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SCC Decisions: *Chippewas of the Thames* & *Clyde River Hamlet*

On July 26, 2017, the Supreme Court released its long-awaited decisions in *Hamlet of Clyde River v TGS*, 2017 SCC 40 and *Chippewas of the Thames v. Enbridge*, 2017 SCC 41. These two decisions clarify the role of the National Energy Board ("NEB") in the consultation process, the scope of what is required for "deep consultation," and whether and how the NEB's reasons need to address the duty to consult.

KEY IMPLICATIONS FOR THE DUTY TO CONSULT AND ACCOMMODATE

The Crown's duties in the consultation process

- The Crown can rely on the National Energy Board to satisfy its duty to consult. It may be able to rely on other regulatory tribunals as well if their statutes give them similar powers to hear from Indigenous peoples and accommodate their concerns.
- Whether a particular regulatory process was enough to satisfy the duty to consult and accommodate will depend on the facts of the case.
- Where the question is put to it, a tribunal like the NEB must decide whether the duty to consult has been met PRIOR to making any approval.
- If an Indigenous nation is now happy with the consultation process before a regulatory tribunal, it needs to let the Crown know.

What is needed for deep consultation?

- Meaningful consultation that achieves mutual understanding of the core issues — the potential impact on Aboriginal rights, and possible accommodations
- The focus must be on the impact of the project on Aboriginal *rights*, not the impacts on the environment.
- Affected Indigenous peoples must be able to participate fully in the process - make submissions, present oral evidence and final arguments, submit scientific evidence, and obtain written reasons.
- Lack of funding for Indigenous participation will likely not meet duty to consult.
- Where there are serious potential impacts to treaty rights, the accommodation ordered needs to be significant, responsive to the rights-holder's concerns, and proportional to the impacts.

Other takeaways

- Cumulative effects of an ongoing project can inform the scope of the duty to consult and accommodate.
- We are still a long way from recognizing free, prior informed consent and the nation-to-nation relationship in Canadian consultation law.

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WHAT ARE THE DECISIONS ALL ABOUT?

Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS) et al

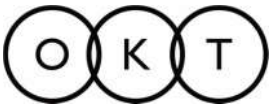
TGS, a geosciences testing company, applied to the NEB for approval under para. 5(1)(b) of the *Canada Oil and Gas Operations Act* [("*COGO*")] to conduct seismic testing on the waters of Baffin Bay and Davis Strait. The testing would involve detonating air guns far louder than a jet engine 24 hours a day, five months a year, into ecologically sensitive and culturally vital waters. These waters are within the territory of the Inuit, in the region of the *Nunavut Land Claims Agreement* ("NLCA"), which is a modern treaty. The NLCA provides constitutional protection for Inuit rights to harvest marine mammals in the area.

The NEB is responsible for approving projects under the *COGO*. The NEB required an environmental assessment, and through the course of that process communicated back and forth with TGS, asking them to provide more information. The Inuit community of Clyde River complained that the consultation process was flawed because, while meetings were held, the meetings were poorly organized, timed to coincide with the harvest, and therefore poorly attended. In addition, TGS did not answer most of the questions the Inuit raised at those meetings. Following direction from the NEB, TGS agreed to work with the affected Inuit communities to design an Inuit traditional knowledge study, and filed more information with the NEB – over 3,900 pages of material. Only two documents were translated into Inuktitut. This huge package of material was sent by email to Clyde River, a community with limited and very expensive internet access. The Inuit were given no opportunity to comment on this material and no further meetings were held. The federal government did not participate directly in the consultation process. There was no oral hearing.

The NEB issued the authorization including the conditions set out in its environmental assessment report, concluding that if the conditions were met there were unlikely to be any significant environmental effects.

The Supreme Court concluded that while the NEB was capable of satisfying the duty to consult, and was required to assess whether the duty to consult was met, there was not enough consultation and accommodation in this case. The court found that the consultation process failed for three reasons:

1. The NEB focused on the impact on the environment, not the impact on the Inuit rights themselves;
2. The Crown did not make clear it was relying on the NEB process to meet the duty to consult; and
3. There was limited opportunity for Inuit participation and inadequate accommodation in view of the seriousness of the impacts on the Inuit's treaty rights.



