An Analysis of the Adequacy of Crown Consultation with Indigenous Peoples on the Energy East Pipeline Project and an Overview of the Relevant Law of the Duty to Consult

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INTRODUCTION

This paper begins with a summary of the law of the duty to consult – its origin and more specific requirements for cases of major pipeline projects that involve the National Energy Board's (NEB) hearing processes. It includes an analysis of the Crown's consultation efforts to date on the Energy East Pipeline Project (Energy East) relative to Canadian legal consultation obligations as well as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It concludes that if the federal government continues with and properly executes its consultation plan for Energy East, it will likely meet its legal obligations in terms of consulting with the appropriate Indigenous groups on this project.

DUTY TO CONSULT

Basics of duty to consult

The duty to consult is based on the Supreme Court of Canada's interpretation of section 35(1) of the *Constitution Act, 1982*[1] in *R v Van der Peet*.[2] Later, in *Delgamuukw v British Columbia*, the Court reiterated that the purpose of section 35(1) is to "reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty".[3]

This purpose of reconciliation lead to the establishment of the concept of the honour of the Crown. In *Haida Nation v British Columbia (Minister of Forests)*, the Court clarified that the Crown's duty to consult, in accordance with section 35(1), is grounded in the concept of the honour of the Crown.[4] In all instances in which the Crown deals with Aboriginal peoples, its honour, which it must uphold, is at stake.[5] The Crown must consult with Aboriginal peoples to uphold this honour.

The threshold for triggering the Crown's duty to consult, to uphold its honour, is very low. The Court in *Haida* described the Crown's duty to consult as arising "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal rights or title, and contemplates conduct that might adversely affect it".[6]

Initially, in *R v Sparrow*, the Court set out that the Crown could infringe Aboriginal rights under section 35(1), but only if it did so in pursuit of a valid legislative objective and where it upheld the honour of the Crown in its infringement.[7] The Court said that the claimant group would have the onus of demonstrating a *prima facie* case of Crown infringement of a

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[1] *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].
[2] *R v Van der Peet* [1996] 2 SCR 507 at para 31, 1996 CanLII 216 (SCC).
[3] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 141, 1997 CanLII 302 (SCC) [*Delgamuukw*].
[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511, 2004 SCC 73 (CanLII) [*Haida*].
[5] *R v Badger* [1996] 1 SCR 771 at para 41, 1996 CanLII 236 (SCC).
[6] *Haida*, *supra* note 4 at para 35.
[7] *R v Sparrow* [1990] 1 SCR 1075 at 1113-14, 1990 CanLII 104 (SCC) [*Sparrow*].

constitutionally protected (i.e. "existing") Aboriginal right, under section 35(1) in the judicial review process.[8] The onus would then shift to the Crown to demonstrate that the infringement of that right as justifiable, according to the two-part test.[9] If the Court found that there was an Aboriginal right, that it had been infringed and that the Crown could not justify the infringement, the claimant would be entitled to a remedy.

In *Haida* and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, the Court relaxed the burden on the claimant, such that a claimant need merely show infringement of an unproven but possible Aboriginal interest.[10]

The Court has characterized valid legislative objectives as those of "sufficient importance to the broader community as a whole".[11] Recognized legislative objectives include natural resource conservation[12], preserving the safety of the general populace[13] and "…the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations".[14]

The requirements for meeting the second part of the test, upholding the honour of the Crown, vary with the circumstances of each case. *In Delgamuukw*, the court explained that "[i]n occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title", noting that "[o]f course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue".[15] Building on its reasons in *Delgamuukw*, the Court in *Haida* stated that the duty to consult is proportionate to the strength of the Aboriginal group's claim to the Aboriginal right, and the seriousness in terms of the potential adverse effects of the Crown's actions on the right.[16] In cases where the claim is weak or the adverse effect is minimal, mere notification may be sufficient to satisfy the Crown's duty to consult.[17] Alternatively, where both the claim and the potential adverse effect on Aboriginal peoples are strong, especially where the risk of non-compensable damage is high, deep consultation and accommodation may be appropriate.[18] The Court notes that "[w]hile precise requirements will vary with the circumstances, the [deep] consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written

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[8] *Ibid* at 1109.
[9] *Ibid.*
[10] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 21, 3 SCR 550.
[11] *R v Gladstone* [1996] 2 SCR 723 at para 73, 1996 CanLII 160 (SCC) [*Gladstone*].
[12] *Sparrow*, *supra* note 7 at 1113.
[13] *Ibid.*
[14] *Delgamuukw*, *supra* note 3 at para 165.
[15] *Ibid* at para 168.
[16] *Haida*, *supra* note 4 at para 39.
[17] *Ibid* at para 43.
[18] *Ibid* at para 44.

reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" but that "[t]his list is neither exhaustive, nor mandatory for every case".[19] The Court even suggests that "[t]he government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases" to fulfill its duty to consult.[20]

