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SUPREME COURT OF CANADA DECISIONS:
Chippewas of the Thames & *Clyde River Hamlet*

Frequently Asked Questions	
What are the new decisions about?	These cases deal with the Crown's duty to consult and accommodate Indigenous Peoples, as it plays out in proceedings before the National Energy Board (NEB). The cases raised questions about the role of the NEB and what is required to meet the standard of "deep consultation". *Chippewas of the Thames* is about an NEB process that led to the approval of changes to the Line 9 Pipeline, including more oil flowing through the pipeline, a change in the direction of the flow of the oil, and a change in the kind of oil the pipeline carries. These changes affect the territory of the Chippewas of the Thames, and their Aboriginal and treaty rights. *Hamlet of Clyde River* is about the NEB's approval of major seismic testing in the waters of Baffin Bay and Davis Strait that would seriously impact marine life in the area, and affect the rights of the Inuit to harvest marine mammals (which is their treaty right under the *Nunavut Land Claim Agreement*.) The Supreme Court held that the Crown can rely on the NEB process completely to satisfy the duty to consult. If an Indigenous group raises the issue of whether the consultation process was adequate before the NEB, the NEB is also required to assess whether the Crown has assessed its duty to consult before it can issue a project approval. The Court found in *Clyde River* that deep consultation requires a robust process that focuses on the impact on the rights (not just the environment), major opportunities for Indigenous participation, and accommodation that reflects the seriousness of the impacts and the rights in question. In *Clyde River,* the court said consultation was inadequate and cancelled the NEB's approval. The Supreme Court said that the duty to consult was satisfied in *Chippewas of the Thames* by the NEB process even though the Crown did not participate. The NEB provided the Chippewas of the Thames with an opportunity to participate, assessed the risk of the project and found that it was minimal, and adequately accommodated their concerns.
Can the National Energy Board's	• Yes. The Crown can rely entirely on the NEB (or other regulatory tribunals) to satisfy the duty, but it needs to inform Indigenous groups in advance that it is

process satisfy the Crown's duty to consult and accommodate?	doing so. • The Crown does not have to participate in NEB process, but must ensure the duty to consult is met prior to any approval. • The Court found that given the NEB's specialized expertise, experience in conducting consultations, and broad remedial powers (e.g. the ability to impose conditions), the NEB was well placed to both consult and accommodate Indigenous concerns. • If an Indigenous group thinks the consultation process is deficient, it should request that the Crown participate directly. It needs to make this request in a timely manner.
Does the National Energy Board have to assess whether the Crown has fulfilled its duty to consult before it approves a project?	• Yes. The NEB has the power to decide questions of law, and so it has to decide whether consultation is sufficient. It may not approve a project where the Crown has not fulfilled its duty to consult and accommodate. • If an Indigenous group thinks the NEB's consultation process was inadequate, it should raise the issue before the NEB.
How does this decision affect other tribunals that make decisions that impact Indigenous rights?	• It all depends on the tribunal in question, and what powers that particular tribunal is given by its statute. • If the tribunal has the power to decide questions of law *and* the issue is put to the tribunal by an affected Indigenous group, the tribunal will be required to determine whether the duty to consult is met before it issues any project approval. • The Crown can rely on other tribunals to satisfy its duty to consult, if those tribunals have the power to undertake consultation (e.g. the power to have oral hearing and the power to order additional information on project impacts), and the power to order accommodation.
What does Clyde River say about consultation in the context of a modern treaty?	• If an affected Indigenous group is a party to a modern treaty and perceives the consultation process to be deficient, it should request direct Crown engagement in a timely manner if the regulatory process (like the NEB) is not fulfilling the obligation to consult and accommodate. • The existence of a modern treaty right and the potential for damages to a right that cannot be compensated for will likely mean that the scope of the consultation falls at the highest end of the spectrum.
What is "deep" consultation?	• Deep consultation is the highest level of Aboriginal consultation and accommodation, where the level of engagement by the Crown, and the specific steps of address impacts on Aboriginal rights, must be more significant. It is, for instance, more than mere notification about a project .

When is the Crown required to do "deep" consultation?	• Deep consultation is required where: (1) there is a strong evidence that the Aboriginal right exists (for example, because it is affirmed in a treaty); (2) the Crown decision could significantly impact on that right; and (3) the risk of damage that can't be financially compensated is high (citing *Haida* decision)
What does deep consultation include?	• Deep consultation can include: o the opportunity to make submissions; o formal participation in the hearing process; o written reasons showing how Indigenous communities' concerns were considered and addressed (focusing on the impact of the project asserted right and not just environmental impacts more generally); o participation opportunities for affected Indigenous groups, and funding to support their participation; o an oral hearing to present evidence; o funding to allow the Indigenous community to submit its own scientific evidence; o the opportunity to present evidence, test the evidence of the proponent and make final arguments; o consideration of barriers created by limited technology access (for example, lack of easy access to the internet); and, o participation as members in an environmental assessment panel.
Is the Crown required to address cumulative impacts in satisfying the duty to consult?	• Yes, in some cases. Cumulative effects of an ongoing project and historical context can inform the scope of the duty to consult and accommodate. This approach acknowledges the current state of affairs and the consequences that flow from it.
Do the NEB's reasons need to address the duty to consult?	• The short answer is "it depends". • If an Indigenous group raises concerns about the consultation process before the NEB, the NEB will usually be required to provide written reasons about the duty to consult. It will not typically be enough to consider the "environmental impacts" of the proposed project; the NEB must focus its analysis on the Aboriginal right in question. • But the Court makes clear that explicit written reasons on the duty to consult and accommodate will not be required in every case. This means that where the duty to consult falls at the low end of the spectrum, written reasons on the duty to consult may not be required. • And the NEB is ***not*** required to do an explicit *Haida* analysis – to assess the strength of the right and the impact of the project to see whether the duty is at "low", "medium" or "high" end of the spectrum, and then to determine if process adequate for scope of the duty.