NORTON ROSE FULBRIGHT

Legal update

Supreme Court of Canada: regulatory processes may be used to satisfy the duty to consult

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Aboriginal

On July 27 the Supreme Court of Canada released two important decisions that provide guidance about how the duty to consult with Indigenous groups is discharged by the Crown in heavily regulated industries such as oil and gas exploration and energy transportation: *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.* (*Chippewas of the Thames*) and *Hamlet of Clyde River et al. v Petroleum Geo-Services Inc.* (PGS) et al. (*Hamlet of Clyde River*).

Chippewas of the Thames First Nation

Background

Enbridge Pipelines Inc. applied to the National Energy Board (NEB) for authorization to reverse the flow of a portion of the Line 9 pipeline, expand that pipeline's capacity, and enable the transportation of heavy oil. Enbridge's application was made under section 58 of the *NEB Act* pursuant to which the NEB is the final decision-maker, instead of the Governor-in-Council which is tasked with approving major pipeline projects.

The NEB approved the project, subject to conditions, despite opposition from various environmental advocacy groups, First Nations and others. The Chippewas of the Thames First Nation filed an appeal based on alleged breaches of the duty to consult. That appeal was dismissed by the Federal Court of Appeal, Rennie JA dissenting. The majority of the Federal Court of Appeal held that the NEB was not required to assess whether the Crown discharged the duty to consult because federal departments did not participate in the NEB process and the NEB had not been delegated that duty.

Supreme Court of Canada

The Supreme Court of Canada unanimously dismissed the appeal by the Chippewas of the Thames First Nation, although it did not adopt the reasoning of the majority from the Federal Court of Appeal.

The NEB process was accepted by the Supreme Court of Canada as "Crown conduct" that could trigger the duty to consult. That duty was triggered by the NEB process and the project's potential to affect Indigenous rights irrespective of any lack of participation by federal departments in the regulatory process.

The NEB was recognized by the Supreme Court of Canada as empowered by legislation to establish regulatory processes that facilitate meaningful consultation and, if justified, accommodation, which could then be relied upon by the Crown. Indeed, the NEB process that applied to Enbridge's application was accepted as robust enough to satisfy

the duty owed by the Crown to the Chippewas of the Thames First Nation, even if that First Nation's assertions of impacts were taken at their highest, because:

- Indigenous groups were given early notice of the NEB process and were invited to participate meaningfully through information requests, oral final argument and participant funding;
- it was sufficiently clear from the circumstances that the NEB process was intended to constitute Crown consultation, even though that was not explicitly communicated by the Crown until after the oral hearing;
- the NEB assessed the risks posed by the project to Indigenous rights and concluded that any impacts would be minimal and could be mitigated;
- the NEB satisfied itself as to the adequacy of consultation;
- the NEB imposed conditions on the approval that accommodated impacts on asserted Indigenous rights; and
- the NEB provided written reasons that demonstrated its consideration and accommodation of the appellants' Indigenous rights even though it did not engage in a traditional "*Haida* analysis."

The Supreme Court of Canada dismissed the appeal by the Chippewas of the Thames First Nation because the Crown had discharged the duty to consult by relying on a robust NEB process.

Hamlet of Clyde River

Background

The proponents applied to the NEB for authorization to conduct a two-dimensional offshore seismic survey program in Baffin Bay and the Davis Strait. That program was opposed by Inuit groups largely because of potential adverse impacts on their treaty-protected harvesting of marine mammals.

The offshore seismic survey program was approved by the NEB subject to conditions. An application to judicially review the NEB approval was filed, alleging breaches of the duty to consult. That application was dismissed unanimously by a three-member panel of the Federal Court of Appeal, which held that consultation was achieved by meaningful opportunities to participate in the regulatory process.

Supreme Court of Canada

The Supreme Court of Canada unanimously allowed the appeal and quashed the NEB approval.

The Supreme Court held that the Crown can rely on the regulatory processes of broadly empowered regulators to satisfy the duty to consult, wholly or partially. Where a regulatory process is inadequate to wholly discharge a duty to consult, supplemental measures must be taken by the Crown. The Supreme Court of Canada recognized a Crown obligation to advise Indigenous groups of any intention to rely on a regulatory process as satisfying the duty to consult.

The NEB approval of the proponents' offshore seismic survey program was recognized by the Supreme Court of Canada as "Crown conduct" that could trigger a duty to consult because the NEB was exercising executive power for the Crown.

The NEB was empowered by legislation to provide an appropriate level of consultation and, if justified, accommodation. The Crown could then satisfy the duty to consult by relying on a sufficiently robust NEB process; however, the NEB process for the proponents' application failed to satisfy that duty, which was at the highest end of the spectrum, because:

- the NEB process focussed unduly on environmental impacts without considering the source of the appellants' Indigenous rights and the project's potential to affect those rights;
- the significance of the NEB process was not explained adequately to the appellants;
- the appellants did not have meaningful opportunities to participate in the NEB process, in part, because there was no oral hearing, the proponents' evidence could not be tested effectively, and participant funding was not provided;
- the proponents did not respond promptly to important questions from the appellants about potential impacts and, when the proponents eventually responded, they did so without translation and in a way that was inaccessible due to bandwidth constraints in the appellants' northern communities;
- only "insignificant concessions" resulted from the consultation process; and
- the NEB's written reasons gave no reasonable assurance to the appellants that their treaty rights were considered other than as an afterthought.

While the Supreme Court of Canada agreed the Crown can satisfy the duty to consult by relying on robust NEB processes, it allowed the appeal and quashed the NEB approval because effective consultation was not achieved in the process that applied to the proponents' application.

Implications of these rulings

The Supreme Court of Canada recognized the NEB as an expert regulator that is well positioned, at least in certain circumstances, to facilitate meaningful consultation and accommodation. The perception that the NEB is adept at facilitating consultation is not shared universally. Indeed, a perceived lack of public confidence in the NEB is one motivation for the federal government's initiative to modernize the NEB. Only time will tell how this seeming vote of confidence from the Supreme Court of Canada – together with that court's guidance – will influence the NEB modernization initiative.

The interplay between regulatory processes and the duty to consult is a long-standing issue of legal uncertainty. These two new Supreme Court of Canada rulings have gone a long way toward resolving that uncertainty. They provide guidance to the Crown about when and how it can rely on regulatory processes. They provide guidance to regulators like the NEB about how to establish processes that are effective at facilitating consultation and accommodation. They also provide proponents with guidance about how to participate in regulatory processes in ways that reduce the risk of post-approval legal challenges. These two new Supreme Court of Canada decisions may promote reconciliation in the energy sector by clarifying the role of regulators and encouraging the resolution of disputes through dialogue and regulatory participation, rather than litigation.

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