

Natural Resource Development in Nunavut and the Duty to Consult

(a seismic shift?)

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Context

- **1982 – repatriation of the Constitution**
- **Section 35 provides protection of Aboriginal and treaty rights**
- **“Aboriginal rights” not defined – the Courts step in**

Some Leading cases on the Duty to Consult and Aboriginal Rights:

- *Haida Nation v. British Columbia (Minister of Forests)*
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*
- *Beckman v. Little Salmon/Carmacks First Nation*
- *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*
- *Paul First Nation v. Parkland County*
- *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 257, 2014 SCC 44

Recent cases and Experience shows...

Indigenous communities want a seat at the table

Expectations are higher – Court decisions and societal change are changing people's views

Courts challenged to balance interests of all stakeholders

Some recent examples from Nunavut

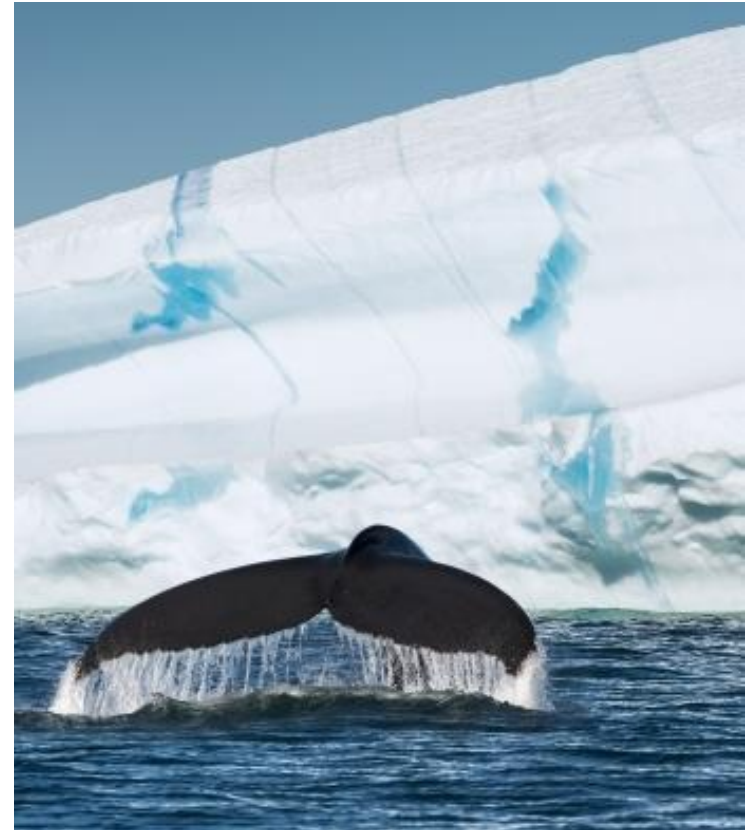
1. Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)

- ***Qikiqtani Inuit Association v. Canada (Minister of Natural Resources), 2010 NUCJ 12***
 - Natural Resources Canada agreement with German research ship R/V Polarstern to map Lancaster Sound using seismic testing
 - Nunavut Impact Review Board (NIRB) approved testing
 - Qikiqtani Inuit Association sought injunction from Nunavut Court of Justice to stop testing
 - Why? Inadequate consultation



1. Qikiqtani Inuit Association v. Canada (Minister of Natural Resources)

- **Nunavut Court of Justice:**
 - Serious issue to be tried: NIRB process may not have fulfilled duty to consult
 - Potential irreparable harm to marine mammals, loss of traditional Inuit hunting grounds & cultural practices
 - Balance of convenience favoured the Inuit
 - **Injunction granted; no appeal.**
 - Future seismic testing?



Source: DeSmog.UK

2. Clyde River (Hamlet) v TGS-NOPEC Geophysical Co ASA (TGS)

- ***Clyde River (Hamlet) v TGS-NOPEC Geophysical Co ASA (TGS), 2015 FCA 179***
 - Proponents want to conduct offshore seismic survey in Baffin Bay and Davis Strait
 - Obtained Geophysical Operations Authorization from National Energy Board (NEB)
 - The Hamlet of Clyde River, Nammautaq Clyde River Hunters and Trappers Organization and Jerry Natanine (the "Applicants") applied for judicial review by Federal Court of Appeal
 - Why? Inadequate consultation

2. Clyde River (Hamlet) v TGS-NOPEC Geophysical Co ASA (TGS)

- **Federal Court of Appeal:**

- Deep consultation required due to serious potential impacts on Inuit hunting, fishing, harvesting rights
- Environmental assessment undertaken by NEB was sufficient to fulfil Crown's duty to consult
- Project delayed for additional consultation; changes addressed community concerns
- **Application dismissed; consultation was sufficient**

Applicants granted leave to appeal to the Supreme Court of Canada on March 10, 2016

To be Heard November 30, 2016

More to come!

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