil eastward from Sarnia, Ontario to Montréal, Québec. As noted by the SCC, the Line 9 pipeline crosses the Chippewas of the Thames' asserted traditional territory. In 1999, the flow of the pipeline was reversed to a westward direction. In July 2012, the Board authorized a re-reversal (to eastward flow) of the westernmost 194-kilometre segment of Line 9 from the Enbridge Sarnia Terminal to the Enbridge North Westover Pump Station near Hamilton, Ontario.

In November 2012, Enbridge applied to the NEB for approval of the Line 9B project to reverse the flow of the remainder of the pipeline, increase its capacity, and enable it to carry heavy crude oil. These changes were held to increase the risk of spills along the pipeline. While the project involved a significant increase of Line 9's throughput, nearly all required construction would take place on previously disturbed lands owned by Enbridge and on Enbridge's right of way.

The Chippewas of the Thames requested Crown consultation before the NEB's approval, but the Crown expressed that it would rely on the NEB's public hearing process to fulfill its duty to consult.

Under s. 58 of the NEB Act, the Board may make orders on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications such as Line 9B from the requirement of a certificate which would require approval by the federal cabinet. As was the case in Clyde River, in Chippewas the NEB held final decision-making authority under the applicable statutory scheme.

The Board established a hearing process in which the Chippewas of the Thames were represented by counsel, were able to submit evidence, had meaningful opportunities to test the evidence of other parties, including Enbridge, and were able to deliver oral argument opposing the project. Before the hearing, the NEB issued notice to potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the Board's role, and the upcoming hearing process. Also before the NEB hearing, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development, calling on them to carry out consultation for the Crown.

In the NEB hearing process, the Chippewas of the Thames asserted: a treaty right guaranteeing exclusive use and enjoyment of their reserve lands; Aboriginal harvesting rights and the right to access and preserve sacred sites in their traditional territory; and Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory. The First Nation submitted that the Board should not authorize the Line 9B project in light of the impact of spill risk on its asserted rights and title, and that the Board was required to decline to grant the project approvals until Crown consultation had occurred.

After conclusion of the hearing, the NEB approved Enbridge's proposed modification to Line 9 as being in the public interest and consistent with the requirements of the NEB Act, subject to a number of conditions related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous peoples. The Board held that these conditions "... enhance [the] current and ongoing pipeline integrity, safety and environmental protection measures to which Line 9 is already subject." The Board concluded that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated", given the project's limited scope, the commitments made by Enbridge, and the approval conditions imposed by the NEB.

---

[10] *Clyde River, at para. 44.*

[11] *Although it was appropriate to do so in context of the NEB's EA report, which it was also charged by statute to carry out.*

[12] *Clyde River, at para. 49..*

[13] *Clyde River, at para. 51.*

[14] *National Energy Board Act, RSC 1985, c N-7 [NEB Act].*

[15] *Chippewas, at para. 43.*

[16] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2015 FCA 222 at para. 17, [2016] 3 FCR 96*

The Chippewas of the Thames appealed to the FCA from the NEB's authorization, submitting that the Board had no jurisdiction to issue authorizations to Enbridge prior to the Crown fulfilling its duty to consult and accommodate. A majority of the FCA per Ryer J.A. (Webb J.A. concurring) dismissed the appeal[17] and held that s. 35(1) of the Constitution Act, 1982 did not require the NEB in this case to: (1) consult the Chippewas of the Thames on behalf of the Crown; or (2) decide whether a Crown duty to consult was triggered and, if so, whether the duty was fulfilled.

Dissenting, Rennie J.A. would have allowed the appeal by reason that, as final decision maker, the NEB must have the power and duty to assess whether consultation is adequate, and to refuse an s. 58 application where consultation is inadequate. Rennie J.A. held that: (1) the NEB was obliged to ask whether the duty to consult had been triggered, and if so, whether consultation had been adequate; (2) the NEB was incapable of fulfilling the duty to consult; and (3) the Crown erred in relying on the NEB to fulfill the duty.

