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Indigenous law: Implications for future regulatory (un)certainty

Ray Chartier, Partner
Aaron Stephenson, Of Counsel

January 31, 2018

*motion*2018
discussing what matters

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Speakers



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Mr. Chartier's practice focuses on commercial litigation and dispute resolution within the energy industry, regulatory and environmental compliance matters and aboriginal law issues. He is experienced in complex litigation and arbitration proceedings involving joint venture, gas processing and marketing disputes, as well as transnational litigation.



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Mr. Stephenson practices in the areas of commercial litigation, professional liability, insolvency and restructuring, and Aboriginal law. As a commercial litigator, he has experience representing energy industry participants. As an insolvency and restructuring lawyer, he works on a team that advises debtors, creditors and insolvency professionals in CCAA and BIA proceedings.

The review of environmental and regulatory processes in Canada



“

The times they are a-changin'...

- *Bob Dylan*

”

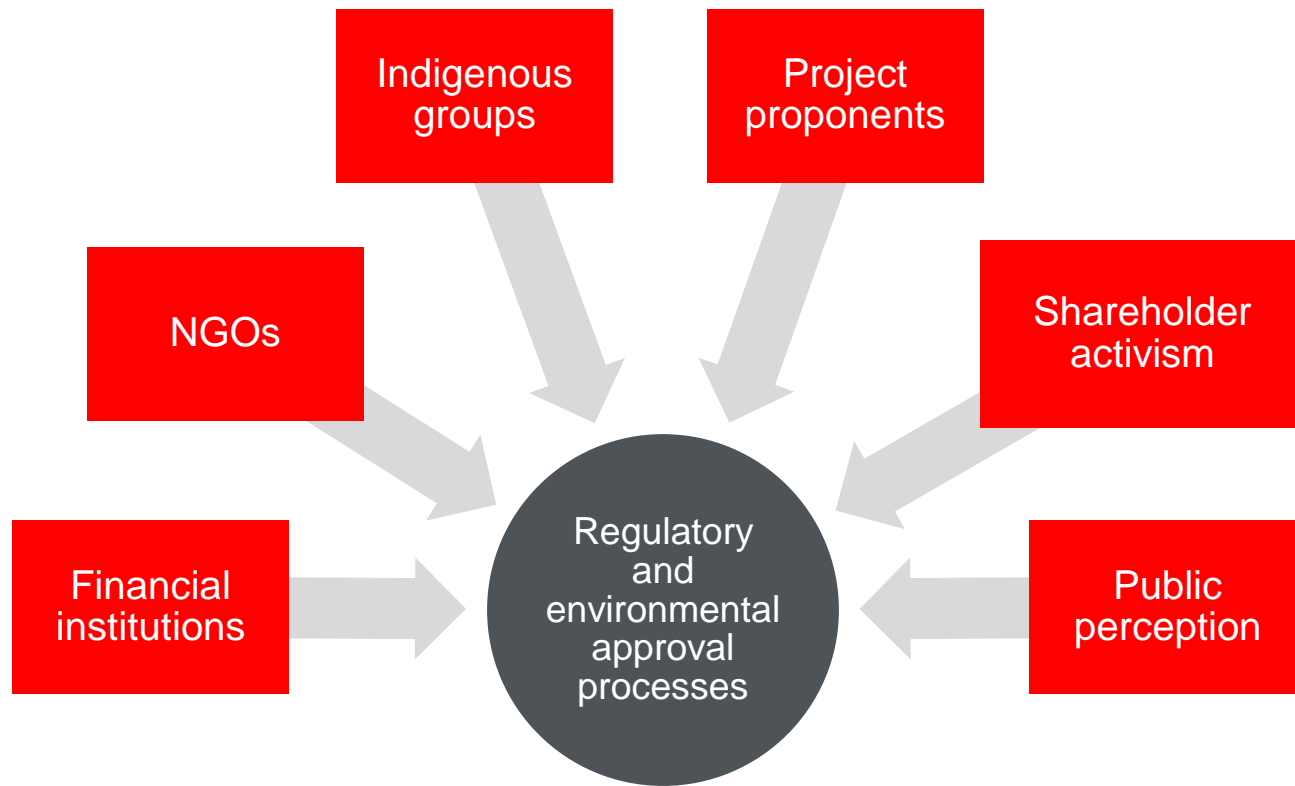
February 22, 2017



Today, we are meeting the commitment we made to First Nations, Inuit and Métis, and to all Canadians to review the laws and policies that relate to Indigenous Peoples. The Working Group of Ministers – in partnership with Indigenous leaders and a broad range of stakeholders, including youth – will assess and recommend what statutory changes and new policies are needed to best meet our constitutional obligations and international commitments to Indigenous Peoples. Through this initiative and the other steps we have recently taken, we are working on a complete renewal of Canada's nation-to-nation relationship with Indigenous Peoples.