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Chippewas of the Thames First Nation v Enbridge

In 2012, Enbridge filed an application under s. 58 of the *National Energy Board Act* ["*NEB Act*"] to modify a segment of the Line 9 pipeline. The modification would change the direction of the oil's flow, increase the amount of oil transported, and change the material transported from diluted bitumen to heavy crude oil. The affected area passed directly through the territory of Chippewas of the Thames, over which they hold Aboriginal and treaty rights.

The NEB held a public hearing at which the Chippewas of the Thames participated (and received funding to assist with their participation). The federal government relied on the NEB to carry out consultations with the Chippewas of the Thames and refused the First Nation's requests for direct Crown consultation. The NEB approved the project subject to some conditions, concluding that any impacts on the rights of the Chippewas of the Thames would be minimal and appropriately mitigated. The NEB's reasons did not expressly identify the Aboriginal or treaty rights at stake, specifically address the concerns raised by the Chippewas of the Thames, assess the level of consultation required, discuss accommodation, or address the NEB's role in ensuring the Crown's duty to consult was satisfied.

The Supreme Court found that it was not necessary for the Crown to have participated in the NEB process or to have consulted directly. The Court upheld the NEB's conclusion that the impacts on the rights of the First Nation were limited and any concerns were adequately addressed through conditions on the permit. In view of this, it concluded the consultation process was adequate as the First Nation had the opportunity to participate in the NEB hearing to raise its concerns and was provided funding to participate.

WHAT ARE THE IMPLICATIONS?

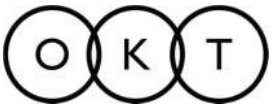
The Role of the NEB in the Consultation Process

A big question in these cases was the role of the NEB in the consultation process.

In the Supreme Court's earlier decision in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* ("*Carrier Sekani*"), the Court held that regulatory tribunals like the NEB can have four possible roles:

1. To determine whether adequate consultation has taken place;
2. To actually conduct the consultation with Aboriginal peoples;
3. To both assess AND satisfy the duty to consult; or
4. No role at all

These cases make clear that the NEB may have both roles depending on the circumstances (in practice, it seems likely this will happen in many, if not most cases).



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If the question of whether the Crown did enough consultation is put to the NEB, the NEB must answer that question before it decides whether to approve a project. This means that Indigenous groups likely have to raise this issue to press the NEB to consider whether the consultation provided was enough [*Clyde River,* at para 41].

The NEB process can also form part or all of the Crown's consultation process, even if the Crown does not participate directly before the NEB. The Supreme Court came to this conclusion by assessing the powers given to the NEB by its enabling statute - powers to hold hearings, order studies, fund Indigenous participation, and - most importantly - insist on accommodation of Indigenous concerns as a condition of project approval.

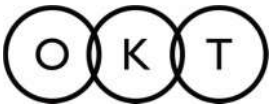
This does not mean, however, that the NEB process will satisfy the Crown's duty to consult in every case. The duty to consult ultimately rests with the Crown, and where the NEB process falls short, the Crown must do the additional consultation required to meet its constitutional obligations. If the process is not sufficient, the Court held that Indigenous groups must seek the Crown's direct involvement in a timely fashion [*Clyde River,* at para 22].

Impact of the NEB Modernization Process - the NEB's Role May Change

The federal government is currently in the process of moving toward draft legislation coming out of its reviews of its environmental legislation. In May, the Expert Panel on the Modernization of the NEB released its report on its recommended changes to the NEB. This follows on the heels of the Expert Panel Report on the Environmental Assessment Processes. Both reports were highly critical of the NEB's ability to adequately engage with Indigenous peoples fairly and both recommended major changes to the NEB. The EA Expert Panel recommending removing the NEB from any EA oversight, and the NEB Modernization Panel recommending replacing the NEB with a new, restructured body. The NEB Modernization Panel was frank about the concerns: "In our consultations we heard of a National Energy Board that has fundamentally lost the confidence of many Canadians...Canadians described an organization that limits public engagement...does not explain or account for many of its decisions, and generally operates in ways that seem unduly opaque" [at p 7].