The SCC upheld the NEB project approval and dismissed the appeal. The Court held that, when the NEB approved the Line 9B project under s. 58 of the NEB Act, it acted on behalf of the Crown, as a statutory body with the delegated final decision-making authority. The SCC also held that, on the facts of the case, the Crown had a duty to consult the Chippewas of the Thames with respect to the Line 9B project because the increase in flow capacity and change to heavy crude could potentially adversely affect their asserted Aboriginal and treaty rights.

The SCC confirmed that the Crown could rely entirely on steps taken by the NEB to fulfill its duty to consult regarding the Line 9B project in the present case because: (1) the Board possessed the statutory procedural and remedial powers to do what the duty to consult required; (2) the circumstances made it sufficiently clear that the Crown was relying on the NEB process to fulfill its duty and that the Chippewas of the Thames understood that no entity other than the NEB would be involved in carrying out Crown consultation; and (3) the Board did in fact provide adequate consultation and accommodation.

Because the Chippewas of the Thames raised the adequacy of Crown consultation before the NEB, the Board was obliged to consider whether consultation was adequate, and such was held not to give rise to a reasonable apprehension of bias.

Even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the SCC held that the consultation undertaken was "manifestly adequate" because: (1) the NEB provided the Chippewas of the Thames with an adequate opportunity to participate in the decision-making process; (2) the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated; and (3) as Enbridge submitted, in order to mitigate potential risks to the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

Finally, the SCC held that this case required the NEB to provide written reasons to permit the Chippewas of the Thames to determine whether their concerns were adequately considered and addressed. However, that did not require a formulaic "Haida analysis". According to the SCC, the Board's written reasons indicated that it took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate. This is the litmus test for providing sufficient reasons to satisfy the Crown's duty to consult.

In conclusion the SCC held that the Crown met its duty to consult the Chippewas of the Thames in respect of the Line 9B project and dismissed the appeal with costs payable to Enbridge.

Implications of the legal framework

Clyde River and Chippewas establish the following principles governing the role of regulatory bodies in fulfilling the Crown duty to consult Indigenous peoples, and are likely to be applied by tribunals and courts going forward.

(1) Tribunals with "delegated executive responsibility" act "on behalf of" the Crown

In Clyde River, the SCC recognized that even if the NEB is not strictly speaking "the Crown" or its agent, its decisions could nevertheless amount to "Crown conduct" which triggers the duty to consult. In this regard, the SCC held:

... 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. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in Carrier Sekani to "government action" and "Crown conduct" (paras. 42-44). 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. ... [18]

In fact, the SCC confirmed that when the NEB approves a proposed regulated project as the final decision maker, it is exercising its delegated executive authority and, as such, acts "on behalf of the Crown". [19] Therefore, if the project at issue could adversely affect asserted Aboriginal and treaty rights so as to trigger a Crown duty to consult, the NEB must refrain from approving until satisfied that consultation is adequate.We note that the Board's roles under the COGOA (Clyde River) and section 58 of the NEB Act (Chippewas) can be distinguished from its role under section 52 of the NEB Act, where the final approval authority rests with the federal Governor-in-Council. Review and assessment of projects subject to section 52 of the NEB Act may present additional opportunities for Crown consultation, as compared to Clyde River and Chippewas.

(2) Crown consultation can occur through tribunal processes

The Clyde River and Chippewas appellants submitted that Crown consultation could not meaningfully take place without the direct involvement of "Crown" actors other than the NEB, such as a minister. The SCC rejected this assertion. The Court found that as long as the tribunal in question possesses "the statutory powers to do what the duty to consult requires in the particular circumstances," the tribunal's process could be relied upon to meet the duty to consult. The Court's ruling in this regard builds upon Carrier Sekani, which recognized that the Crown could "delegate to a tribunal the Crown's duty to consult."[21]

---

[17] *Ibid.*

[18] *Clyde River, at para. 29.*

[19] *Chippewas, at para. 31.*

[20] *Chippewas, at para. 32.*

[21] *Carrier Sekani, at para. 56.*

Consistent with developments in administrative law on tribunal independence—notably the SCC's decision in Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52, [2001] 2 S.C.R. 781—the Court saw no impediment to the NEB playing the role of both the body carrying out consultation and the body adjudicating adequacy of that consultation.

