

August 4, 2017

Clyde River and Chippewas of the Thames: Some Clarifications Provided But Some Challenges Remain

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Cases Commented On: *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017 SCC 40 \(CanLII\)](#) and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, [2017 SCC 41 \(CanLII\)](#)

The Supreme Court of Canada has rendered judgment in two cases involving the National Energy Board (NEB) and the duty to consult Indigenous communities. One decision, *Clyde River*, involves an authorization granted to Petroleum Geo-Services Inc (PGS) to conduct marine seismic testing in Baffin Bay and Davis Strait under the terms of the *Canada Oil and Gas Operations Act*, [RSC 1985, c O-7 \(COGOA\)](#). The Supreme Court of Canada concluded that the Crown had failed to discharge its duty to consult and accommodate and that as a result the NEB authorization should be quashed. The second decision, *Chippewas of the Thames First Nation* (CTFN), involves an order by the NEB under s 58 of the *National Energy Board Act*, [RSC 1985, c N-7 \(NEBA\)](#) exempting Enbridge Pipelines Inc (Enbridge) from the need to obtain a certificate of public convenience and necessity under s 52 of *NEBA* and at the same time amending the operation of part of Line 9 (Line 9B), to authorize reversing the flow of the line, increasing its capacity and allowing for the transportation of heavy crude. The Supreme Court of Canada concluded that the Crown was entitled to rely on the procedures adopted by the NEB in engaging with CTFN to discharge the Crown's duty to consult and accommodate and that those procedures in this case were adequate.

Both decisions were unanimous decisions authored by Justices Karakatsanis and Brown. Both decisions engaged statutory provisions which authorized the NEB to make final decisions. Neither was a case in which the NEB was making a recommendation to the Governor in Council or a minister with the final decision to be made by that party.

This post first addresses what the Court has clarified. It then turns to explore some remaining areas of uncertainty or areas where these decisions may prove difficult to apply. It concludes by identifying some of the important issues that the Court does not talk about before turning to consider the relevance of these decisions for the ongoing litigation involving Kinder Morgan's TransMountain expansion project (TMX).

What Did the Supreme Court Decide, What Does It Clarify?

In these two judgements the Supreme Court of Canada has undoubtedly clarified a number of important points that were outstanding, particularly with respect to the interpretation of the trigger to consult as articulated in *Haida Nation v British Columbia (Minister of Forests)*, [2004 SCC 73 \(CanLII\)](#), and *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010 SCC](#)

43 ([CanLII](#)), and the application of the duty to consult in the context of administrative tribunals as articulated in *Rio Tinto*. For my earlier post on the Federal Court of Appeal's decision in *Clyde River* see [here](#) and for my note on the two leave to appeal applications see [here](#). *Clyde River* and *CTFN* articulate common legal standards but reach different results on the application of those legal standards to the factual matrix of the particular issues before the Court. As a consequence, the two decisions offer important qualitative insights as to what will suffice to discharge the Crown's obligations and what will not. As such, these decisions merit careful analysis by proponents, regulators, line departments and those advising these entities as well as executive bodies such as cabinet.

I divide my comments under this heading into two – first I identify those “pure” propositions of law which seem to emerge from the two decisions, and, second, the more qualitative considerations which emerge from comparing the two decisions on the “merits”.

Some Points of Law

1. The duty to consult plays a central role “in fostering reconciliation between Canada’s Indigenous peoples and the Crown” (*Clyde River* at para 1).
2. The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown. As a constitutional obligation it is grounded in the honour of the Crown. As a legal obligation it is grounded “in the Crown’s assumption of sovereignty over lands and resources formerly held by Indigenous peoples” (*Clyde River* at para 19).
3. A goal of consultation is to identify, minimize and address adverse impacts where possible (*Clyde River* at para 25).
4. The duty to consult does not provide Indigenous groups with a veto. The interests of Indigenous groups may be balanced with other interests at the accommodation stage (*CTFN* at para 59).
5. The duty to consult is a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (*Clyde River* at para 40; *CTFN* at para 59). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*Clyde River* at para 40).
6. “The substance of the duty does not change *when a regulatory agency holds final decision-making authority in respect of a project*. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty” (*Clyde River* at para 1 (emphasis added); *CTFN* at para 1).
7. The duty to consult may be triggered by an approval issued by a regulatory board such as the NEB since it is “the vehicle through which the Crown acts” (*Clyde River* at paras 27-29). It is itself the necessary Crown conduct for the purposes of the trigger (*Clyde River* at para 39, *CTFN* at para 29). It is irrelevant that “the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB” (*CTFN* at para 30).
8. Where a board has the authority to make a final decision that decision constitutes Crown conduct which may trigger the duty to consult if the resulting authorization may potentially adversely affect (e.g. as a result of increasing pipeline capacity or the nature of the product) asserted Aboriginal and treaty rights (*CTFN* at para 31).
9. The duty to consult has meaningful content but is limited in scope. In particular “The duty to consult is rooted in the need to avoid the impairment of asserted or recognized

rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project” (*CTFN* at para 2). The duty to consult is not triggered by historical impacts but it may be necessary to consider historical impacts as part of an assessment of the cumulative effects of the proposed project and to assess the seriousness of the impact of the project on s 35 rights (*CTFN* at para 42).

10. If the Crown intends to rely on the processes of a regulatory body to fulfill its duty in whole or in part, that should be made clear to the affected Indigenous groups in advance so that they can assess their position (*Clyde River* at para 23; *CTFN* at para 44). However, it may be enough if the “circumstances of the case” should have made it clear to the Indigenous community that the Crown was intending to rely upon a regulatory process to discharge its obligation (*CTFN* at para 46).
11. The Crown may be in a position to rely on the regulatory agency to discharge its duties if the agency’s statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Clyde River* at para 30; *CTFN* at para 32).
12. 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, but the Crown always holds ultimate responsibility for ensuring consultation is adequate. And where the regulatory process is not adequate the Crown must take further measures to meet its duty (*Clyde River* at para 27; *CTFN* at para 32).
13. A tribunal with the power to decide questions of law has an obligation to determine whether consultation was constitutionally sufficient if the issue is properly raised (*Clyde River* at para 36; *CTFN* at paras 37, 48) unless there is some statutory indication that Parliament intended to withhold such a power (*Clyde River* at para 37). It matters not that the Crown in some other capacity is not before the tribunal (*Clyde River* at para 39; *CTFN* at para 36). In discharging this obligation the regulatory agency must ordinarily provide reasons, especially where deep consultation is required. Such reasons should explain how the regulator considered and addressed the concerns that had been raised (*Clyde River* at paras 41-42). However, the reasons need not follow “a formulaic ‘*Haida* analysis’” (*Clyde River* at para 42) and the failure of the decision-maker not to explicitly assess the depth of consultation that might be required is not necessarily fatal (*CTFN* at para 47).
14. It follows that a regulator may have conferred upon it both the power to carry out the Crown’s duty to consult and accommodate and the power and duty to adjudicate on the sufficiency of that consultation (*CTFN* at para 34). The tribunal is not compromised by fulfilling both functions (*CTFN* at para 34).
15. A decision that is based on inadequate consultation should be quashed in judicial review proceedings (*Clyde River* at paras 24, 39, 53; *CTFN* at para 32).

The Evaluation of the Conduct of the Crown

The Court in *Clyde River* concluded that deep consultation was required given that an important treaty right was engaged (at paras 43-44). The Court gave three reasons for concluding that the NEB’s procedures failed to deliver what was required by deep consultation. First, “the inquiry was misdirected” – or the NEB asked itself the wrong questions. It was not enough for the Board as part of its responsibility to conduct an environmental assessment to consider the environmental effects of the proposed seismic testing; it must also consider the impact of this on the rights of the Indigenous community. In this case (at para 45) “No consideration was given in

the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights." See also at para 52 where the Court noted that the NEB's report "does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required."

Second, the Crown failed to make it clear to the Inuit community that it intended to rely on the NEB's procedures to discharge its duty to consult and accommodate.

