Shared Path Consultation Initiative

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Clyde River (Hamlet) v Petroleum Geo-Services Inc. SCC 2017 & Chippewas of the Thames First Nation v Enbridge Pipelines Inc. SCC 2017

Note: This is a summary of two cases that were decided at the same time by the Supreme Court and have identical reasoning.

Background

These two cases both relate to decisions by the National Energy Board (NEB) to allow pipeline development and upgrades on the traditional territory of Indigenous peoples. The NEB consulted with Indigenous groups in both cases, however, the affected groups brought actions arguing that the consultation was inadequate.

Legal Issues

The legal issues addressed in these cases are: whether the Crown can delegate the duty to consult to regulatory bodies, and if so, what does adequate consultation look like in such circumstances?

The Law

The Supreme Court in these cases said that the Crown (in this case the Federal Government) can rely on regulatory bodies (in these cases the NEB) to fulfill the duty to consult in whole or in part. The only requirement to this is that the regulatory body has the adequate authority to carry out consultation and offer accommodations. Also, it should be noted that the Crown still holds the ultimate responsibility for ensuring adequate consultation.

In carrying out consultation on behalf of the Crown, a regulatory agency must carry out consultation to the same standard of the Crown. If the agency is not equipped to do this, the Crown must provide the affected groups with additional avenues for meaningful consultation. If consultation is not adequate, the decision of the regulatory agency can be quashed.

In both of these cases, the court laid out the same law on regulatory bodies consulting, but came to different conclusions on whether consultation in each case was adequate.

In *Clyde River*, the NEB's consideration of environmental damage as a result of pipeline development was found to be flawed because it looked only at environmental impacts and not on the effects of this on the hunting and fishing rights of the local Inuit people. Additionally, there were limited opportunities for participation and consultation made available to the Inuit. Specifically, the Inuit were not given meaningful responses to their concerns on the impact to marine life. While the NEB did make changes to the project based on the consultation that was carried, and community liaison officers were placed in the affected communities, this was not found to be adequate consultation given the degree of potential impairment to the Inuit's rights to harvest marine mammals. As a result, the NEB decision was quashed.

In *Chippewas of the Thames*, consultation was found to be adequate as the Chippewas formally participated in the decision-making process. This included the Chippewas participating in an oral hearing after being fully informed of all aspects of the project and receiving money from the NEB to conduct their own environmental assessments. Additionally, the NEB sufficiently assessed the impact on the Indigenous rights and found that the risks were minimal and could be mitigated. The NEB provided accommodations through placing limitations on Enbridge's, the private proponent, operations. Although the impact to the Chippewas' rights was minimal, the NEB ensured ongoing consultation and accommodated the concerns of the Chippewas. The court considered this to be adequate consultation and upheld the NEB's decision to allow Enbridge's operations.

Conclusion

These two cases state that the Crown may delegate the duty to consult to a regulatory agency if it has the authority and capacity to conduct adequate consultation and accommodate affected Indigenous groups. This consultation must be carried out to the same standard that would normally be expected of the Crown.

In terms of adequacy of consultation, the two decisions shed light on what is considered good and bad consultation. In *Chippewas* the impact was small yet significant consultation and accommodation was concluded. As a result, the decision was upheld. In *Clyde River* the impact was significant, and consultation was deemed to be less in-depth than that carried out in *Chippewas*, as a result, the decision was quashed.

Finally, these cases establish a possible precedent for the duty to consult applying to municipalities, as bodies of the Provincial Crown. Future cases may extend the reasoning of these cases to impose a duty to consult on local government bodies.

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