The Court in *Haida* further specifies that the Crown's duty to consult "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim", that "[t]he Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case" and that "[r]ather, what is required is a process of balancing interests, of give and take".[21] In most cases, the requirements, in terms of the Crown's duty to consult, will be somewhere in the middle of the consultation spectrum.[22] The Court also notes that each case should be approached individually, and flexibly as the extent of the duty to consult may change throughout the process, for example, if more information becomes available.[23]

Further, relevant factors for considering the second part of the test (i.e. whether the Crown has upheld its honour) include: whether the Crown has prioritized Aboriginal interests over the interests of others, whether there has been as little infringement as possible to in order to effect the desired result, whether fair compensation has been paid (in the case of expropriation), and whether the Aboriginal group in question was consulted or informed of factors relevant to the infringement.[24]

The duty to consult arises with respect to a specific Crown undertaking – "[it] is not triggered by historical impacts" and "[i]t is not the vehicle to address historical grievances".[25] The Crown must consult on the "adverse impacts [to established or claimed rights] flowing from the specific Crown proposal at issue" and "not [on] larger adverse impacts of the project of which it is a part".[26] However, the court in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* elaborated on this, acknowledging that "it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context".[27] As such, the "[c]umulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult" for the specific project at issue.[28]

Although this paper will not discuss judicial review in great detail, it is relevant to note that questions of the extent and content of the duty to consult are legal questions, reviewable on

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[19] *Ibid*.
[20] *Ibid.*
[21] *Ibid* at para 48. See this view of consent reaffirmed in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59 [*Chippewas*].
[22] *Ibid* at para 45.
[23] *Ibid*.
[24] *Gladstone*, *supra* note 11 at paras 54-55.
[25] *Chippewas*, *supra* note 21 at para 41.
[26] *Ibid*. See also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 53 [*Rio Tinto*]. Note that some sources refer to this case as "*Carrier Sekani*".
[27] *Ibid* at para 42.
[28] *Ibid*. See also *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 117, 333 DLR (4th) 31, 306 BCAC 212.

the standard of correctness, while the question of the adequacy of consultation and/or accommodation is a question of mixed fact and law and reviewable on the standard of reasonableness.[29] To oversimplify, this means that the Crown's consultation efforts need not be correct but at least reasonable, although the Crown must have correctly judged the level of consultation that Indigenous groups require.

Role of industry in duty to consult

In *Haida*, the Court maintains that third parties (including businesses) may owe Aboriginal people duties based in negligence or contract, or they may be delegees of certain *procedural* aspects of the consultation process, but that they do not have an independent duty to consult Aboriginal people.[30] The Court recognizes that the Crown may choose to delegate procedural aspects of consultation to industry proponents seeking a particular development, such as with environmental assessments.[31] This delegation may be explicit, through guidelines, policies and agreements, which is preferable, or implicit, as a result of regulatory processes that require applicants and/or project proponents to demonstrate evidence of consultation with communities and stakeholders.[32]

The NEB, for example, in "Consideration of Aboriginal Concerns in National Energy Board Decisions" sets out that proponents must contact potentially affected Aboriginal communities and include certain consultation information in their project applications.[33] The NEB requires proponents to demonstrate, with sufficient detail, in their applications "that all persons and groups [including Aboriginal groups] potentially affected by the project are aware of the project, the project application to the Board, and how they can contact the Board with outstanding application-related concerns".[34] Further, proponents must show "that those potentially affected by the project have been adequately consulted, and that any concerns raised have been considered, and addressed as appropriate".[35] The NEB also advises proponents to integrate local and traditional knowledge, where appropriate, into the design of the project.[36] Where proponents do not include consultation information in their applications, they must provide reasons to justify why consultation was unnecessary.[37]

The Crown may only delegate procedural aspects of consultation to non-tribunal third parties. This means that these third parties cannot make substantive decisions as to the

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[29] *Haida*, *supra note 4* at paras 61-62. See also *Rio Tinto*, *supra* note 26 at paras 56-58.
[30] *Ibid* at para 56.
[31] *Ibid* at para 53.
[32] *Ibid*.
[33] Canada, National Energy Board, *Considerations of Aboriginal Concerns in National Energy Board Decisions*, (Calgary: National Energy Board, 2011) at 1, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/771416> [NEB Consultation]. See also Canada, National Energy Board, *Filing Manual*, December 2016 Update (Calgary: National Energy Board, 2016) at 3–3-3–11, online: <https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/flngmnl-eng.pdf> [*Filing Manual*].
[34] *Filing Manual*, *supra* note 32 at 3-7. See more on what constitutes sufficient detail from 3-7-3-8.
[35] *Ibid*.
[36] *Ibid* at 3-10.
[37] *Ibid*.

sufficiency of Crown consultation. The Crown must itself find out if the delegee's consultations in such a scenario were sufficient to discharge its duty to consult – it may not rely solely on the delegee's reports (more to come on whether a tribunal is "the Crown" in this capacity).[38] In contrast, these third parties can properly assist with other, non-substantive aspects of consultation, such as providing notice and information to Aboriginal groups about a project, collecting information from these groups regarding asserted Aboriginal rights, including title, and discussing ways to minimize the impacts of a project (i.e. accommodation).