And third, the NEB's procedures in this case were inadequate to constitute deep accommodation: the NEB did not provide an oral hearing, there was no funding available to the community and only "limited opportunities for participation". It fell far short of the opportunities for participation that were available to the First Nation in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004 SCC 74 \(CanLII\)](#). In respect of that case (which is the other leading decision in which the Court found that a somewhat unique regulatory process could satisfy the duty to consult and accommodate), the Court here (*Clyde River* at para 48) noted that "despite its entitlement to consultation falling only at the midrange of the spectrum ..., the Taku River Tlingit First Nation, with financial assistance ..., fully participated in the assessment process as a member of the project committee, which was 'the primary engine driving the assessment process'". The Court went on to note that while these "procedural safeguards" may not always be necessary, their absence in this case was pivotal since as a result the proponents failed to provide timely and useful responses to the questions and concerns that the community had raised. In a colourful and memorable passage the Court noted (at para 49) that "...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." Neither were the proposed accommodations adequate since they were largely required by law. The Court characterized them (at para 51) as "insignificant concessions in light of the potential impairment of the Inuit's treaty rights" and further (at para 51) that "[n]one of these putative concessions, nor the NEB's reasons themselves, 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."

By contrast, the Court concluded in *CTFN* that the actions taken by the NEB did serve to discharge the Crown's obligations to consult and accommodate. The Court gave three reasons for this conclusion. First, (*CTFN* at para 52) the CTFN was accorded adequate opportunity to make submissions to the NEB. The NEB held an oral hearing and provided participant funding. CTFN intervened in the proceedings and presented oral evidence and final argument. The record suggested that the NEB took CTFN's concerns seriously and recognized the rights that CTFN was asserting and in light of this assessed whether CTFN had adequate opportunities to participate. Both the Board and the Court also noted that virtually all of the project was to occur on Enbridge's existing right of way (*CTFN* at paras 13, 53).

Second, (*CTFN* at para 54) the NEB identified and assessed the potential for negative impacts that the project might have for the *rights and interests* of CTFN. It concluded that the risks of a negative impact were negligible or minimal (*CTFN* at paras 55-56).

Third, the NEB's process did provide an opportunity for adequate accommodation and indeed (at para 57) the NEB did impose a "number of accommodation measures that were designed to

minimize risks and respond directly to the concerns posed by affected Indigenous groups.” The obligation of consultation and accommodation does not afford Indigenous communities a veto and some balancing of interests can occur at the accommodation stage.

In sum, there is plenty of useful guidance to be found in these decisions for situations in which the Crown seeks to rely entirely upon a regulatory process to discharge its obligations to consult and accommodate. But I think that decision makers and proponents will also face some challenges in applying these decisions. The next sections of this post explore some of those challenges.

How and When Can We Determine if a Regulatory Body Like the NEB is Able to Discharge the Crown’s Duties?

As noted above, the Crown may be in a position to rely on the regulatory agency to discharge its duties if “the agency’s statutory duties and powers enable it to do what the duty requires in the particular circumstances” (*Clyde River* at para 30). It is clear that the legislation need not explicitly contemplate the discharge of the Crown’s duties. Thus, in *Clyde River* the Court noted that both the *NEBA* and *COGOA* predated judicial recognition of the duty to consult. In assessing whether the NEB acting under *COGOA* could discharge the Crown’s duties the Court emphasised (at para 31) that

the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of [COGOA](#) and the public interest (ss. 5.331, s. 5.31(1) and s. 5.32). It can also require studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).

The NEB was also in a position to accommodate the concerns raised by Indigenous communities (at paras 32-33):

[32] . . . The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (s. 5(1)(b), s. 5(5) and s. 5.36(2)).

[33] The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project’s potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

The Court had less to say in *CTFN* although it did observe (*CTFN* at para 48) that the NEB was

particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad jurisdiction to impose conditions on proponents to

mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions.