In contrast, the Supreme Court in its decision relied heavily on the expertise of the NEB, finding that the NEB was "well-situated" to conduct consultations and deal with the impacts on Aboriginal rights [*Clyde River*, at para 33].

None of the evidence about the serious structural problems and concerns of bias concerns in the NEB were raised before the Supreme Court. In addition, the Discussion Paper on the environmental processes released by the government at the end of June indicates that the federal government may make some modest changes to the NEB's process. How those changes will alter the Court's assessment of the NEB's role remains to be seen. If the changes are significant, it may be that the Supreme Court



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will consider again in a future case whether the NEB can carry out consultation, and assess whether the Crown's duty to consult and accommodate is met.

How do you know if *this* is your consultation process?

In *Clyde River,* the Supreme Court said that Indigenous communities are entitled to know whether the Crown intends to rely on the NEB or another regulatory process to discharge some or all of its duty to consult [*Clyde Rive*r, at para 23]. The intention of this is to help rights-holders properly direct their resources and attention to the "real" consultation process, and give them a chance to raise red flags early in the process if the consultation process they are being offered is not good enough.

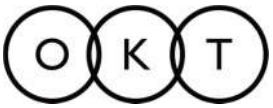
However, the Supreme Court undermined this sensible conclusion in *Chippewas of the Thames.* The Chippewas of the Thames did not receive any notice from the Crown that it intended to rely on the NEB to satisfy its duty to consult and accommodate until *after* the NEB process was already complete. The Court held that this was okay, since it would have been clear to the Chippewas of the Thames from the circumstances that the Crown intended to rely on the NEB. These circumstances included the fact that the NEB wrote to the First Nation to give them notice of the hearing and to invite them to participate; that the Chippewas of the Thames participated in the NEB process and were aware that the NEB had the final decision-making authority for the project; and that they understood that no other Crown entity would participate in the NEB process [*Chippewas of the Thames,* at para 46]. If this is notice, notice isn't worth much.

The result in *Chippewas of the Thames* means Indigenous groups need to be attentive to indirect indications that the Crown may be relying on the NEB to discharge its duty to consult. In the face of this, it would be a good idea to ask the Crown early on in a regulatory approval to clarify whether it intends to rely on the NEB process to discharge or partially discharge its duty to consult and accommodate. If you write to the Minister and ask, "Which part of the Crown is in charge of consultation on this project?", they owe you an answer. The Crown has to be up front about when and how it plans to consult.

What does this decision tell us about the duty to consult before other boards and tribunals?

What happens to other Tribunals depends on the statute that gives the Tribunal its powers.

Generally, if a tribunal has the power to decide questions of law, it can assess whether the Crown has satisfied its duty to consult before it issues any project approvals. There may be situations, however, where a tribunal is expressly forbidden, by its enabling legislation, to make this assessment (an example of such a tribunal is the Alberta Energy Regulator).



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Whether the Crown can rely on a tribunal to do the actual consultation (in other words, the back and forth engagement with an Indigenous group to understand and address its concerns about impacts on Indigenous rights) depends on whether the tribunal's statute gives it the power to provide meaningful consultation and accommodation. For example, does it have the power to order that Indigenous groups be funded to participate? Can it hear evidence? Hold hearings? Order that Indigenous groups be accommodated? All of these questions will be important in determining whether the Crown can rely on a tribunal to conduct consultation. And, in every case, at the end of the day, the duty to consult and accommodate rests with the Crown itself. A tribunal may have the power to conduct consultation, but that does not mean that the consultation process it offers will be sufficient to discharge the Crown's constitutional duty.