Finally, when the Crown delegates procedural aspects of consultation to a third party, it has an obligation to clearly inform to the delegee, as well as relevant Aboriginal communities, that it is delegating its duty to consult and about the delegee's role in the process of Crown consultation.[39]

Role of tribunals in duty to consult

In *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the Court set out that the legislature may actually delegate to tribunals its duty to consult, to consider consultation, or no duty at all with respect to consultation.[40]

The Crown may rely on an administrative body or tribunal, such as the NEB, "to fulfill its duty to consult in whole or in part, and where appropriate, accommodate".[41] However, it may only do this where the administrative body has statutory powers to do what the duty to consult requires in the circumstances and where it can provide adequate consultation and accommodation.[42] Where it cannot do this, the Crown "must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval".[43] As such, it is possible for a regulatory process to provide sufficiently meaningful consultation, at least from a legal perspective.[44] As well, although tribunals may be used in this way, the Crown is always responsible for ensuring that its duty to consult is satisfied.[45] This "does not mean that a minister of the Crown must give explicit consideration in every case to whether [it] has been satisfied, or must directly participate in the process of consultation" but that the Crown must take extra steps where the regulatory process is insufficient.[46] These extra steps could include actions such as "filling any gaps on a case-by-case basis or more systematically

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[38] *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139 at para 93. The Federal Court of Appeal affirmed this decision (see 2015 FCA 148).
[39] *Halalt First Nation v. British Columbia (Environment*), 2011 BCSC 945 at para 677. The British Columbia Supreme Court reversed this decision on other grounds (see 2012 BCCA 472).
[40] *Rio Tinto*, *supra* note 26 at paras 56-58.
[41] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 22, 30 [*Clyde River*]. Also see *Chippewas*, *supra* note 21 at para 32.
[42] *Rio Tinto*, *supra* note 26 at para 60. See also *Clyde River*, *supra* note 41 at para 30; *Chippewas*, *supra* note 21 at para 32.
[43] *Chippewas*, *supra* note 21 at para 32.
[44] *Ibid*.
[45] *Clyde River*, *supra* note 41 para 22.
[46] *Ibid*.

through legislative or regulatory amendments[,]…making submissions to the regulatory body, requesting reconsideration of a decision, or seeking postponement in order to carry out further consultation in a separate process before the decision is rendered".[47]

Where the Crown does intend to use such a body to fulfill its duty to consult, "it should be made clear to the affected indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty" so that the affected groups can participate accordingly, including notifying the authorities if they have concerns about the consultation provided.[48]

In a case where an affected Indigenous group that is a party to a modern treaty finds that the consultation on a project has been insufficient, it must make a timely request to the Crown for more engagement, as these treaties require parties "to act diligently to advance their interests".[49]

The Court in *Chippewas* specifically enumerated that "[t]he Crown is entitled to rely on the NEB's process to fulfill the duty to consult".[50]

The NEB's duty to consult

As it is, the NEB is not actively involved with the consultation process itself. It "can only consider evidence" brought before it.[51] However, the federal government is in the process of reforming the NEB, which may change its role in the consultation process.[52]

This lack of consultation by the NEB is likely appropriate, as the NEB likely does not have a duty to consult. This is because the Crown has likely not delegated its duty to consult to the NEB. The Federal Court of Appeal level in *Chippewas* found that there was no delegation of this duty because there was no delegating legislation. The Court reasoned that provisions of the *National Energy Board Act*[53] could not be interpreted as delegating the Crown's duty to consult because it was enacted over 20 years before the *Constitution Act, 1982*[54] (recall that this is the legal source of the duty to consult) and over 40 years before the *Haida* decision.[55] The Court "[left] open the question of whether some formal type of disposition other than legislation could be employed by the Crown to produce an effective delegation of its *Haida* duties".[56] However, it found that a letter from the Minister of Natural Resources, which stated that "[t]he Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights

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[47] *Ibid*.
[48] *Clyde River*, *supra* note 41 at para 23. See also *Chippewas*, *supra* note 21 at para 44.
[49] *Ibid* at para 22.
[50] *Chippewas*, *supra* note 21 at para 5.
[51] NEB Consultation, *supra* note 32 at 1.
[52] Government of Canada, "National Energy Board Modernization", online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html>.
[53] *National Energy Board Act*, RSC 1985, c N-7 [*NEB Act*].
[54] *Constitution Act*, *supra* note 1.
[55] *Chippewas*, *supra* note 21 at para 69.
[56] *Ibid* at paras 67-68.

stemming from projects under its mandate" was not sufficient to delegate the Crown's duty.[57] On appeal, the Supreme Court did not comment in its reasons on the matter of delegation of the duty to consult. It only reiterated that the Crown has a duty to consult and clarified when the NEB has a duty to consider the sufficiency of Crown consultation.

