

Supreme Court releases much-anticipated Chippewas and Clyde River decisions

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Overview

The Supreme Court of Canada's much-anticipated decisions in *Hamlet of Clyde River (Hamlet) v Petroleum Geo-Services Inc. (Clyde River)* and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc. (Chippewas)* are significant in that they confirm the ability of governments to rely on regulatory processes to fulfill the Crown's duty to consult with Aboriginal groups, including in cases where the Crown itself is not involved in the process. While the decisions largely confirm previously established legal principles, they also provide clear guidance on what practices will and will not be sufficient to meet Aboriginal consultation requirements when navigating the regulatory approval process.

Background

On July 26, 2017, the Supreme Court of Canada (SCC) released unanimous judgments in the companion appeals of *Hamlet of Clyde River (Hamlet) v Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* Both cases concerned the Crown's duty to consult with Aboriginal groups for projects where the National Energy Board (NEB) was the sole decision-maker.

In *Clyde River*, the proponents sought NEB approval to conduct offshore seismic surveys in Baffin Bay and Davis Strait. These surveys had the potential to affect migration patterns of marine mammals traditionally harvested by the Inuit at Clyde River (Clyde River). On that basis, Clyde River petitioned the NEB in opposition to the proposed surveys. In efforts to address Clyde River's concerns, the proponents engaged in bilateral meetings with Clyde River and filed written materials with the NEB. The NEB ultimately granted the approval without any formal hearing process, finding that the proponents' mitigation efforts were sufficient.

In *Chippewas*, the proponent (Enbridge) applied to the NEB for approval to modify its existing Line 9 pipeline to enable it to carry heavy crude, reverse flow in certain sections and increase pipeline capacity by 60,000 barrels per year. Following a formal public hearing process including the appellant Chippewas of the Thames (Chippewas), the NEB approved the Enbridge application, imposing conditions on the project to address the concerns of the Indigenous communities (*Chippewas*, at para. 24).

In both cases, the NEB was the final decision-maker for the application and the Crown (i.e., the relevant government minister or department) did not participate in the NEB's regulatory review process. Clyde River and Chippewas challenged the decisions on the basis that the

NEB had no legal authority to approve the projects because the Crown's duty to consult with Aboriginal groups had not been adequately discharged.

SCC decisions

General legal principles

The SCC ultimately determined that the duty to consult had been discharged in *Chippewas*, but not in *Clyde River*. The reasoning behind the SCC's decisions in both cases was based on the following legal principles, many of which had been previously established:

- The Crown may rely on steps taken by an administrative body to fulfill the duty to consult, in part or in full, so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Clyde River*, at para. 30; *Chippewas*, at para. 32). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval (*Chippewas*, at para. 32). This may include the Crown making submissions on its own behalf to the regulatory body, seeking postponement or reconsideration of the decision, or enacting legislative and regulatory amendments (*Clyde River*, at para. 22). Similarly, while the Crown always holds ultimate responsibility for ensuring consultation is adequate, the Crown does not need to actively monitor or participate in the regulatory process for consultation to be adequate (*Clyde River*, at para. 22).
- Where the Crown intends to rely on a regulatory process to discharge the duty to consult, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Chippewas*, at para. 44; *Clyde River*, at para. 23).
- The duty to consult is not triggered by historical impacts and consultation on a specific project is not the vehicle to address historical grievances (*Chippewas*, at para. 41). However, the SCC also endorsed the conclusion in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* (2011 BCCA 247) that cumulative effects of an ongoing project, and historical context, may inform the scope of the duty to consult (*Chippewas*, at para. 42).
- Where Aboriginal and treaty rights are asserted, the provision of reasons by the decision-maker denotes respect and encourages proper decision-making (*Chippewas*, at para. 62). However, this requirement does not necessitate a formulaic "Haida analysis" regarding the scope of the Aboriginal groups' rights and the level of consultation and accommodation required in the circumstances. Instead, where deep consultation is required and the issue of Crown consultation is raised with the decision-maker, the decision-maker is obliged to "explain how it considered and addressed" Indigenous concerns. What is necessary is an indication that the decision-maker took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate (*Chippewas*, at para. 63; *Clyde River*, para. 42).

- Conditions attached to regulatory approvals may constitute accommodation measures. Further, in developing such accommodation measures the decision-maker must balance competing societal interests with Aboriginal and treaty rights (*Chippewas*, at para. 59). The SCC found that the NEB has (1) considerable institutional expertise and is well suited to oversee consultations and assess risks where the effects of a proposed project on Aboriginal or treaty rights substantially overlaps with the project's environmental impacts; (2) the procedural powers necessary to implement consultation; and (3) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. As a result, the NEB's process can be relied on by the Crown to completely or partially fulfill the Crown's duty to consult (*Clyde River*, at para. 34). In addition, while the NEB is not strictly speaking "the Crown," it acts on behalf of the Crown when making a final decision on a project application. NEB decisions consequently represent Crown actions that may trigger the duty to consult (*Clyde River*, at para. 29). The substance of the duty to consult is not affected by whether the NEB or the Crown ultimately holds final decision-making authority over the project (*Clyde River*, at para. 1).