Cumulative Impacts

One of the key questions in *Chippewas of the Thames* was how cumulative impacts figure into the duty to consult analysis. At issue in the case was a modification to the Line 9 pipeline that ran through the Chippewas of the Thames' territory. The modification itself posed real risks to the Chippewas' rights. However, to fully understand the scope of the impact would be impossible without attention to the cumulative impact of a significant amount of existing pipeline work in the area, all of which had been undertaken without proper Indigenous consultation processes.

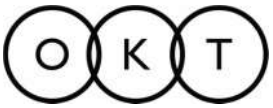
The Court said that these cumulative impacts are part of the picture. Even though the focus of the duty to consult is not on "historical grievances," it may be impossible to understand the seriousness of the impact of a project without considering this larger context of ongoing and cumulative effects. These effects can properly inform the scope of the duty to consult [*Chippewas of the Thames,* at para 42]. For Indigenous groups whose territories have been traversed by pipelines for many years, this offers some foothold for broader recognition of the serious cumulative effects that typically arise.

However, the *Chippewas of Thames* decision still minimizes the very real ongoing consequences of past development (where proper consultation did not occur) on the ability to achieve reconciliation when dealing with new projects. While the Court signals that cumulative impacts are part of the larger context to be considered when determining the potential impact of a project, it stops short of giving these impacts the central role they deserve.

Understanding Deep Consultation

The Court provided some guidance on what is required to satisfy a duty of "deep consultation"- that is, the consultation required when an Indigenous group has a strong claim to an Aboriginal or treaty right and where the potential impacts of a proposed project on that right are significant.

The Court did not set out a list of "must-haves" in every deep consultation process. However, the cases make clear that, depending on the facts, deep consultation may require:



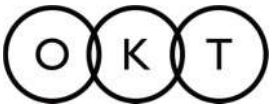
- The opportunity to make submissions;
- Formal participation in the hearing process;
- Written reasons showing how Indigenous communities' concerns were considered and addressed (focusing on the impact of the project on the asserted right and not just environmental impacts more generally);
- Participation opportunities for affected Indigenous groups, and funding to support their participation;
- An oral hearing to present evidence;
- Funding to allow the Indigenous community to submit its own scientific evidence;
- The opportunity to present evidence, test the evidence of the proponent and make final arguments;
- Consideration of barriers created by limited technology access (for example, lack of easy access to the internet);
- Participation as panel members in an environmental assessment panel; and
- Appropriate accommodations.

There are a number of hopeful signals in the Court's reasons on this issue, but the law about consultation still has a long way to go if it is to reflect and reinforce a nation-to-nation relationship between the Crown and Indigenous rights-holders.

A) A Renewed Focus on Accommodation

One bright spot is a renewed focus in the *Clyde River* decision on accommodation as a substantive requirement of the consultation process. Previous cases have said that the consultation process must be more than just an opportunity to "blow off steam before the Minister proceeds to do what she intended to do all along" [*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69]. Accommodation has always been at the heart of this.

These new decisions re-affirm this idea, and begin to articulate some basic principles for how we know if the accommodation was sufficient. In *Clyde River,* a lack of accommodation was central to the Court's conclusion that the consultation process that had taken place did not conform to the demands of the constitution. The Court said that the changes the proponent had made were "insignificant concessions in light of the potential impairment of the Inuit's treaty rights" [at para 51]. This tells us that accommodation must be both *significant* and *proportionate* to the harm that will be caused by the project. The Court also said that part of the problem with the accommodations given was that some of the "concessions" were required by industry practice guidelines and in fact had nothing to do with responding to the concerns raised by the Inuit. This suggests accommodation must be *responsive* to the Indigenous rights-holders. Measures otherwise required by law or policy - even if, in substance, they go some way towards addressing Indigenous concerns - are not necessarily enough to satisfy the duty to consult and accommodate. Accommodation must be specifically linked to the impact on the



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Indigenous right that it is meant to address. Project modifications to satisfy general environmental mitigation concerns will not suffice.

