

Backgrounder

Backgrounder on Clyde River's case against seismic testing at the Supreme Court of Canada

28 November 2016 (Ottawa) – On November 30, 2016, the Supreme Court of Canada (SCC) will be hearing the cases of *Hamlet of Clyde River et al. v. Petroleum Geo-Services Inc. (PGS) et al.* (36692) (“Clyde River”) and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. et al.* (36776) (“Chippewas”). The decisions could have profound implications for how government consults with Indigenous peoples in the future, particularly in respect to oil and gas development.

The Supreme Court has established that in decisions potentially affecting the rights of First Nations, Inuit or Metis peoples, there is a Crown obligation to ensure meaningful consultation so that Indigenous peoples' concerns can be identified and accommodated as needed. The scope of this duty varies depending on the rights at stake and the potential for harm. As a result, the scope of the duty needs to be determined based on the facts of each case.

The two cases before the SCC concern the role of the National Energy Board (NEB), a government-appointed regulatory tribunal responsible for oversight of many aspects of oil and gas development and related infrastructure.

In the *Clyde River* case, the Federal Court of Appeal (the lower court) found that the NEB could undertake consultation with Indigenous peoples and assess the sufficiency of any consultation carried out by the project proponent. The Court found that the Crown could rely on the NEB's regulatory process to assess whether the duty to consult had been met. However, in the *Chippewas* case, the lower Court determined that because the Crown was not a participant in the decision-making process by the independent tribunal, the NEB did not have an obligation to consider or help fulfill the Crown's duty to consult.

Both Clyde River and the Chippewas argue that the Crown has the ultimate duty to consult and accommodate but failed to discharge this duty by relying on a flawed NEB process. Furthermore, *Clyde River* argues that the duty to consult was at the high end of the spectrum and therefore required significant involvement of the Inuit community and substantial accommodation of their rights, which did not occur.

Greenpeace Canada hopes to see a decision that states that the Crown must be more diligent in their Duty to Consult. Greenpeace Canada hopes that the consultation process is more involved and meaningful which could mean that Aboriginal rights or interests that may be threatened by energy projects will be taken more seriously. Moving towards a framework of consent and not just consultation will mean that Aboriginal communities will have more power and say in the projects and the approval process. Ideally proponents start thinking about environmental and aboriginal concerns at earlier stages of their projects and the Crown will work closer with Aboriginal communities and meaningfully engage them at earlier stages in the development of any project.

With the two cases now before it, SCC has the opportunity to clarify the confusion surrounding the role of administrative and regulatory tribunals, particularly the NEB, in respect to the duty to consult and accommodate. Ideally the SCC will provide clarity on the law and a concrete way to move forward for Indigenous peoples, government and industry.

See timeline on next page.

1970s and early 1980s

Clyde River experiences the impacts of seismic blasting for oil exploration. The community recalls the deaths of fish and seals who had been deafened.



"We heard about seismic testing being done in the western Arctic and people experiencing what they did, and in the early '80s they did a little seismic testing right near Clyde.

And people saw what that did to the seals. And this time around, people know a little bit about it, and they didn't want anything to do with it"

— Jerry Natanine, Mayor of Clyde River

2000s

MAY 2011

A group of Norwegian companies files an initial Project Description with the National Energy Board.

MAY 2013

The Clyde River Hamlet and Hunters and Trappers Organization pass a joint motion opposing the project, and send a letter reiterating their concerns to the NEB.

2014



JULY

Clyde River invites Greenpeace to support their fight against seismic blasting in Baffin Bay and Davis Strait.



JULY 23

Members of the Clyde River community hold a public protest against seismic testing and call on Environment Minister Leona Aglukkaq to engage with them.

JULY 28

Clyde River applies for a judicial review of the NEB approval.



SEPTEMBER

A banner that reads "We Stand With Clyde River" with Inuktitut translation is displayed at the largest climate march in history in New York City.

NOVEMBER 12-15

All 25 of Nunavut's mayors, as part of Nunavut Association of Municipalities (NAM), pass a resolution supporting Clyde River's legal struggle.

NOVEMBER

Online petitions are launched and attract the support of over 300,000 individuals from around the world.

2015



MARCH

A coalition of Indigenous, Human Rights, and Environmental organizations form the Clyde River Solidarity Network and Naomi Klein and Lucy Lawless add their voices to the cause.



APRIL

Clyde River's case is heard at the Federal Court of Appeal.



MAY

Seismic companies cancel their plans to explore for oil in Baffin Bay and Davis Strait for 2015.



JUNE

Emma Thompson releases a statement in support of Clyde River.



AUGUST

Clyde River's case is dismissed by Federal Court Judges.



OCTOBER

Clyde River seeks leave to appeal at the Supreme Court of Canada.

2016



MARCH

The Supreme Court of Canada grants Clyde River leave to appeal their case.



NOVEMBER 30

Clyde River and the Chippewas of the Thames First Nation are set to present their cases at the Supreme Court of Canada. Hundreds of supporters are expected to attend a solidarity rally in Ottawa.