Application to *Chippewas* and *Clyde River*

As stated above, when the SCC applied the above legal principles to the facts of *Chippewas* and *Clyde River* it reached different conclusions on whether the Crown's duty to consult had been discharged in the circumstances. In *Chippewas*, consultation was found to be adequate. In *Clyde River*, it was not. The key factual differences between the two cases are the following:

- **Severity of potential impacts:** The SCC agreed with the NEB that the potential impacts of the Line 9 application on the Chippewas were "minimal" (*Chippewas*, at para. 51). In contrast, the SCC concluded that the impacts of the proposed activities in *Clyde River* on Clyde River's rights were "significant" and that they had the potential to "impair" Clyde River's treaty rights (*Clyde River*, paras. 44 and 51). As a result, a deeper level of consultation was likely required in *Clyde River*.
- **Adequacy of engagement by the proponents:** In *Chippewas*, the SCC acknowledged the adequacy of information provided to the Indigenous groups by Enbridge (*Chippewas*, at para. 57). In contrast, in *Clyde River*, the Court cited detailed evidence of the proponents being unable to answer questions from community members (*Clyde River*, paras. 10-11). In addition, when the responses to questions were ultimately provided by the proponents, they were filed as part of a roughly 4,000-page document that was difficult to access and was largely untranslated. The SCC commented that this did not constitute "true consultation" (*Clyde River*, para. 49).
- **Notice of how the Crown intended to rely on the NEB process:** In *Chippewas*, the NEB had sent out a notification to all potentially affected Aboriginal groups in advance of the formal hearing explaining its regulatory process. It was also evident from the Chippewas' submissions during the regulatory process that they understood that the NEB was the final decision-maker on the application. The SCC concluded that even though there was no direct communication from the Crown to the Chippewas regarding its reliance on the NEB (and even though the Chippewas had written to the Crown asking for clarification and the Crown did not respond until after the hearing process had concluded), "the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process

was intended to constitute Crown consultation and accommodation” (*Chippewas*, at para. 46). In contrast, in *Clyde River*, the SCC found that it was not made clear to the Aboriginal group that the Crown intended to rely on the processes of the NEB as fulfilling its duty to consult (*Clyde River*, para. 46).

- **Opportunities to participate in the NEB process:** In *Chippewas*, the NEB provided the Chippewas with (i) participant funding, (ii) the opportunity to pose formal information requests to Enbridge, to which they received written responses, (iii) the opportunity to tender evidence (using the participant funding) and (iv) the opportunity to make closing oral submissions to the NEB. Based on these process steps, the SCC concluded that the Chippewas were given a sufficient opportunity to make submissions to the NEB as part of its decision-making process (*Chippewas*, at para. 52). In contrast, in *Clyde River*, there was no participant funding and no formal hearing process. The SCC commented that while formal hearings are characteristic of an adversarial process, they may be required for meaningful consultation (*Clyde River*, para. 47). The SCC further noted that if *Clyde River* had been provided with the resources to submit their own scientific evidence in that case, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different (*Clyde River*, para. 52).
- **Sufficiency of the NEB’s reasons:** In its reasons on the Line 9 application, the NEB expressly recognized the Aboriginal rights of the Chippewas and considered the potential for negative impacts on these rights (*Chippewas*, at paras. 53-54). In contrast, in *Clyde River*, the NEB only considered environmental effects and no consideration was given to the source of *Clyde River*’s rights to harvest marine mammals, nor to the impact of the proposed activities on those rights (*Clyde River*, para. 45).
- **Accommodation measures:** In *Chippewas*, the SCC concluded that the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups, namely an Environmental Protection Plan for the project, ongoing engagement with the affected Aboriginal groups, and further consultation on “emergency preparedness and response” (*Chippewas*, at para. 57). In contrast, while the NEB in *Clyde River* did impose conditions designed in part to address *Clyde River*’s concerns (including a requirement for an Inuit traditional knowledge study), the SCC concluded that none of these conditions or the NEB’s reasons “gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as rights, rather than as an afterthought to the assessment of environmental concerns” (*Clyde River*, para. 51).

Implications

Overall, *Chippewas* and *Clyde River* provide useful clarity to all parties regarding the ability for governments to rely on regulatory processes to fulfill the duty to consult and, if required, accommodate. While the decisions largely confirm previously established legal principles, they also provide additional clarity for regulatory processes that do not involve direct Crown action and establish helpful goalposts for processes that satisfy the Crown’s consultation obligations (*Chippewas*) and those that fall short (*Clyde River*). Project proponents and regulators alike should review the factual differences between these cases to guide their actions on future projects.