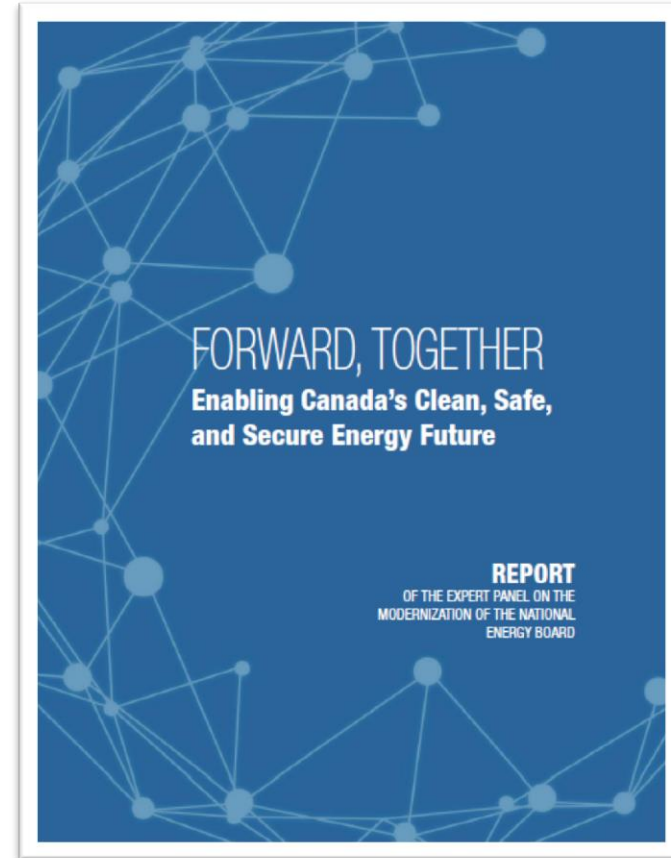
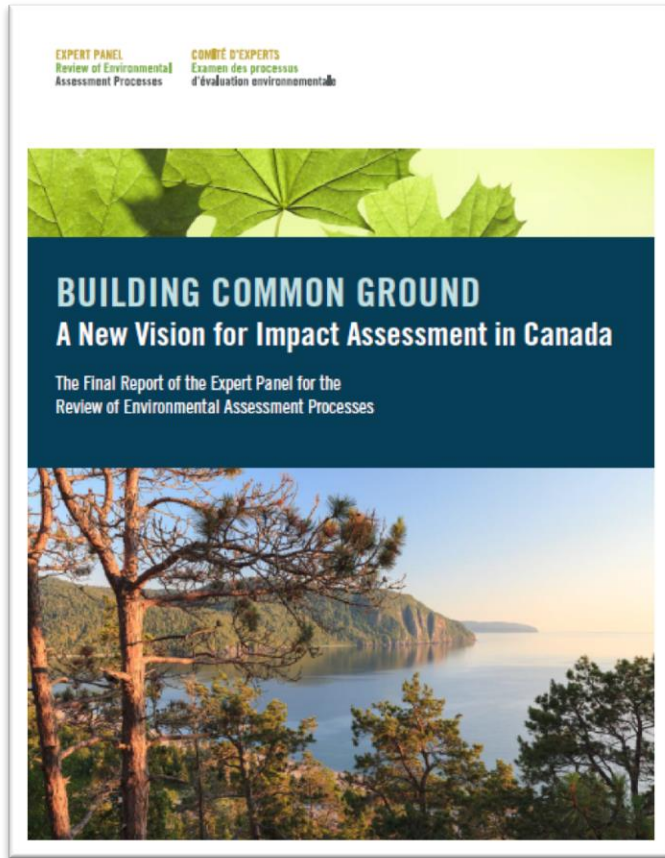
- *The Right Hon. Justin Trudeau, Prime Minister of Canada*











Fixing a 'crisis of confidence' - *The final report of the expert panel for the review of environmental assessment processes*

“ To restore public trust and confidence in assessment processes, the conduct of IAs must respect the principles of being transparent, inclusive, informed and meaningful. ”

“ Indigenous groups across the country express a lack of trust in current EA processes, and there is a lack of confidence in past environmental assessment decisions. EA processes are viewed as being based on flawed planning, misinformation, mischaracterization of Indigenous knowledge and Aboriginal and treaty rights, and opaque decision-making. ”

Fixing a 'crisis of confidence' - *Report of the expert panel on the modernization of the National Energy Board*

“

In our consultations we heard of a National Energy Board that has fundamentally lost the confidence of many Canadians.

