

Mining and Natural Resources and Environmental Law

August 1, 2017

Supreme Court of Canada Provides Guidance on the Government's Duty to Consult

On July 26, the Supreme Court of Canada (SCC) released two decisions that clarify the Crown's duty to consult the aboriginal peoples of Canada if their Aboriginal or treaty rights may be impacted. The first decision relates to the Inuit of Clyde River in Nunavut regarding the National Energy Board's (NEB) authorization of seismic testing off Baffin Islandⁱ and the second decision relates to the Chippewas of the Thames First Nation in Ontario regarding the NEB's decision to permit modification of an existing pipeline that crosses their traditional territoryⁱⁱ. The Indigenous groups argued that the NEB process failed to fulfil the Crown's duty to consult and to accommodate their concerns.

The two decisions include important clarifications regarding the duty to consult:

- Although the NEB is an independent tribunal, it has the final decision making authority regarding these matters and therefore its decisions are themselves Crown conduct. If these decisions could potentially adversely impact Aboriginal and treaty rights, the Crown duty to consult is implicated. "The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB".
- The Crown may rely on steps taken by an administrative body to fulfill some or all of its duty to consult, provided the administrative body has the power to conduct the consultation and to determine appropriate accommodation. This is the case even

when the government is not a party in the administrative proceedings.

- If the Crown intends to rely on an administrative body to carry out its duty to consult, it must be made clear to the affected Indigenous groups that it is doing so.

The Court underscored the importance of evaluating the impact of a project, not simply on the environment – through an environmental assessment – but on the Aboriginal and treaty rights being asserted. The Court held: "The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. . . The subject of the consultation is the impact on the claimed rights of the current decision under consideration".

In evaluating whether the duty to consult is adequately undertaken, the SCC confirmed that there is a spectrum of intensity of consultation requirements. Citing its decision in *Haida Nation v British Columbia (Minister of Forests)*ⁱⁱⁱ, the Court noted that "deep consultation" is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high". The critical balancing of these factors is a continued theme in recent SCC decisions on the Crown duty to consult.

These decisions tell us that the consultation process does not provide a veto; it is a critical foundational process and "a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed."

For further information, please contact any member of our Mining and Natural Resources or Environmental Law Groups.

ⁱ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40.

ⁱⁱ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41.

ⁱⁱⁱ 2004 SCC 73.