(3) Statutory preconditions for a tribunal consultation role

The SCC considered that the NEB Act and COGOA "each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose, may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (Beckman, at para. 39; Taku River, at para. 22)."[22]

Procedural powers that may afford an appropriate level of consultation include powers to conduct hearings, broad discretion to make orders or elicit information in furtherance of enabling legislation and the public interest, require studies to be undertaken, impose preconditions to approval, conduct environmental assessments, and establish participant funding programs to facilitate public participation.

Remedial powers that may afford an appropriate level of accommodation include powers to attach any terms and conditions to an authorization, to make authorizations contingent on performance of terms and conditions, to deny an authorization, or to reserve an approval decision pending further proceedings.

In Clyde River and Chippewas, the SCC acknowledged that the NEB has "developed considerable expertise, both in conducting consultations and in assessing the environmental impacts of projects"[23] , that it is "well positioned to assess the risks posed by [federally regulated pipeline] projects to Indigenous groups"[24] and "use its technical expertise to assess what forms of accommodation may be appropriate"[25], particularly where the effects of a proposed project on Aboriginal or treaty rights "substantially overlap with the project's potential environmental impact".[26]

(4) Sufficient notice that the Crown will rely on consultation by regulatory bodies

For the Crown to rely on regulatory bodies to meet its duty to consult in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The circumstances of a given case may make it sufficiently clear to Indigenous groups that the Crown intends to rely, in whole or in part, on a regulatory process to meet the duty to consult. However, from the SCC's consideration of this issue in Chippewas, it would appear to be most prudent for the Crown to provide explicit and timely (early) notice of its reliance to Indigenous groups.

(5) The duty to consult and sufficient tribunal reasons

The SCC gave clear guidance in Clyde River and Chippewas that, where there is a duty to provide written reasons regarding adequacy of Crown consultation, reasons foster reconciliation, denote respect for Indigenous peoples, and encourage proper decision making. Further, where affected Indigenous groups raise concerns with regulatory bodies about Crown consultation, the tribunal must usually provide written reasons regarding adequacy of the consultation. However, the requirement to provide written reasons does not require a formulaic "Haida analysis" in all circumstances. To the contrary, a tribunal will be obliged to "explain how it considered and addressed"[27] Indigenous concerns, and to indicate that the tribunal considered the asserted Aboriginal and treaty rights, and accommodated them where appropriate.

Where a tribunal carries out an EA and makes an EA report, adequacy of Crown consultation nonetheless enquires into project impacts on the Aboriginal and treaty rights, not biophysical impacts on the environment alone. Written reasons will not be sufficient where no consideration is given in an EA to the source of rights – in a treaty or otherwise – asserted by Indigenous groups and project impacts on those rights. Such a "misdirected" inquiry will not likely pass muster.

(6) No conflict between "the public interest" and the duty to consult

In Clyde River, the SCC held that the public interest and the duty to consult do not operate in conflict and rejected commentary suggesting 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. As the Court explained, the constitutional imperative of a duty to consult "gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest."[28] However, according to the SCC, "this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage".[29]

(7) No "veto" by Indigenous groups over final Crown decisions

Finally, and importantly, the Court cited Haida[30] and reiterated that, "the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions." [31]

---

[22] *Clyde River, at para. 31, citing: Little Salmon/Carmacks First Nation v Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources), 2010 SCC 53, [2010] 3 SCR 103 [Beckman]; and Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550.*

[23] *Clyde River, at para. 33.*

[24] *Chippewas, at para. 48.*

[25] *Clyde River, at para. 33.*

[26] *Clyde River, at para. 33..*

[27] *Clyde River, at para. 42; Chippewas at para. 63.*

[28] *Clyde River, at para. 40.*

[29] *Chippewas, at para 59.*

[30] *Haida, at para. 48.*

[31] *Chippewas, at para. 59.*