Although the Court found both of these cases to be easy cases not all cases will be so easy and the timing of the decision to go what I will refer to as “the administrative route” may also be problematic. Both of these points are related. Suppose that the project in question is a new pipeline (rather than a line reversal) within the traditional territory of a treaty First Nation. Suppose further that it emerges during the consultation process that the First Nation has concerns about water crossings as well as the cumulative effect of a new pipeline corridor both in terms of fragmenting habitat and also the support that the new project will give to upstream exploration and drilling activities. When the project is first announced “the Crown” announces that it intends to fulfil its consultation obligations through the NEB’s process. Note that in making this decision the Crown will be on the horns of a dilemma. On the one hand, these two cases instruct that the Crown needs to give advance notice of its intentions. On the other hand, on what basis can the Crown determine *at the outset* that the ordinary regulatory processes will discharge the Crown’s obligations when it has yet to understand either the strength of the claim or the particular concerns of the Indigenous community? And while the NEB would be well placed to address concerns with respect to the water crossings it has limited jurisdiction to address concerns with respect to cumulative impacts both with respect to the route itself and certainly with respect to any upstream developments. Even where the federal government has full constitutional jurisdiction with respect to these matters (as it does in Nunavut and the Arctic offshore) it will not always be immediately obvious that a single regulator will be able to address all of these issues. For example, even in *Clyde River* part of the argument of the community seems to have been that there should be no permitting of seismic testing absent completion of a strategic environmental assessment (SEA); but the NEB likely has no jurisdiction with respect to SEAs. In sum, in these two cases the Supreme Court of Canada makes it look easy to decide if the Crown’s duties can be discharged entirely through the ordinary administrative routes. In practice I suspect that, without the benefit of 20:20 hindsight, a determination of this issue will be considerably more difficult. This also means that sole reliance on the ordinary administrative route may be a high risk gamble for both the Crown and more especially the proponent.

Additional Measures

Regardless of when it becomes apparent that additional measures must be undertaken by the Crown in order to discharge its obligations what sorts of additional measures did the Court have in mind? The Court had this to say in *Clyde River* (at para 22):

This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, [2012 YKCA 14 \(CanLII\)](#), 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, [2010 SCC 53 \(CanLII\)](#), [2010] 3 S.C.R. 103, at para. 12).

Once again the Court makes this sound very simple but note the range of possible responses. They include legislative or regulatory changes; Crown submissions to the regulator (although it is hard to see how that might fill a gap); Crown (?) submissions seeking a reconsideration (but of what, a decision by the regulator that the Crown had/had not discharged its obligations?); or an adjournment of the regulatory proceedings (this at least does seem fairly straightforward). And for its part a treaty nation must assess the situation and seek “direct engagement”—but what if, as in *CTFN*, the non-regulatory Crown (or the Crown in its executive capacity) simply declines to engage?

In sum, the Crown’s assessment of the need for, and the timing and nature of any supplemental consultation and accommodation activities will be fraught and perhaps subject to the admonition of too-little, too-late as in *Gitxaala Nation v Canada*, [2016 FCA 187 \(CanLII\)](#).

A Final Decision

Another more basic question that arises is whether these decisions have anything to say about situations in which the regulator is not the final decision maker. While the Court’s observations about the quality of the consultation measures are no doubt of general significance I think that it is doubtful that some of the more precise points of law are of any application beyond the final decision-making scenario. For example, if it is the Crown in its executive capacity that has the final decision then it will be harder for the Crown to argue that it can rely exclusively on the regulator’s procedure—principally on the basis that any balancing that has to be done between rights and interests must be the responsibility of the Crown in its executive capacity and not the Crown in its regulatory capacity. Similarly, the idea that the regulator might have the duty to decide questions as to the adequacy of the consultation becomes more questionable if the regulator is not the final decision-maker, largely because the issue is now premature when it arises before the regulator since the Crown in its executive capacity may have additional responsibilities.

The Adequacy of the Reasons Offered by the Regulator

One of the welcome aspects of these decisions is the emphasis that they seem to place on the importance of reasons. But at the end of the day I think that the Court sends mixed messages with respect to the quality of the reasons expected of the decision-maker—both as part of discharging the duty to consult and with respect to any further formal assessment of whether that duty has been discharged. And it is perhaps important to note that the two are separate questions. On the one hand the Court seemingly emphasises the general importance of reasons and recognizes the connection between reasons, respect and reconciliation (*Clyde River* at para 41):

When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are “a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation” (*Kainaiwa/Blood*

Tribe v. Alberta (Energy), [2017 ABQB 107](#), at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 S.C.R. 817, at para. 39).

