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SUPREME COURT OF CANADA AFFIRMS THAT RIGOROUS REGULATORY PROCESSES CAN FULFILL CROWN'S DUTY TO CONSULT WITH FIRST NATIONS

By Stanley D. Berger

On July 26, 2017 the Supreme Court of Canada clarified in two decisions, both involving National Energy Board (NEB) approvals, that the Crown may discharge its duty to consult with First Nations through steps taken by a regulatory agency, providing that agency's statutory duties and powers enable it to do what the duty to consult requires. The fact that the NEB operates independently of the Crown ministers falls by the wayside "...once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures..." *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at par. 29 The requisite duties and powers necessary for an independent regulatory body like the NEB to discharge the Crown's duty to consult consisted of the procedural powers necessary to implement consultation and the remedial powers where necessary, to accommodate affected Aboriginal claims, or Aboriginal and treaty rights.

TWO CASES / TWO RESULTS

The Clyde River case concerns the NEB authorization pursuant to *Canada's Oil and Gas Operations Act* R.S.C. 1985,c.-7 (COGOA) of offshore seismic testing for oil and gas resources which could negatively affect the harvesting rights of the Inuit of Clyde River. The NEB has broad powers under COGOA to conduct hearings, make orders and elicit information in furtherance of the Act and the public interest. It can require studies to be undertaken, preconditions to approval and in the case of designated projects such as seismic testing, conduct environmental assessments. It can also establish participant funding programs to facilitate public participation. COGOA also grants the NEB broad powers to accommodate Indigenous groups' concerns where necessary. Accommodation, most importantly, can be enforced by denying authorization or reserving a decision pending further proceedings. Finally, nothing in the NEB's statutory powers either under COGOA or the *National Energy Board Act* R.S.C. 1985, N-7 (NEB Act) deprived it of the power to decide on the adequacy of the Crown consultation. To the contrary, the NEB has broad powers under both statutes to hear and determine all relevant matters of fact and law. The Inuit had established treaty rights to hunt and harvest marine mammals. These rights were acknowledged as extremely important to the Inuit's economic, cultural and spiritual well-being. The risk of non-compensable damage was high. For all these reasons deep consultation was required. The Court found that the NEB's processes for consultation and accommodation, which involved an environmental assessment, were inadequate and set aside the NEB's


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authorization. The environmental assessment did not consider how the project would impact the source of the treaty right to harvest marine mammals. The harvesting had greater nutritional benefit to the Inuit than purchased food. Culturally, the loss of the ability to share the harvest in the community, to participate in the hunt and to make traditional clothing were of high significance. None of these impacts had been properly considered. The significance of the NEB process was not adequately explained to the Inuit. Limited opportunities for participation and consultation were made available. There were no oral hearings. Participant funding was absent. The proponent's response to the Inuit's concerns about the effect of the testing on marine mammals was delayed, prolix, and delivered to hamlet offices where internet speed was slow and bandwidth expensive. Only a fraction of the 3,926 page impact document submitted by the proponents was translated into Inuktitut.

In the Chippewas of the *Thames First Nation v. Enbridge Pipelines Inc.* 2017 SCC 41 on the other hand, the NEB approval of a modification to a pipeline that would reverse flow, increase capacity and enable the carriage of heavy crude was confirmed by the Supreme Court of Canada. The Court's reasons balance the duty to consult with First Nations with other public interests at the accommodation stage and conclude that "[59]...it is for this reason that the duty to consult does not provide Indigenous groups with a veto over final Crown decisions (Haida, at par.48.") The approval authority was provided by the NEB pursuant to its authority under the NEB Act. The changes would increase the assessed risk of spills along the pipeline. The NEB issued a hearing order establishing the NEB's process for consideration of the project. The NEB accepted participation of 60 intervenors and 111 commentators and issued notice to 19 potentially affected Indigenous groups including the Chippewas of the Thames informing them of the project, the NEB's role and the NEB's upcoming hearing process. Upon request, it held preliminary information meetings in 3 communities. The Chief of the Chippewas and another First Nation complained to the federal government that their Aboriginal and treaty rights would be adversely affected by the project and that no consultation had taken place. The Chippewas had however, been granted funding as an intervener and they filed evidence and delivered oral argument at the hearing delineating their concerns about pipeline ruptures and spills in their traditional territory. The NEB in approving of the project, imposed conditions related to pipeline integrity, safety, environmental protection and protection of Indigenous communities. These latter conditions included the preparation of an archaeological resource contingency plan, an ongoing Indigenous Engagement Report and the involvement of Aboriginal Groups in Enbridge's continuing education program, including emergency preparedness and response. In this case, the Supreme Court found that the duty to consult and accommodate was fulfilled.

A PATH FORWARD

Coincidentally, the Globe and Mail reported in their July 26, 2017 edition that Malaysia's Petronas cancelled plans for an $11.4 billion liquefied natural gas terminal on the B.C. coast. The reason for the cancellation was stated to be stagnating prices and over-supply from countries like Australia and the United States which have moved forward with capacity and saturated the market for liquefied natural gas. The current review of the environmental assessment and regulatory process undertaken by the Canadian government recognizes the economic need for regulatory processes which are conducive to bringing natural resources to market at a pace which permits Canada to compete with the rest of the world. The contrasting results obtained in the two decisions just discussed demonstrate that it is possible to engage in a meaningful and manageable consultation process. Indigenous

groups must be engaged early on, processes must be clearly defined, including informal information meetings and public hearings and principled decisions regarding funding for technical reports must be undertaken. This all involves planning at the earliest opportunity. Proponents would be well-advised to commission reports which are capable of being shared with affected Indigenous communities. If they cannot be condensed they should be summarized and the core findings and supporting analysis translated.