Note that if a tribunal has a duty to consult, it follows that it also has a duty to consider consultation.

Authority and/or duty of tribunals to consider Crown consultation

After determining that the Crown has not delegated its duty to consult to a given tribunal, one must determine whether it has a duty to consider consultation, or no duty at all.

To clarify, the duty to consider the Crown's consultation is where "the legislature … choose[s] to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process".[58]

For this determination, "[b]oth the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations".[59] Where a tribunal has the authority to consider questions of law, it has the jurisdiction to interpret or decide constitutional questions, such as those concerning section 35(1) and the sufficiency of Crown consultation, "absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power".[60] To elaborate on the second criterion, remedial powers, the tribunal must have statutory authority to grant the particular remedy sought.[61] That is, a tribunal requires the power to address specific concerns that an Aboriginal group raises.[62] The Court in *Clyde River* used these two factors, powers to consider questions of law and remedial powers, in its analysis of the authority of the NEB to consider Crown consultation, confirming their relevancy.[63]

Relatively early on, the Court in *Rio Tinto* indicated that the scope of tribunal authority to inquire depends on the mandate conferred by the legislation that creates the tribunal, as tribunals are confined to the powers conferred on them by their constituent legislation.[64] The mandate of a tribunal depends on the duties and powers the legislation has conferred on it as well as the overall purpose and scheme of the enabling statute.[65] In its more recent decisions on the issue of tribunal authority to consider Crown consultation, *Clyde River*, the Supreme Court indicated that, "[g]enerally, a tribunal empowered to consider questions of law must determine whether such

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[57] *Ibid*.
[58] *Rio Tinto, supra* note 26 at para 57.
[59] *Ibid* at para 58.
[60] *Ibid* at para 69. Also see *R v Conway*, 2010 SCC 22 at paras 77, 81, [2010] 1 SCR 765 [*Conway*].
[61] *Conway*, *supra* note 55 at para 82.
[62] Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65:4 Toronto LJ 382 at 391.
[63] *Clyde River, supra* note 41 at para 37.
[64] *Rio Tinto, supra* note 26 at para 55.
[65] *Ibid*.

consultation [by the Government with Aboriginal groups] was constitutionally sufficient if the issue is properly raised".[66] The Court did not seem to consider the mandate of the NEB in determining the scope of the NEB's authority, as it was not mentioned in the reasons.[67] The Court seems to have simplified the test to one where a tribunal either has the authority or does not. However, it could be that scope of authority is relevant for tribunals other than the NEB.

In *Rio Tinto*, the Court expresses concern "that…the government might effectively be able to avoid its duty to consult" by parsing tribunal authority using its analysis.[68] This indicates that a determination of tribunal authority should avoid such a result.

Where a tribunal has the proper authority to consider Crown consultation, it **"**should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute" to further the protection of Aboriginal rights and interests, and reconciliation.[69]

On tribunal impartiality when assessing the adequacy of Crown consultation, the Court in *Chippewas* noted that "[a] tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution".[70] The Court further explained that "[r]egulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias" and that "[it] contemplated this very possibility in *Carrier Sekani* [i.e. *Rio Tinto*], when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation".[71]

Another important consideration is that any tribunal, regardless of its power and role in the Crown's duty to consult, must ensure that its actions and decisions comply with section 35 of the *Constitution Act, 1982*.[72] As will be discussed below, compliance with section 35 may put particular demands on a tribunal.

The NEB's authority to consider consultation

According to *Clyde River*, the NEB has the authority to assess whether or not the Crown has fulfilled its duty to consult.[73] The Court came to this conclusion by finding that the NEB has the relevant powers (as enumerated in the previous section). It stated that "[t]he NEB has broad powers under both the *NEB Act* and *COGOA* [*Canada Oil and Gas Operations Act*] to hear and

[66] *Clyde River, supra* note 41 at para 36.
[67] *Ibid* at para 37.
[68] *Rio Tinto, supra* note 26 at para 62.
[69] *Ibid* at para 61.
[70] *Chippewas, supra* note 21 at para 34.
[71] *Ibid*. See also *Rio Tinto, supra* note 26 at para 58.
[72] *Rio Tinto, supra* note 26 at para 72. See also *Clyde River, supra* note 41 at para 36; *Quebec (Attorney General) v Canada (National Energy Board)* [1994] 1 SCR 159 at 185.
[73] *Clyde River, supra* note 41 at para 37.

