Court File No. 36692

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

HAMLET OF CLYDE RIVER, NAMMAUTAQ HUNTERS & TRAPPERS ORGANIZATION – CLYDE RIVER, and JERRY NATANINE

Appellants

- and -

PETROLEUM GEO-SERVICES INC. (PGS), MULTI KLIENT INVEST AS (MKI), TGS-NOPEC GEOPHYSICAL COMPANY ASA (TGS) and THE ATTORNEY GENERAL OF CANADA

Respondents

FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. OVERVIEW

1. This Court's jurisprudence on the Crown's duty to consult recognizes that the duty can be fulfilled by the Crown relying on regulatory processes that provide for Aboriginal consultation. Expert tribunals consult with Aboriginal parties in order to make their statutory decisions in a manner that is consistent with section 35 of the *Constitution Act, 1982*. Consultation allows tribunals to understand and accommodate Aboriginal concerns by imposing appropriate changes and conditions on the projects that they review. Reliance on the work of these tribunals maintains the honour of the Crown and facilitates reconciliation.

2. The National Energy Board ("the Board") is an independent administrative tribunal created by Parliament. Though not an agent of the Crown, it is part of the executive branch of government. It must make its statutory decisions consistent with the constitutional recognition of existing Aboriginal rights in section 35. When the Board is asked to issue a licence approving a project that is alleged to have an adverse impact on Aboriginal rights, the Crown's duty to consult is triggered. The Board has issued procedural guidelines setting out its commitment to require and provide extensive Aboriginal consultation in such cases, and to make licensing decisions that take into account and accommodate Aboriginal concerns as far as its jurisdiction allows. The Board recognizes that its Aboriginal consultation may be relied on by the Crown to satisfy the Crown's duty to consult.

3. The Board has the legal capacity to answer constitutional questions necessary to its decision-making. In this case, it was not asked to consider whether its process was adequate to discharge the Crown's duty to consult. Nevertheless, in its Environmental Assessment Decision, the Board reviewed the extensive Aboriginal consultation required in its regulatory process, listed the concerns that it heard from Aboriginal groups, described the changes that it required to the seismic surveying

proposed by the proponents to accommodate the Aboriginal concerns that it heard, and concluded that its consultation adequately satisfied its obligation to make decisions consistent with section 35. The Board accepted that the appellants have a treaty right to hunt and fish in the Nunavut Settlement Area. The Board accepted that even though the proposed seismic surveying will not occur near the traditional hunting and fishing grounds, the testing could still have potentially serious impacts on the appellants' right to hunt and fish. However, the Board concluded that upon implementation of all of the conditions that it required of the proponents, including many conditions arising from its consultative process, the seismic surveying was not likely to cause significant adverse environmental effects (including effects on traditional hunting and fishing).

4. The Crown relies on the Board process and decision as satisfying a deep Crown duty of Aboriginal consultation. By relying on the Board's Aboriginal consultation, the Crown is not delegating its duty to consult. It is using the administrative process as an appropriate means to ensure that Aboriginal concerns have been heard and accommodated. This is consistent with the legal principles that have been developed in the jurisprudence of this Court. It is also consistent with the Government's commitment to actively pursue reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, co-operation and partnership.

B. FACTS

i. The licence application and decision of the National Energy Board

5. On January 8, 2011, TGS-NOPEC Geophysical Company ASA (TGS), Petroleum Geo-Services Inc. (PGS) and Multi Klient Invest AS (MKI) (collectively, the proponents) filed a revised project description with the Board, for a Geophysical Operations Authorization (GOA) pursuant to section 5(l)(b) of the *Canada Oil and Gas Operations Act*, R.S.C., 1985, c. 0-7 (COGOA).[1] The project proposed was

[1] See Federal Coordination Notice, **Appellants' Record (AR), Vol II, Tab 20,** p 247.

to conduct an offshore seismic survey program in Baffin Bay and Davis Strait over five years during the open water season (the Project).

6. Following an extensive Environmental Assessment process, on June 26, 2014, the Board issued the GOA to the proponents (including 15 Terms and Conditions attaching to the Authorization), along with a 33 page Environmental Assessment Report. The EA Report concluded that with implementation of the conditions, the seismic surveying would not be likely to have significant adverse environmental effects (including on traditional hunting and fishing).[2]

ii. Summary of the applicable regulatory scheme

(a) COGOA

7. The COGOA governs petroleum exploration activities in waters under federal jurisdiction.[3] One of the purposes of the Act is to promote, in respect of the exploration for and exploitation of oil and gas, the protection of the environment.[4] The Act prohibits any work or activity related to the exploration of oil or gas in Federal waters unless the work or activity is authorized under paragraph 5(1)(*b*) of the Act.[5] Paragraph 5(1)(*b*) confers jurisdiction on the Board to authorize such work or activity. The Board is given full jurisdiction to hear and otherwise determine all matters under the Act "whether of law or of fact".[6]