And in this context I was happy to see the Court reference Justice Jeffrey’s judgement in the *Kainaiwa/Blood* decision (which I posted on [here](#) with the title “Reasons, Respect and Reconciliation”). See also *CTFN* at para 62.

On the other hand, the Court seems to countenance a lack of rigour on the part of a decision-maker insofar as the Court suggests (*Clyde River* at para 42) that the decision-maker need not apply a “formulaic ‘*Haida* analysis’”. While nobody favours formulaic approaches that fail to fully analyse the relevant facts, if what the Court means to say is that the regulatory decision-maker need not apply a strength of claim analysis to determine how “deep” the consultation must be, then I think that this is unfortunate because it suggests that the regulator can discharge the Crown’s obligations almost by accident. This cannot be correct. The process adopted by a regulator must be responsive to the strength of claim as must any subsequent accommodation; thus it is troubling when the Court accepts that the NEB could discharge the Crown’s duty in *CTFN* even though (*CTFN* at para 47 and see also at para. 61) “neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case.” The Court went on to say (at para. 61) that a strength of claim analysis was not always necessary. Instead (at para 63) “(w)hat is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.” Reflecting in more detail on the Board’s reasons in *CTFN* the Court observed (at para 64) that:

It is notable that, unlike the NEB’s reasons in the companion case *Clyde River*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

I think that the best advice to a regulator is that its analysis should always be grounded in a strength of claim analysis. The Court may be satisfied with something less but when one looks at what the Court has said it is perhaps a strength of claim analysis without using that precise terminology.

The Two Cases and the Recommendations of the NEB Review Panel

I have previously [noted](#) that the [Review Panel’s Report](#) was surprisingly silent on two of the key questions before the Court, i.e. the duty to decide sufficiency of consultation and the consequences of the absence of the Crown from the proceedings. But on one question the Panel did express itself clearly and unequivocally and that was the role of the NEB in discharging the duty to consult. And on that point the Panel suggested that this should ordinarily be the responsibility of a body that could speak for the “whole of government” in other words a body like the major projects office—and not the NEB. The government’s discussion paper suggests that it is of the same mind.

Of course there is nothing in these judgements that would preclude the Government of Canada from adopting the Panel's recommendations on this point (*Clyde River* at para 21) and it may be that there is no real inconsistency between the two positions insofar as the Panel was principally concerned with those situations in which the NEB was not the final decision-maker whereas these two decisions are concerned with situations in which the NEB is the final decision-maker. Furthermore, the Court clearly suggests that when the duty to consult and accommodate requires an "all of government" response, the Crown will not be able to rely exclusively on the NEB to discharge its obligations.

What Didn't the Two Cases Discuss?

I think that it is also useful to reflect on what the Court does not discuss in these two decisions. This too may offer some guidance as to the Court's approach but it might equally suggest that we need to be cautious in applying these decisions on a go-forward basis.

The Terms of the Nunavut Land Claim Agreement

It is notable how little the Court has to say in *Clyde River* about the terms of the Nunavut Land Claim Agreement. It simply noted (at para 43) that "the appellants had *established treaty rights* to hunt and harvest marine mammals [which were] extremely important to the appellants for their economic, cultural, and spiritual well-being" before concluding (at para 44) that "(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." It seems to me that this is significant since much has been made in the past as to whether a land claim agreement is a complete code that still allows the duty to consult to function (see *Beckman v Little Salmon/Carmacks First Nation*, [2010 SCC 53 \(CanLII\)](#)) and as to whether the provisos in the numbered treaties might limit the articulation of treaty rights: *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48 \(CanLII\)](#). In this decision the Court was painting with a broad brush when it considered the scope and content of the duty to consult and accommodate and had very little to say about how this related to the precise terms of the Nunavut treaty.

Nothing on Standard of Review

In the modern era of appellate review it seems that it is a rare appellate decision (whether in public law or private law) that does not contain some or even an extended discussion of the standard of review to be applied by the appellate court to the issue or different issues that have to be decided. Duty to consult cases are no exception and appellate courts have typically distinguished between trigger questions (which merit review on a correctness standard) and questions about the adequacy of the consultation and accommodation as to which there is typically more deference. See, for example, *Haida Nation* at paras 61-62. It is therefore somewhat surprising that there is no similar discussion here. This may limit the future application of these two rulings.