determine all relevant matters of fact and law", with no provision in either of these laws suggesting that the government meant to withhold this authority from the NEB.[74]

The Court revealed that the NEB had this authority, at least where it is the final decision-maker, regardless of whether the Crown was a party before the NEB in the hearing(s). The Court took issue with the view that the issue of duty to consult was not properly before the NEB where the Crown was not a participant because when the NEB makes a final decision on a project, that decision *is* Crown conduct, which triggers the duty to consult.[75] As well, in making a decision on a project without examining whether consultation was adequate, the NEB may not be acting in accordance with section 35 (where consultation is inadequate and the NEB approves the project would be contrary to section 35).[76] The view that the NEB has the authority to examine Crown consultation, even where the Crown is not a participant, can also be implied from the Court's finding that the NEB had a duty to consider Crown consultation in certain circumstances, regardless of the status of the Crown's participation in the hearing(s).[77]

The NEB's duty to consider consultation

The recent Supreme Court decisions on *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*. and *Clyde River* greatly clarify when the NEB has a duty to assess the adequacy of the Crown's consultation efforts with Aboriginal peoples.

The Court set out in *Clyde River* that the NEB or Cabinet may have a duty to consider Crown consultation. If the NEB is the final decision maker and someone properly raises the issue of the Crown's consultation with Aboriginal peoples, then it must consider this issue, and withhold project approval if the consultation is inadequate.[78] This is necessary, if the NEB is to act in accordance with section 35, which it must.[79] Where Cabinet is the final decision maker, it must assess the issue of consultation. Whether it is the NEB or Cabinet making the decision, "[it] constitutes Crown action that may trigger the duty to consult"[80] and "[i]f the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate".[81]

The Court in the *Chippewas* and *Clyde River* companion cases does not explicitly rule out the NEB having a duty to consider consultation where Cabinet is the final decision maker, as it only sets out that Cabinet has the duty where it makes the final determination on projects. However, one can assume that the NEB likely does not have a duty in this case, as it would be redundant if both the NEB and Cabinet considered this issue.

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[74] *Ibid*. See also *NEB Act*, *supra* note 48, s 12(2); *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, s 5.31(2) [*COGOA*].
[75] *Ibid* at para 38.
[76] *Ibid.*
[77] *Ibid* at para 39.
[78] *Ibid*. See also *Chippewas*, *supra* note 21 at para 37.
[79] *Chippewas*, *supra* note 21 at para 48.
[80] *Clyde River*, *supra* note 41 at para 29.
[81] *Chippewas*, *supra* note 21 at para 36.

The Court in *Chippewas* also specifies that the NEB has this duty where it is the final decision-maker, whether or not the Crown participates in the NEB's hearing processes.[82]

A final point to note is that, as it is for any tribunal, "[w]hen the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change".[83]

Duty to consult in marine context

The duty to consult differs in a marine context from a terrestrial one in terms of the fact-specific nature of which rights the project at issue may affect and what is required by way of consultation and/or accommodation to minimize the any negative effects on these rights.

For example, in *Clyde River*, the case named after the place, which is primarily inhabited by Inuit people, the proposed offshore seismic testing was to affect the right to harvest animals in the marine waters.[84]

This marine context is of interest to Nature Canada, as one of its focuses is marine conservation, especially in the New Brunswick area, and because Energy East may negatively affect the fishing rights of groups along the coast of the Bay of Fundy, with projected increases in marine traffic in the bay (see section *About Energy East* below for more on this). An increase in traffic increases the likelihood of an oil spill, as well as collisions between aquatic organisms and the boats, both of which can affect the quality and quantity of available food from the bay.

ENERGY EAST PIPELINE CONSULTATIONS

About Energy East

The Energy East Pipeline Project involves construction of around 1520 kilometers of new pipeline and associated facilities, including over 70 new pump stations, connection pipelines, 4 tank terminals, and a marine terminal in New Brunswick.[85] The purpose of the project is to transport crude oil from Alberta and Saskatchewan to locations in Quebec and New Brunswick.[86] The new marine terminal in Saint John, New Brunswick would allow Energy East Pipeline Ltd and TransCanada Pipelines Limited (the project's proponents) to export the oil through the Bay of Fundy. The project also involves converting about 3000 kilometers of existing TransCanada

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[82] *Ibid*.
[83] *Ibid* at para 34.
[84] *Clyde River*, *supra* note 41 at paras 2-3.
[85] Energy East Pipeline Ltd & TransCanada Pipelines Ltd, *Consolidated Application*, vol 1, at 1-1, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2957695> [Pipeline Application]. Also see Canada, Major Projects Management Office, *Energy East Pipeline Project*, online: <https://mpmo.gc.ca/measures/257> [MPMO Information].
[86] *Ibid*. Also see MPMO Information, *supra* note 85.

Mainline natural gas pipelines into ones which would be part of the Energy East network of pipelines and transport crude oil.[87] Once completed, Energy East would be about 4500 kilometers in length and would transport about 1.1 million barrels of crude oil per day to the refineries on the East Coast.[88]

For the project to proceed, it must be reviewed by the NEB, in accordance with the *NEB Act*.[89] The government must also assess the project under the *Canadian Environmental Assessment Act, 2012.*[90]

With pipeline projects like Energy East, the NEB does not make the final decision on project approval – the Governor in Council (cabinet) does.[91] The NEB recommends to cabinet how to proceed, based on whether it sees the project as being in the public interest.[92] The NEB may place conditions on project approval (for example, rules that minimize environmental impacts and/or impacts on the rights of affected Indigenous groups).[93] Listed examples of conditions in the NEB's Hearing Process Handbook include restricting the timing of construction and conducting a rare plant study.[94] However, the NEB has considerable freedom in choosing conditions so there are many other possibilities.

Consultation obligations

Deep consultation will likely be required for the process with many, if not all, Indigenous groups that must be consulted on Energy East. In *Tsleil-Waututh Nation v Canada (National Energy Board),* which involved a project very similar to Energy East, the Crown deemed a high level of consultation to be required.[95] The Project in that case, proposed by Trans Mountain Pipeline ULC (TM), involved an extension of the existing pipeline system, new and modified facilities, including pump stations, tanks, and additional tanker loading facilities.[96] The Energy East project, in many locations, involves very similar initiatives. To briefly summarize, the Crown must engage in deep (or a "high level") of consultation "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".[97] Where a rights claim with respect to Energy East is similar to those in *Tsleil-Waututh*, deep consultation may be required.

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[87] *Ibid*. Also see MPMO Information, *supra* note 85.
[88] MPMO Information, *supra* note 85.
[89] *NEB Act*, supra note 53, s 52.
[90] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52. See also MPMO Information, *supra* note 85.
[91] *NEB Act*, supra note 53, s 52.
[92] National Energy Board, *Hearing Process Handbook*, (Calgary: 2013), online: <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngpmphlt-eng.pdf> [NEB Hearing Process Handbook].
[93] *NEB Act*, supra note 53, s 52(1)(b). Also see NEB Hearing Process Handbook, *supra* note 92 at 28.
[94] NEB Hearing Process Handbook, *supra* note 92 at 25.
[95] *Tsleil-Waututh Nation v Canada (National Energy Board),* 2016 FCA 219 at para 5.
[96] *Ibid* at para 2.
[97] *Haida*, *supra* note 4 at para 44. Also see *Clyde River*, supra note 41 at para 43.

Where the Crown must engage in deep consultation, it may meet its duty to consult if there is "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision", although this is not mandatory for every case and more may be required in some cases.[98] Where, in contrast, the level of required consultation is much lower, at the other end of the spectrum, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice".[99]

Recall that consultation and accommodation in Canadian law do not give Indigenous groups a veto on projects.[100]

Depending on the nature of the rights claim, as well as the nature of the Energy East plans that might affect that right for a given group, consultation requirements may vary as there are many different groups and nearby aspects of pipeline construction to consider in relation to this test, which is very fact-specific. Because of the variety of situations across the expanse of the proposed pipeline, it is difficult to summarily assess the measures that would be required of the government by way of consultation. However, one can examine the government's proposed consultation process generally and consultation thus far to see if there are any glaring issues.

Something else to note is that courts look positively on the government providing funds to Indigenous groups for participation in the hearings process.[101]

Consultation efforts to date relative to legal requirements

The proponents submitted their application for Energy East in October of 2014 and the process is ongoing.[102] The proponents' application contained the required records of its consultation efforts with Indigenous groups and/or representatives, which is limited to the previously enumerated procedural aspects of consultation.[103] Energy East consulted with 166 First Nations and Metis communities across the expanse of the pipeline.[104] Note that many more than 166 Indigenous groups are involved, but they are subsumed in the larger groups that make up the reported figure.[105]

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[98] *Ibid.*
[99] *Ibid* at para 43.
[100] *Haida*, *supra* note 4 at para 48. *Chippewas*, *supra* note 21 at para 59.
[101] *Chippewas*, *supra* note 21 at para 52.
[102] MPMO Information, *supra* note 84.
[103] Energy East Pipeline Ltd & TransCanada Pipelines Ltd, *Consolidated Application*, vol 10, sections 1-7, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2967601>.
[104] Pipeline Application, *supra* note 85 at 1-5.
[105] Energy East Pipeline Ltd & TransCanada Pipelines Ltd, *Consolidated Application*, vol 10, section 1, at 1-4-1-12, online: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2967601>.

