

June 18, 2018

Hamlet of Clyde River and Chippewas of the Thames First Nation – Impact on Alberta’s Administrative Tribunals: Alberta Energy Regulator, Alberta Utilities Commission, Natural Resources Conservation Board, National Energy Board

Presenters: Martin Ignasiak, Partner, Osler Hoskin & Harcourt LLP; Sandy Carpenter, Partner, Blake, Cassels & Graydon LLP

Summarized by: Moira Lavoie (JD Candidate, University of Alberta)

In July 2017, the Supreme Court of Canada released a set of decisions dealing with the duty to consult where an administrative agency serves as the final decision maker: *Clyde River (Hamlet) v. Petroleum Geoservices Inc.*, [2017 SCC 40 \(CanLII\)](#) and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017 SCC 41 \(CanLII\)](#). Sandy Carpenter, counsel for the proponent in *Clyde River*, and Martin Ignasiak, counsel for Suncor in *Chippewas*, provided an overview of the two decisions and their implications for administrative agencies moving forward. In both cases the National Energy Board (NEB) was the final decision-maker on the proposed projects. The Crown was not involved in making the decision nor as a project proponent in either case.

Both decisions reaffirmed the established principle that the Crown may rely on regulatory processes to satisfy the duty to consult but must supplement these processes where necessary to ensure the duty is adequately discharged. It must be made clear to the parties, including affected indigenous groups, at the outset of the regulatory process the extent to which the Crown intends to rely on that process to discharge its duty to consult. It is not sufficient to expect affected Aboriginal communities dissatisfied with the consultation process to resort to judicial review to remedy their concerns. Instead, there must be a built-in remedy within the regulatory process for dealing with Aboriginal dissatisfaction.

The Court clarified in *Clyde River* that if an administrative agency has the authority to determine questions of law, then that agency is presumed to also have the authority, and therefore the responsibility, to assess consultation adequacy, unless this authority is explicitly removed in statute (for instance, as is the case with the Alberta Energy Regulator under the *Responsible Energy Development Act*, [S.A. R-17.3](#), (REDA)). The Court also confirmed that regulatory agencies need not always engage in a formal *Haida* analysis in determining whether or to what extent consultation is owed. Yet as noted in the presentation, this seems inconsistent with the practical reality that agencies attempting to discern the extent of their consultation obligations have little choice but to conduct some form of *Haida* analysis to determine the necessary depth of consultation, and potentially accommodation. Finally, the Court emphasized in both *Clyde River* and *Chippewas* that given their constitutional nature, Aboriginal interests will take priority over other types of public interest in the regulatory process.

In *Chippewas*, the Court clarified that the NEB acts on behalf of the Crown when it serves as the final decision-maker, therefore triggering the duty to consult affected Aboriginal groups. The Crown need not be a formal party to the decision for consultation to be required. Further, an agency's written reasons must specifically address the Aboriginal interests raised during consultation. It is not sufficient to simply address the environmental effects of a proposed project. Finally, while the duty to consult cannot be triggered by historical impacts, it may nonetheless be acceptable for an affected Aboriginal group to introduce evidence of such impacts in order to support their concerns about anticipated novel impacts of a proposed project.

Both presenters emphasized that *Clyde River* and *Chippewas* demonstrate how established principles of administrative law may yield to indigenous issues, however it is unclear how these cases might affect the work of the Alberta Energy Regulator given the explicit restrictions of *REDA*.

This post may be cited as: Moira Lavoie “Hamlet of Clyde River and Chippewas of the Thames First Nation – Impact on Alberta’s Administrative Tribunals: Alberta Energy Regulator, Alberta Utilities Commission, Natural Resources Conservation Board, National Energy Board” (18 June, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/06/Blog_Lavoie.pdf.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