(b) *Canadian Environmental Assessment Act*

8. Under paragraph 5(1)(*d*) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA, 1992) a federal authority, such as the Board, could not issue an authorization under federal legislation to enable a project to proceed unless the federal authority first ensured that an environmental assessment of the project was

[2] Report of EA, **AR, Vol IV, Tab 1,** p 36.
[3] *Hamlet of Clyde River et al. v. TGS-Nopec Geophysical Company ASA et al*, 2015 FCA 179 (*Clyde River*), **AR, Vol 1, Tab 5,** para 52.
[4] COGOA para 2.1(b).
[5] COGOA para 4(b).
[6] COGOA subs 5.31(3).

conducted. CEAA, 1992 was in force when the proponents sought their project authorization. Pursuant to subsection 2(1) of the CEAA, 1992 "environmental effect" was defined to include the effect of any change that a project may cause in the environment, including any change upon "the current use of lands and resources for traditional purposes by Aboriginal persons".[7]

9. Upon repeal of the CEAA, 1992 in 2012, the Board continued the environmental assessment process, noting that it continued to have a mandate under the COGOA to consider the environmental effects of the Project. The Board found it appropriate to continue with the same scope of the EA.[8]

(c) The Board Guidelines

10. The Board is an independent federal regulator established to promote, among other things, environmental protection and economic efficiency in the public interest, in the regulation of energy development.[9] As a quasi-judicial tribunal, the Board considers only evidence filed by interested parties.[10] The Board provides for a consultative process that enables Aboriginal groups to explain their concerns, to the extent that those concerns are within the limits of its mandate. It does so by requiring proponents to consult directly with Aboriginal groups and by hearing directly from Aboriginal groups regarding their concerns in a procedurally fair manner.[11]

[7] *CEAA, 1992*, paras 2(1)(a) and (b), referred to in Scope of Environmental Assessment, **AR, Vol III, Tab 22,** p 484.
[8] Report of EA, p 4, **AR, Vol I, Tab 1,** p 13.
[9] From the Board Guidance Document "*Consideration of Aboriginal Concerns in National Energy Board Decisions"* dated October 2011, **AR, Vol IV, Tab 59,** p 945.
[10] Ibid.
[11] Ibid.

11. These procedural requirements for Aboriginal consultation provide a list of information requirements to proponents including: identifying potentially affected Aboriginal communities, early provision of project overview to interested Aboriginal groups, summaries of all meetings with Aboriginal communities, information on all concerns raised by Aboriginal communities, analysis of potential impacts on traditional practices such as hunting and fishing.[12]

12. Aboriginal communities are encouraged to participate directly in the Board proceedings either as an intervener, or by providing a letter or providing oral evidence before the Board. The Board specifically advises:

> It is important that Aboriginal groups bring any concerns or views they may have about a proposed project to the Board's attention through the hearing process….the Board understands that Crown consultation is an issue of interest to Aboriginal groups. In recent hearings, the Crown has stated that it will rely on the Board process to the extent possible to meet any duty it may have to consult with Aboriginal groups.[13]

iii. The EA process

13. On April 29, 2011, the proponents filed an Environmental Impact Assessment (EIA) with the Board. The EIA analyzed and assessed potential impacts of the project on the marine environment – including phytoplankton, corals, fish, marine mammals and birds – and on the human and socioeconomic environment. The EIA also detailed the proponents' early engagement with:

(a) The Qikitani Inuit Association (QIA) and Nunavut Research Institution, (January 2011), Hunter and Trapper Associations (HTO) from Clyde River, Pond Inlet, Qikiqtarjuaq and Iqaluit (February 2011), and meetings with Clyde River and other Inuit communities (May 2011);[14]

(b) Territorial organizations;[15]

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[12] Ibid.
[13] The Board publication *Information for Aboriginal People*, **Respondents' Record (RR), Vol 11, Tab 19,** p 4185, referred to by Dawson JA in *Clyde River*, **AR, Vol I, Tab 6,** para 63.
[14] EIA, **AR, Vol II, Tab 21,** pp 399, 400, 405-411.
[15] Ibid, pp 392, 395, 397, 398, 402

(c) Parks Canada;[16]

(d) Indian and Northern Affairs Canada;[17] and

(e) Fisheries and Oceans Canada.[18]

14. The EIA also included detailed review of proposed mitigation measures to reduce any potential adverse effects of the Project on the environment. Those measures included the Canadian Statement of Practice with respect to the mitigation of Seismic Sound in the Marine Environment, and a Department of Fisheries and Oceans publication entitled *Review of Scientific Information on impacts of Seismic Sound on Fish, Invertebrates, Marine Turtles and Marine Mammals.*[19]

15. The Board commenced an environmental assessment in accordance with the *Canadian Environmental Assessment Act, 1992.*[20] Fisheries and Oceans Canada, Environment Canada and Natural Resources Canada identified themselves as Federal Authorities in possession of specialist or expert information or knowledge. Parks Canada also expressed interest in monitoring and participating in the process.[21]