As it is, the government has yet to find that the application for Energy East is complete and issue a hearing order, formally starting the review process for the second time (the first set of hearings were voided when panel members recused themselves following accusations of bias).[106]

Further, the government has released its consultation plan for this project. Firstly, this plan involves appointing five Regional Consultation Coordinators (RCCs), to be responsible for managing consultation efforts in their respective areas.[107] The government plans to appoint other federal and provincial government staff to support these regional officers.[108]

Efforts to take place before the NEB hearings include, the Major Projects Management Office (MPMO) developing a list of potentially impacted Aboriginal groups, which officials will then be meeting with to explain the consultation process and funding available to them, among other things. The government intends to offer Indigenous groups additional funding to support their participation in the NEB process and consultations on any proposed conditions.[109] The government also plans to keep track of "concerns raised by Aboriginal groups and proposed avoidance, mitigation and accommodation measures".[110]

The government is committed to meet with Indigenous groups during the hearing process "to identify and consider issues".[111]

After the NEB issues its report, the government plans to undertake further consultation efforts with Aboriginal groups on "outstanding issues related to potential or established Aboriginal or Treaty rights", including how the conditions and/or any proponent commitments address their concerns.[112]

The MPMO and relevant federal departments and agencies meet with potentially impacted Aboriginal groups to determine if the proponent's commitments and the NEB's proposed conditions address their concerns and whether any additional avoidance, mitigation or accommodation measures should be considered by the Crown.

Finally, if cabinet approves Energy East, the Crown plans to consult with groups further on regulatory authorizations, where fitting.

This plan lines up fairly well with the standard of consultation at the higher end of the spectrum set out in *Haida*, which, as discussed, likely applies to at least some Indigenous groups with Energy East. The process is similar to that in *Chippewas*, which was sufficient in for meeting the standard of deep consultation in the circumstances of the case.[113]

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[106] MPMO Information, *supra* note 84. Also see National Energy Board, *Recusals*, (Calgary) at 2, online: <https://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/26rgltrsnpsht-eng.pdf>.
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] *Ibid.*
[111] *Ibid.*
[112] *Ibid.*
[113] *Chippewas*, *supra* note 21 at para 52.

Early in the Energy East consultation process, the government indicated that it planned to rely on the NEB's regulatory processes to fulfill its duty to consult.[114] Several Indigenous leaders took issue with this and spoke out about how they felt this process would be inadequate.[115]Although the case law shows that the government can, in certain circumstances, rely solely on the regulatory process to fulfill its duty to consult, it is interesting to note that the government later announced that it would be engaging in "deeper" consultation efforts with Indigenous peoples outside of the NEB process, as was outlined above.[116] This is presumably to ensure that it meets its obligations as far as consulting with Canada's indigenous peoples.

Three New Brunswick First Nations also raised concerns with the consultation process. They spoke with lawyers, media outlets, and federal government officials last year about a lack of adequate funding for them to participate in the NEB's hearing processes.[117] The NEB later announced, presumably in response to these concerns, that it would be doubling the funding available to facilitate participation through its Participant Funding Program.[118]

Some Indigenous groups in Ontario have indicated that the federal government's consultation with them on Energy East is deficient, as is set out in the Ontario Energy Board's Report.[119] Complaints on consultation from Indigenous groups in Ontario include that TransCanada's application was incomplete, especially without a definition of "significant waterway", which is necessary for understanding where additional shutoff valves should be, that TransCanada would receive an unfairly disproportionate share of the benefits of the project with Indigenous people bearing disproportionate risks[120], and that the NEB has not acknowledged Canada's support of UNDRIP.[121] Some members of the Algonquins of Ontario expressed that they felt mislead by the consultation efforts to date, that "they felt that neither the Crown, nor the NEB, nor TransCanada had demonstrated due regard for their treaty rights" and that TransCanada was not adequately using their Traditional Ecological Knowledge studies.[122] One can assume that the Ontario government will be providing the information in the report to the federal government, at which point the federal government can (hopefully) address the concerns.

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[114] Jorge Barrera, "No Added First Nation Consultation Process Planned for Energy East Pipeline Beyond Energy East Hearings", APTN National News (24 November, 2015), online: <http://aptnnews.ca/2015/11/24/no-added-first-nation-consultation-process-planned-for-energy-east-pipeline-beyond-neb-hearings/>.
[115] Brent Patterson, "Trudeau Dodges Question about Duty to Consult Outside of NEB Pipeline Process", *The Council of Canadians* (25 November, 2015), online: <https://canadians.org/blog/trudeau-dodges-question-about-duty-consult-outside-neb-pipeline-process>.
[116] MPMO Information, *supra* note 84.
[117] Connell Smith, "First Nations Demand Halt to Energy East Review over Funding Cut", *CBC News New Brunswick* (21 September, 2015), online: <http://www.cbc.ca/news/canada/new-brunswick/neb-energy-east-intervener-funding-1.3236504>.
[118] Canada, Alberta National Energy Board, "Energy East: NEB doubles participant funding to $10 million", (Calgary: 22 June 2016), online: <https://www.canada.ca/en/national-energy-board/news/2016/06/energy-east-neb-doubles-participant-funding-to-10-million.html>.
[119] Ontario, Ontario Energy Board, *Giving a Voice to Ontarians on Energy East: Report to the Minister*, (2015) at 68-72, online: <https://www.oeb.ca/sites/default/files/uploads/energyeast_finalreport_EN_20150813.pdf>.
[120] *Ibid* at 69.
[121] *Ibid* at 70.
[122] *Ibid* at 70-71.