The power to accommodate is also central to whether the Crown can rely on other regulatory tribunals to discharge its duty to consult [*Clyde River,* at para 32]. Coming out of these decisions, there is a strong argument that tribunals cannot properly accommodate the concerns of Indigenous rights-holders and thus cannot discharge the Crown's duty to consult. However, the power to deny a project authorization may be enough for a court to conclude a tribunal has the power to order accommodations.

B) FUNDING FOR PARTICIPATION IN CONSULTATION

Another hopeful part of the Court's reasons was the focus on funding for Indigenous participation in the consultation process (see, for instance, *Clyde River*, at para 47). The reasons signal that it's not enough to give affected Indigenous communities participation rights at the NEB if they are not given the funding they need to take an active role.

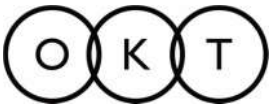
This is important. It recognizes the power and resource imbalance between Indigenous groups on the one hand, and Crown parties and project proponents on the other. Indigenous rights-holders may face a number of proposed projects in their territory/homeland at the same time. Indigenous communities typically have other goals and priorities they need to pursue. Resources are limited. Centuries of colonization may have disrupted or interfered with traditional knowledge sources. Work is required to gather that knowledge. All of this means that the right to come before the NEB, on its own, is not enough. Participation rights are not meaningful if the rights-holder does not have the time and resources to take an active role, call its own evidence and get the legal and technical advice it needs. Participant funding helps to level the playing field.

More than that, it is not fair to ask a community to expend its own resources to participate in a consultation process for a project that benefits a private company or Crown actor, but negatively impacts Indigenous rights. The Ontario Superior Court reflected on this recently in *Saugeen First Nation v Ontario,* 2017 ONSC 3456 at paras 158-159.

C) MEANINGFUL INFORMATION AND MUTUAL UNDERSTANDING

The reasons also make clear that a key goal of the consultation process is "mutual understanding on the core issues - the potential impact on treaty rights, and possible accommodations" [*Clyde River*, at para 49].

To achieve "mutual understanding", proponents must respond to the questions about the project in a meaningful, digestible and accessible way so that Indigenous groups can raise their concerns. All of this must happen well before project approval. In *Clyde River*, the proponents provided answers to questions raised by the Inuit in a 3,926 page "data dump". The information was provided in English; only two documents translated into Inuktitut. For most Inuk, the file was too large and expensive to



download and review in a remote community with very limited and expensive internet access. This, the Court said, was not true consultation [para 49].

This emphasis on shared understanding and providing information in a meaningful and timely way sends an important signal to the Crown and to proponents wishing to undertake projects in Indigenous territory. It sets a common goal of coming to a shared understanding of the impact of the project on Indigenous rights and the required accommodations. This should prevent the Crown and proponents from proceeding without 1) providing digestible and accessible information to Indigenous parties; and 2) funding the development of, receiving and understanding concerns about the Project, including concerns rooted in Traditional Knowledge, raised by rights-holders.

D) WHAT ABOUT FREE, PRIOR, INFORMED CONSENT?

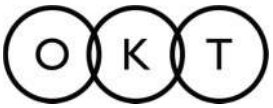
The Court stopped short of recognizing the principles of free, prior, informed consent (FPIC) as recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This is unfortunate, since FPIC and UNDRIP represent the product of decades of work by Indigenous groups and governments to establish practical principles for consultation that recognize the nation-to-nation relationship between governments and Indigenous peoples. FPIC also offers practical relationship-focussed benchmarks for understanding whether Indigenous rights impacts have been addressed.

Although the Court did not explicitly rely on FPIC, some of its underlying principles were reflected in the decision.

The right to free, prior, informed consent is enshrined in Articles 19 and 32(2) of UNDRIP, which state:

> Art 19. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> Art. 32(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.

In practice, the principles of free, prior, informed consent serve to adjust the balance of power in resource development processes so that more influence falls into the hands of the people and communities who will have to endure the consequences of the proposed activity. At the hearing in *Clyde River*, drawing on the analysis of the Special Rapporteur on Indigenous Rights, the Inuvialuit Regional Corporation argued that FPIC can be distilled into six key principles:



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a. **Freedom from force,** intimidation, manipulation, coercion or pressure by a proponent;
This component reflects the fact that consent cannot be valid if it is extracted through force, threats, or intimidation.

b. Mutual **agreement on a process** for consultation;
This element requires the Crown and the rights-holders to come to a common understanding about what steps are required to obtain reasonable consent.

c. **Robust and satisfactory engagement** with the Aboriginal group prior to approval;
Robust engagement requires the commitment of time, energy and resources to understand the positions and interests of the Aboriginal group.

d. Sufficient and timely **information exchange**;
This element is necessarily multi-directional. It requires an exchange of information on the nature of the project, as well as a demonstrated understanding of the Aboriginal right at stake and the specific nature of the potential impacts on the Aboriginal interests in question, including impacts on the rights of future generations.

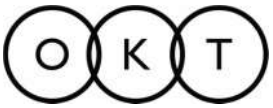
e. **Proper resourcing**, both technical and financial, to allow the Aboriginal group to meaningfully participate;
The party seeking to obtain consent must ensure that the treaty rights-holder has adequate financial and technical resources to responsibly study the risks and rewards of a proposed development on present and future generations, to understand their legal rights with respect to the proposal, and to present their positions for consideration.

f. Shared objective of obtaining the **reasonable consent** of the Aboriginal group;
Consent in FPIC is "a complex process of building a relationship, exchanging information, conducting analysis" and fully integrating an Aboriginal community in the process of discussion, analysis and decision-making[1]*. The objective of consent acts as overarching guide to the FPIC process.*

Freedom from force and intimidation was already enshrined in Canadian law. After *Clyde River,* three more of these principles are gaining a foothold in Canadian law on the duty to consult:

★ The Court emphasized the importance of proper resourcing, and signalled that consultation may be insufficient to discharge the Crown's constitutional obligations where these resources are not provided. This reflects the "proper resourcing" requirement.

[1] Lorraine Land, "Who's Afraid of the big, bad, FPIC? Evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy" (2016) 4:2 *Northern Public Affairs* 42 at 43



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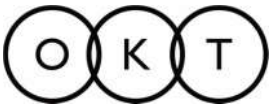
- ★ The Court also highlighted the crucial role of information exchange. In *Clyde River,* the failure to provide digestible information in a timely way was part of why the consultation process failed to pass constitutional muster.
- ★ And the Court emphasized that the failure to reach *and demonstrate* an understanding of the impact of the Project on Inuit treaty rights is essential in deep consultation. In particular, where Indigenous groups have "squarely raised concerns about Crown consultation" before the NEB, the NEB will usually have to address those concerns in its reasons. It is <u>not</u> enough for the NEB to address "environmental impacts" generally - the focus has to be on the impact of the project on the rights asserted by the Indigenous group. This, in turn, supports robust engagement with rights-holding groups.

Two principles are left out, however: participation of the rights-holding group in the design of the consultation process, and structuring the consultation process around the objective of obtaining reasonable consent.

The problem is that these last two principles are probably the most important and transformational parts of FPIC. Without them, deep consultation looks a lot like a traditional court process, with an oral hearing in which Indigenous rights-holders can participate actively.

In Canadian law, all people are entitled to "procedural fairness" when the government makes a decision that affects their rights, privileges or interests. When the courts talk about procedural fairness, they usually mean the right to get notice of a decision that affects you, the right to participate in the decision by making submissions or even having an oral hearing, and the right to get some kind of reasons from the decision-maker that explain why the decision gets made. Like the duty to consult, procedural fairness falls along a spectrum. How much a person gets to participate, and what kind of reasons are required, depends on a number of factors, including how much the decision being made looks like a decision that would be made in court, the statute that gives the decision-maker her power, the importance of the decision to the people affected, and the legitimate expectations of the person who is affected (for instance, whether the tribunal said they would follow a particular process, but then followed a different process) (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-26).

