Supreme Court of Canada issues two decisions on Indigenous Consultation and the National Energy Board

Author : Brenda Heelan Powell

This blog is part of the Environmental Law Centre's blog series exploring climate change law in Canada. This blog series provides updates on climate change law developments and includes insights from our related law reform research. This blog series is generously funded by the Alberta Law Foundation.

Last week, the Supreme Court of Canada issued two decisions which considered the role of the National Energy Board (NEB) with respect to consultation with Indigenous peoples impacted by a NEB decision: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (the *Clyde River* decision) and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (the *Chippewas* decision).

The *Clyde River* decision

In the *Clyde River* decision, the project proponents applied to the NEB for permission to conduct offshore seismic oil and gas testing in Nunavut. Clyde River opposed the seismic testing arguing that it would negatively affect the Inuit of Clyde River treaty rights and that the duty to consult had not been fulfilled. The NEB granted the requested approval finding that sufficient efforts to consult with the Aboriginal groups had been made, that the Aboriginal groups had adequate opportunity to participate in the NEB process, and that the seismic testing was unlikely to cause significant environmental impacts.

Clyde River sought judicial review of the NEB's decision to issue the approval. Upon review, the Federal Court of Appeal found that the duty to consult had been triggered and that the Crown was entitled to rely on the NEB to undertake such consultation (and, in this case, the NEB's process fulfilled the duty to consult). The matter was appealed to the Supreme Court of Canada. The Supreme Court of Canada allowed the appeal and quashed the NEB's approval.

In making its decision, the Court stated (para. 22):

while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. … Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty.

Further, the Court stated (para. 23):

…because the honour of the Crown requires a meaningful, good faith consultation process (Haida, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

The Court found that, although not strictly speaking the Crown, the NEB acts on behalf of the Crown when making a final decision on a project application. Since a regulatory body (such as the NEB) exists to exercise executive power as authorized by legislatures, the distinction between its actions and Crown action "quickly falls away" and therefore it "does not matter whether a final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger a duty to consult" (para. 29).

Once a duty to consult has been triggered, the decision maker may approve a project only if Crown consultation is adequate. The Crown may be able to rely on the NEB's process to fulfill the duty to consult. However, it must be remembered that "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest" (para. 40). When adequacy of consultation is raised by an Indigenous group, the NEB will often (but not necessarily always) be required to explain how it addressed and considered the concerns. The degree of consideration that is appropriate depends on the circumstances.

Deep consultation is required where there is a strong *prima facie* claim for the right, the right and potential infringement is significant, and high risk of non-compensable damage. In this particular case, "[g]iven the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum." (para. 44). In light of this, the Court found several flaws with the consultation conducted by the NEB. Firstly, the inquiry was misdirected because it looked at environmental impacts and not at impacts on aboriginal rights. Secondly, it was not clear that the Crown was relying on the NEB process to fulfill its duty of consultation. Thirdly, the NEB process was not sufficient to perform deep consultation: there was no oral hearing; questions were addressed via a

massive document dumped online (to which many individuals had no access) and only portions translated into Inuktitut; there was no participant funding). Finally, the Court noted that the NEB's report did not mention traditional Inuit rights to harvest wildlife in the Nunavut Settlement Area or that deep consultation was required.

The *Chippewas* decision

The *Chippewas* decision involved an application by Enbridge for modification of a pipeline to reverse its flow in some parts, increase its capacity and enable it to carry heavy crude. In this case, the NEB provided notice to Indigenous groups (including the Chippewas) informing them of the project, the NEB's role, and the upcoming process. The Chippewas received participant funding and participated in the hearing, filed evidence and making oral argument. Ultimately, the NEB approved the project noting that it considered that Indigenous groups received adequate information and opportunity to share their views. The NEB found that potential project impacts on Indigenous rights and interests would be minimal and appropriately mitigated. The Chippewas unsuccessfully appealed the NEB decision to the Court of Appeal. Subsequently, the matter was appealed by the Chippewas to the Supreme Court of Canada. The Supreme Court of Canada dismissed the appeal and the decision of the NEB was allowed to stand.

The reasoning in the *Chippewas* decision follows that in the *Clyde River* decision. The Court found that because the NEB is a regulatory agency tasked with decision-making authority that could impact treaty or Aboriginal rights, the NEB acted on behalf of the Crown in making a decision on the proposed project. The Crown is entitled to rely on the actions of the NEB (or other regulatory bodies) to fulfil the duty to consult so long as the body possesses the statutory powers needed to consult as required by the circumstances.

The Court stated that the duty to consult is not a venue to address historical grievances rather the duty to consult is to address potential impacts on an asserted rights by the decision under consideration (para. 41). However, the Court noted that "it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (*references omitted*). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult" (para. 42).

In this case, the Court found that the Chippewas were aware that the NEB process was being used to fulfil the duty to consult, that adequate consultation occurred (citing early notice of the NEB hearing, participant funding, and full participation in the hearing), that the NEB sufficiently assessed the impacts and found that the negative impacts were minimal and could be mitigated, and appropriate accommodation was achieved by imposing conditions on the approval. As such, the Court upheld the decision to approve made by the NEB.

Commentary

These decisions provide clarity on the role of the NEB and its processes in making decisions that impact upon treaty and Aboriginal rights. A decision by the NEB (or another regulatory tribunal) triggers Crown's duty to consult when the Crown has actual or constructive knowledge of a treaty or Aboriginal right that may be adversely affected by the decision. The Crown may rely upon the NEB process to fulfill its obligation to consult and accommodate.

The following must be kept in mind:

1. The Indigenous group must be made aware that the Crown is relying on the regulatory process for consultation purposes;
2. If the regulatory body does not possess sufficient powers or does not provide adequate consultation and accommodation, then the Crown must provide additional avenues for meaningful consultation and accommodation prior to project approval; and
3. An approval decision made on the basis of inadequate consultation does not meet constitutional requirements and will be quashed. As a final decision maker, the NEB is required to consider whether consultation is adequate when that issue is raised before it.

A recent federal discussion paper looked at possible amendments to the current NEB structure and processes (along with several other federal environmental processes that are under review: see our blog post). In the discussion paper, the federal government stated its commitment to the United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP) and reconciliation. In its *Clyde River* decision, the Supreme Court of Canada stated that it "has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown" (para.1).

While ensuring the duty to consult is fulfilled in the course of regulatory decision-making will not in itself lead to reconciliation or implementation of UNDRIP, it is an essential step. In revamping the NEB and its process, the federal government ought to keep the direction provided in *Clyde River* and *Chippewas* at the top of mind. If the federal government intends to rely upon the NEB process to fulfill its duty to consult, that ought to be clearly stated. In addition, the NEB process must be designed to ensure deep and meaningful consultation with Indigenous peoples (and such process must be supported with appropriate funding) prior to approvals being issued. As stated by the Court:

judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all,

“[c]oncerned with an ethic of ongoing relationships” (*Clyde River*, para. 24)

Forthcoming changes to the NEB as contemplated in the federal discussion paper must foster an ongoing relationship.

Share this: