Consultation case law update: *Clyde River*

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Outline

- 1. Why is this case important?
- 2. What did the court decide?
- 3. What are the implications for consultation?

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Why is this case important?

- Implementation through consultation
- How are modern treaty rights being protected day to day?
- Important for the what the court did and what the court did not do

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What the court did

- Re-affirmed consultation requirement: public interest not served by ignoring treaty rights
- Clarified aspects of the duty to consult
- Allowed Crown to fulfill consultation through regulatory processes alone
- Required assessment of impacts to rights – not just environmental effects

What the court did not do

- Did not invoke UNDRIP
- Did not invoke free, prior and informed consent for “deep consultation”
- Limited cumulative effects analysis

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Clyde River

- Proposed offshore seismic testing for oil and gas
- Inuit of Clyde River concerned that testing would impact ability to harvest marine mammals
- (food, economic, cultural, ceremonial)

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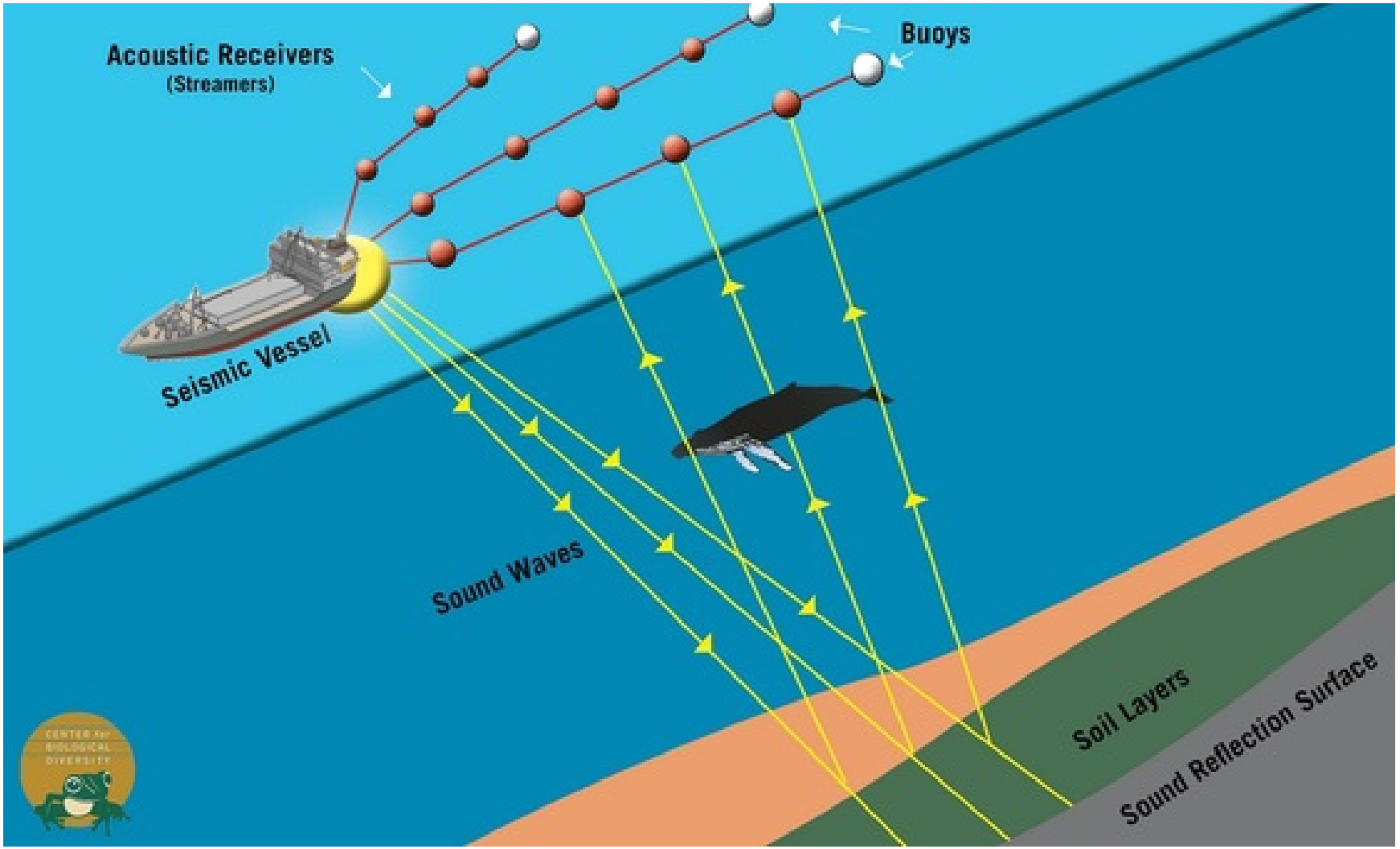

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Clyde River

- NEB had power to make final decision approving testing
- Proponent carried out consultation
- NEB approved testing based on application and letters of concern
- Clyde River challenged that approval

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Headlines

Clyde River scores big win for Nunavut Inuit at the Supreme Court

Canada's highest court quashes seismic testing scheme, saying NEB failed to perform its duty to consult

POLITICS

National Energy Board Failed To Properly Consult Clyde River On Seismic Testing, Top Court Rules

Supreme Court quashes seismic testing in Nunavut,

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How did Court get there?

- Key legal issue: can Crown rely wholly on its regulatory processes to discharge duty to consult?
- Crown response to *Haida*:
  - Become proficient at consultation
  - Create regulatory processes that reduce opportunities for direct consultation

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Consultation through regulation

- (21) "it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult"
- (30) "Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult … in whole or in part"
- (22) "the Crown always holds ultimate responsibility for ensuring consultation is adequate"

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Why was this process inadequate?

- Deep consultation required, but lots of problems:
  - lack of participant funding
  - unresponsiveness of proponent limited opportunities for participation
  - lack of oral hearing
  - Information inaccessible to Indigenous groups, (e.g. large files and slow internet; lack of Indigenous language translation)
  - Crown failed to indicate it would rely on regulatory process

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Why was this process inadequate?

- Bigger problem: impacts to rights not assessed
- Overarching concern of Court: focus of consultation is impacts to rights, not only to environment
- NEB process geared towards environmental effects, not treaty rights

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Must consider impacts to rights

- [45] Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects per se. Rather, it inquires into the impact on the right. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

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Rights based analysis

- Assessing environmental impacts not the same as assessing impacts to rights
- Minimal impacts on marine mammals does not mean that the right to harvest marine mammals will not be impacted
- Change in harvesting opportunities
- Perception of risk
- This should be focus of consultation, not afterthought

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Key implications

- Reinforces need for land claims organizations to diligently participate in regulatory processes
- Reinforces need to approach regulatory/consultation processes strategically

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Key implications

- UNDRIP has yet to arrive
- Links to federal regulatory reviews
- Protecting rights through consultation will continue to require First Nations to do heavy lifting