”

“

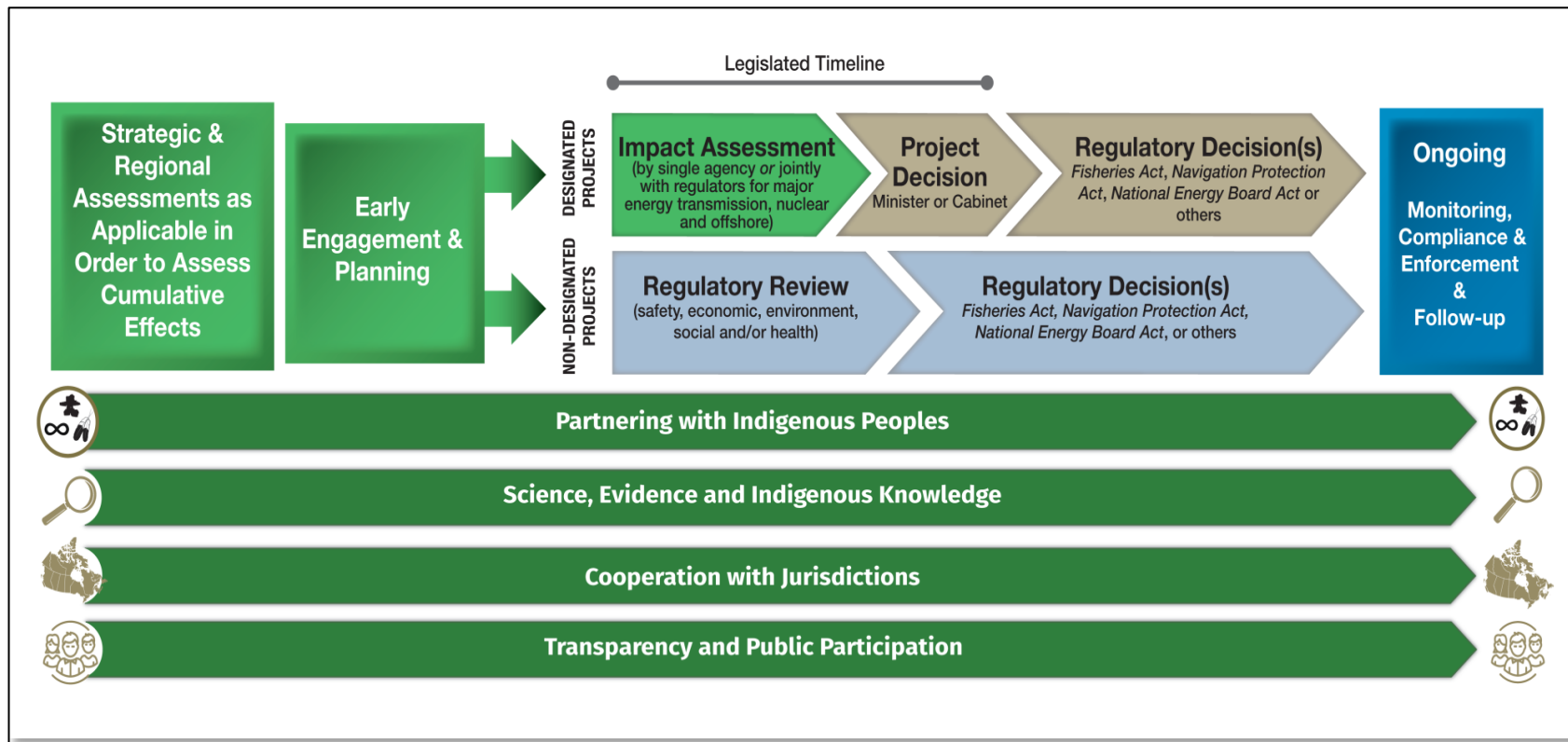
As we travelled the country we heard from people of all backgrounds on an incredible spectrum of issues relating to Indigenous peoples. We heard stories of how the system has failed, and we heard thoughtful suggestions as to how it can be repaired.

”

Fundamental, structural changes

Broader perspective on environmental and social impacts

Increased Indigenous involvement



Supreme Court of Canada: Consultation in regulatory processes

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.



Clyde River (hamlet) v. Petroleum Geo-Services Inc.





NEB

Triggering the
duty to consult

Consulting

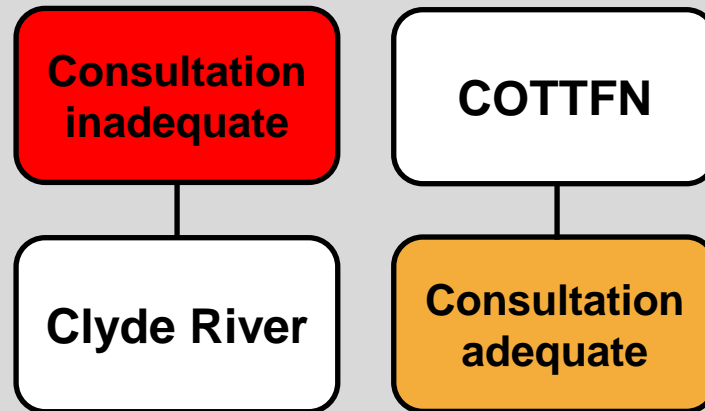
Assessing
consultation

Triggering the duty to consult	Consulting
<p>Clyde River</p> <p>“[O]nce it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts.” (Paragraph 29)</p>	<p>COTTEN</p> <p>“[T]he Crown may rely on steps taken by an administrative body to fulfill its duty to consult. The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances. However, if the agency’s statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.” (Paragraph 32)</p>

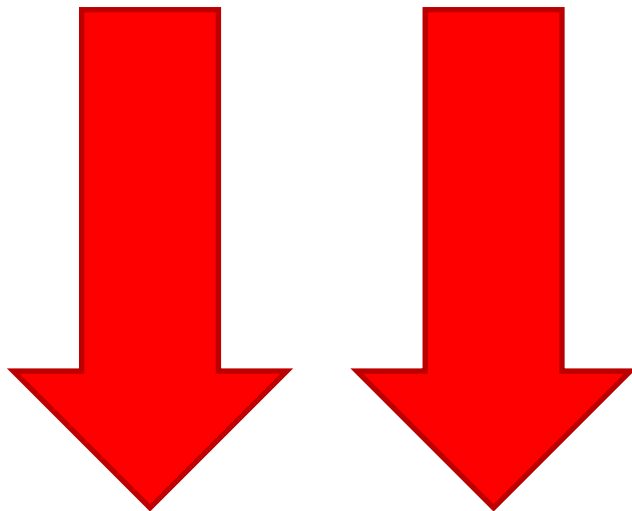
Assessing consultation

Clyde River

“Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. [...] Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn. It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982*.” (Paragraph 36)



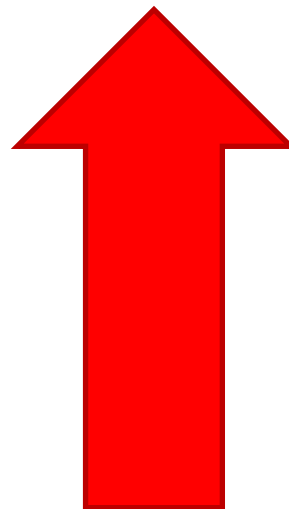
Perceptions of regulatory efficacy



Public

Parliament's

SCC perception



Courtoreille v. Canada

Supreme Court case could lead to First Nations role in law-making

Mikisew First Nation in northern Alberta wants First Nations to have a say in laws concerning treaty rights

The Canadian Press · January 14



Appellant (Mikisew Cree)

- “Legislative processes are the most significant decision making processes”
- “The duty to consult should not depend upon the means the Crown chose to achieve an end rather than on the nature of the right, decision or effect”
- The direction of modern Aboriginal law is to ensure First Nations’ rights are recognized and protected as legal rights and not mere political rights”
- “Imposing the duty to consult is in keeping with Canada’s international obligations”
- “Consultation is to be preferred to litigation as a tool to advance reconciliation”

Respondent (Canada)

- “[C]ourts would be in a position to intervene immediately upon the passage of such legislation”
- “[The argument] is again met by the existing requirements for a duty to consult and the courts’ involvement once the legislation is passed...
- “That is not the issue in this case”
- “[UNDRIP] is consistent with the Crown’s duty to consult and accommodate... The implementation of the UNDRIP will ultimately be achieved, in a manner consistent with Canada’s constitutional framework, through a combination of legislation, state action and action initiated and taken by Indigenous peoples themselves”
- “Consultation on proposed legislation can, and does, take place”







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