UNDRIP

And finally the two judgments make no reference to the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). There is perhaps nothing particularly significant about this other than to observe that while UNDRIP (and its right to free, prior and informed consent (FPIC)) seems to have been mainstreamed in much political discourse in Canada (and is the subject of specific direction to both the NEB and environmental review panels), and while it is frequently referenced in lower court decisions, it has yet to become a requisite part of the analysis in Indigenous law cases before the Supreme Court of Canada (albeit the reference to the Draft of the *Declaration* in *Mitchell v Minister of National Revenue*, [2001 SCC 33 \(CanLII\)](#) at paras 80-83). Instead, the Court was content to remark in *CTFN* (at para 59) that the duty to consult does not provide Indigenous groups with a “veto” over final Crown decisions, rather, and as noted above, Indigenous interests may be balanced with other interests at the accommodation stage. But it is, I think, notable that the Supreme Court has not really offered any principled or methodological guidance as to how to approach this balancing exercise.

And finally, what might be the implications of these two decisions for TMX?

Implications for Kinder Morgan’s Trans Mountain Expansion Application (TMX)

A common question from the media is what might be the implications of these two decisions for the fate of the statutory appeals and judicial review proceedings that have been launched in the TMX proceedings. There are at least fifteen such proceedings. They have been consolidated and a number of procedural orders issued, most recently in *Tsleil-Waututh First Nation v Canada*, [2017 FCA 128 \(CanLII\)](#). The various proceedings are also listed on the NEB’s website [here](#). The hearing is scheduled for October 2017.

Here are some relevant factors to consider in thinking about the application of these decisions.

First, the two decisions are of limited *direct* significance for the TMX project. This is because, as emphasised above, both *Clyde River* and *CTFN* involved the NEB acting as the final decision-maker. This is not the case with respect to TMX.

Second, TMX is not a case in which the Government of Canada seeks to rely solely on the NEB process to discharge its obligations to consult and accommodate. Indeed, the Crown, learning from the mistakes identified in *Gitxaala* with respect to the Northern Gateway project, has taken supplementary steps to improve the quality of its consultation and accommodation endeavours. In particular, in addition to the NEB process and any other activities that it might have undertaken during the NEB process, the federal Crown undertook further consultation through the Major Projects Management Office and, as well, appointed the [Trans Mountain Pipeline Expansion Project Ministerial Panel](#) to engage potentially affected communities close to the proposed pipeline and shipping corridors. The report of that panel is available [here](#). In addition, the federal Crown itself conducted more intense consultation and accommodation activities in conjunction with the provincial Crown. A key result of this exercise is a detailed [Joint Federal/Provincial Report Consultation and Accommodation Report](#) prepared in November 2016 and thus available to the federal Cabinet prior to its [ultimate decision](#) to direct the NEB to issue the certificate of public convenience and necessity for the project in later that same month.

Third, the *CTFN* decision provides a useful confirmation (see also *Rio Tinto*) that consultation and accommodation with respect to TMX will focus on the particular application and not on past decisions with respect to that same pipeline. That said, while the “new project” that was before the NEB in *CTFN* was small, the same cannot be said of TMX since it involves a very significant expansion in both pipeline capacity and tanker shipments.

Fourth, while the Court in *CTFN* seems to rely heavily on the fact that the NEB conducted an oral adversarial process in the Line 9 proceedings, whereas much of the TMX proceeding was a written proceeding, it must be borne in mind that the Court in *CTFN* was offering these comments as part of assessing whether or not the Crown could rely exclusively on the NEB’s process to discharge its duty to consult and accommodate. Consequently, these two cases will be of limited assistance in assessing whether the NEB’s process was procedurally flawed as [various parties have alleged](#). Instead the relevant tests will more likely be those applied by the Federal Court of Appeal in *Forest Ethics Advocacy Association v National Energy Board*, [2014 FCA 88 \(CanLII\)](#).

This post may be cited as: Nigel Bankes “*Clyde River and Chippewas of the Thames: Some Clarifications Provided But Some Challenges Remain*” (4 August, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/08/Blog_NB_Clyde_River_CTFN.pdf

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