The procedural rights associated with the deep consultation sound a lot like the rights associated with procedural fairness, particularly at the high end of the procedural fairness spectrum. The biggest practical differences are that Indigenous groups may be entitled to funding to help them meaningfully participate, and that there is a substantive right to accommodation that is significant, proportionate and responsive. The funding requirement is important since it recognizes that power and resource imbalances can affect what participation looks like. The accommodation piece is central because it is the only thing that prevents consultation from being just a chance to blow off steam before the Crown does what it otherwise would have done. But, fundamentally, *Clyde River* still reflects a conservative



view of consultation that treats Indigenous rights-holders much like they are any other person affected in a serious way by a government decision.

This is not the right way to think about Indigenous rights in Canadian law. Indigenous rights are constitutional rights; the duty to consult and accommodate flows from these rights, and so should reflect their special importance. More importantly, though, the duty to consult and accommodate is a reflection of ongoing Indigenous sovereignty and nationhood. A court-like process, determined solely by the Crown and in which an approval can go forward even where there is no consent, does not reflect the sovereignty of Indigenous rights-holders (or asserted rights-holders) with respect to their own traditional lands and resources. Since the consultation process is still dictated by the Crown, it does not reflect a nation-to-nation relationship. No nation-to-nation relationship can be built on unilateral Crown power.

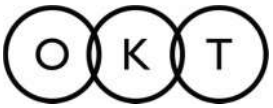
What would deep consultation that goes beyond procedural fairness look like? UNDRIP gives us the blueprint. The two pieces the Court did not recognize or affirm in this decision are central in taking consultation beyond mere procedural fairness and towards something that recognizes Indigenous sovereignty and the nation-to-nation relationship - the right to co-design the consultation process, and the objective of consent. These are the two pieces that more fundamentally challenge the idea that the Crown alone has the right to decide what happens on Indigenous lands.

Principles respecting the Government of Canada's relationship with Indigenous peoples

Canada's has recently released a set of principles for its relationship with Indigenous peoples. These principles help illuminate some of Canada's thinking about the implementation of UNDRIP. Some commentators, such as Professor John Borrows have expressed cautious optimism about these new principles.

A close reading indicates that Canada's embrace of FPIC is still very lukewarm: "To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together." In particular, Canada's principles do not fully accept consent, which lies at the heart of FPIC . In fact, Canada does not even appear to accept that consent is required for activities that will impact Aboriginal title lands, even though the Supreme Court already said that it is (*Tsilhqot'in Nation v British Columbia,* 2014 SCC 4 at para 76). Canada admits only that the "standard to secure consent of Indigenous peoples is strongest" in cases of Aboriginal title. Canada's "processes and approaches" must go much farther than just aiming to secure consent, especially in cases of proven rights, if Canada hopes to be consistent with the internationally-accepted FPIC standard.

Part of the barrier to FPIC for the courts and for Canada appears to be the continued misperception



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that consent is a "veto". However, consent under FPIC is not a veto, but a *process* by which parties build relationship, share information and conduct analysis together so that Indigenous peoples are fully integrated into the process of discussion, analysis, and decision-making at every stage. The objective of consent acts as an overarching guide to this process. Until the courts and Canada move away from the "no veto" language there is little hope of realizing the promise that FPIC presents for both Indigenous and non-Indigenous Canadians.

Conclusion

This brings us back to the bigger picture. The Canadian government has made a lot of gestures in the last two years towards the importance of reconciliation, addressing historic injustices, and building a nation-to-nation relationship. The Canadian law on Aboriginal consultation, however, remains a long way from recognizing and reflecting this kind of relationship. Unilateral Crown power remains the foundation that underlies what the Court sees as a just process. While the *Clyde River* and *Chippewas of the Thames* decisions provide some helpful clarification on what deep consultation means and about the role of the NEB in the consultation process, they still haven't addressed this fundamental problem.