The complaints set out here are just a few from a small fraction of the Indigenous groups involved in the Energy East consultation process. However, if the government follows its new consultation plan, it seems possible for it to address these concerns and meet its legal obligations, especially considering that the standard of judicial review of the duty to consult is reasonableness. That it has addressed some Indigenous groups' concerns so far is an indication that the government wants to consult appropriately.

Consultation in the context of UNDRIP

For the sake of convenience, this paper will only discuss provisions of UNDRIP that are most obviously associated with resource development.

Article 32 of UNDRIP pertains specifically to resource development and has 3 parts, which set out that:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior* to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources [emphasis added].
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[123]

The free and informed consent prior to project approval in article 32(2) is commonly referred to as Free, Prior, and Informed Consent (FPIC).

An in-depth discussion on the content of article 32 in UNDRIP, FPIC and how they fit into the Canadian legal regime is beyond the scope of this paper. That said, it is important to acknowledge that the current government has indicated a commitment to UNDRIP and that many Canadians will be measuring the government's consultation efforts on Energy East against these provisions.[124]

The meaning of the concept of Free, Prior and Informed Consent (FPIC) in Canada is not widely agreed upon. There are generally two schools of thought on the meaning of FPIC. The

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[123] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, UN Doc A/61/49 (2008), online: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf [*UNDRIP*].

[124] "Government Supports Indigenous Declaration Without Reservation: Wilson-Raybould", *CBC News Indigenous* (20 July 2016), online: <http://www.cbc.ca/news/indigenous/government-supports-undrip-without-reservation-1.3687315>.

first is that "Indigenous peoples have the right to say no for any project or activity affecting their lands, territories, resources or well-being", while the second is that "the right to veto only arises when there is a potential for a profound or major impact on the property rights of an indigenous people or where their physical or cultural survival may be endangered".[125] The first is easy to apply, whereas the second would likely present considerable difficulties in application. (Where does one draw the line?) Many would agree that consent should be an objective, regardless of which interpretation one takes of this phrase from UNDRIP legally requires. As well, with either interpretation, a government must engage in good faith negotiations with the goal of obtaining consent.[126] Where a government decides to proceed without consent, it must, at a minimum under UNDRIP, "respect and protect the rights of indigenous peoples and must ensure that other applicable safeguards are implemented, in particular steps to minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing".[127]

With this in mind, if one adopts the second interpretation of FPIC, the Energy East consultation process, if executed properly, could meet UNDRIP standards, assuming that one would not classify Energy East initiatives as a major impact on property rights. However, under the first interpretation of UNDRIP, construction would be contrary to UNDRIP if there was opposition from Indigenous groups on the project (which there is).[128]

CONCLUSION

In conclusion, if the federal government continues with and properly executes its consultation plan for Energy East, it will likely meet its legal obligations in terms of consulting with the appropriate Indigenous groups on this project.

This paper is intended as a resource for those looking to understand the state of the Government of Canada's consultation efforts with Indigenous groups on Energy East, as well as the law of the duty to consult that applies to similar situations. As the government is reforming the National Energy Board, depending on the nature of the new tribunal and/or decision-making process for projects, this work may primarily be useful as a reference of the former system.

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[125] Jérémie Gilbert & Cathal Doyle, "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford, UK: Hart Publishing, 2011) at 316-317 [Gilbert & Doyle]. See also Centre for International Governance Innovation, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws" (2017) at 74 [UNDRIP Implementation].

[126] *UNDRIP*, *supra* note 123, articles 19, 32(2). See also UNDRIP Implementation, *supra* note 125 at 74.

[127] James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, HRC Res 6/12, UNHRC, 12th Sess, UN Doc A/HRC/12/34 (2009) at paras 37-38 [Anaya]. See also UNDRIP Implementation, *supra* note 125 at 74.

[128] Elizabeth McSheffrey, "Energy East Consultation on Hearing Design Will Focus on Indigenous Voices", *National Observer* (5 June 2017), online: <http://www.nationalobserver.com/2017/06/05/news/energy-east-consultation-hearing-design-will-focus-indigenous-voices>.

However, it will likely remain relevant for Energy East, as it seems that the government will consult and make its decision on the pipeline under the current legislative framework.