16. Although the Board's Chief Conservation Officer has delegated authority to consider GOA applications,[22] the Board opted to withdraw that delegated authority and instead retain its own decision-making power respecting the application and the EA responsibility that it triggered.[23] The Board then authorized an individual Board Member (Member Hamilton) to report and make recommendations to the Board concerning the project application.[24] Member Hamilton had all of the

[16] Ibid, p 403.
[17] Ibid, p 393.
[18] Ibid, p 396.
[19] Ibid, Appendix I commencing at p 464.
[20] SC 1992, c 37 [repealed].
[21] The Board, Scope of the Environmental Assessment Pursuant to the *Canadian Environmental Assessment Act*, 10 June 2011, **AR, Vol III, Tab 22,** p 483 section 1.0.
[22] COGOA, subs 4.1(1).
[23] The Board letter to proponents dated 13 July 2011, **AR, Vol III, Tab 24,** p 486.
[24] Pursuant to the *National Energy Board Act,* RSC 1985 c N-7, s 15.

powers of the Board for the purpose of acquiring information necessary for his report and recommendations, including the ability to issue procedural decisions. The full Board ultimately reviewed Member Hamilton's report and recommendations before deciding whether to issue the GOA.[25]

17. Following receipt of a petition from Clyde River opposing the project and comment letters from other groups, the Board determined that public participation in the environmental assessment would be appropriate. The Board committed to provide a draft environmental screening report for public comment.[26]

18. On June 10, 2011 the Department of Fisheries and Oceans (DFO) wrote the Board advising:

> It is noted that the proponent is following the DFO "*Statement of Canadian Practice with respect to the Mitigation of Seismic Sound in the Marine Environment*" and applying additional more stringent mitigation measures. Provided that the plans are implemented as described DFO has concluded that the proposal is not likely to result in impacts to fish and fish habitat.[27]

19. In early summer of 2011, the Board received letters of concern from the QIA and other interested parties regarding the potential impacts of the Project, the process of consultation, the scientific information available, and the incorporation of an Aboriginal Traditional Knowledge (IQ) study into the Project.[28] The proponents responded in part by postponing the Project until the 2012 season, enabling additional community consultation to take place.[29]

20. In July 2012, the *Canadian Environmental Assessment Act, 1992* was repealed and replaced by the *Canadian Environmental Assessment Act, 2012* (*CEAA 2012*). An environmental assessment was not required by the *CEAA 2012*. Nonetheless, the

[25] The Board letter to proponents dated 13 July 2011, **AR, Vol III, Tab 24,** p 486.
[26] The Board Decision Record dated 14 June 2011 **AR, Vol III, Tab 23,** p 485; the Board letter to proponents dated 13 July 2011, **AR, Vol III, Tab 24,** p 486.
[27] DFO letter, **AR, Vol IV, Tab 44,** p 832.
[28] Letter from QIA to the Board dated 13 June 2011, **AR, Vol IV, Tab 46,** p 838.
[29] Letter dated 12 July 2011 from proponents to QIA, **RR, Vol I, Tab 1,** p 1.

Board opted to continue its environmental assessment under the COGOA. Because material filed under the COGOA is privileged, the Board sought and obtained the proponents' consent to disclose information relating to the ongoing environmental assessment.

21. The Board proceeded to complete a full environmental assessment under COGOA. That EA included:

(i) Four Information Requests (IRs) made by the Board summarizing all questions and information requests received from Aboriginal and other groups and requiring the proponents to provide the information between September 2011 and April 2013;[30]

(ii) Within the proponents' answers to the IR's they provided enhanced community consultation plans, a plan to complete the requested IQ study and a description of how the IQ study would be incorporated into the Project Planning and operation;[31]

(iii) As detailed in the proponents' Community Engagement Reports, the proponents met with the Inuit communities in Clyde River, Pangnirtung, Pond Inlet, Iqaluit, Qikiqtarjuaq and Kimmirut in June 2012, October 2012, and then again in November and December 2012;[32]

(iv) The Board posted materials related to the environmental assessment on the public registry, including some important documents translated into Inuktitut.[33]

(v) On March 22, 2013 the Board issued a Process Update advising of upcoming public meetings and attaching a "Discussion Paper" with

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[30] Letter from the Board to RPS Energy dated 8 September 2011 attaching the Board Information Request No 1, **RR, Vol I, Tab 2,** p 2; letter from the Board to RPS Energy dated 4 April 2012 attaching the Board Information Request No 2, **RR, Vol I, Tab 4,** p 176; letter from the Board to RPS Energy dated 30 May 2012 attaching the Board Information Request No 3, **RR, Vol I, Tab 6,** p 184; letter from the Board to RPS Energy dated 22 March 2013 attaching the Board Information Request No 4, **RR, Vol I, Tab 15,** p 245**.**

[31] Response to the Board Information Request No 1 dated 23 February 2012, **RR, Vol I, Tab 3,** p 7; response to the Board Information Request No 2 received 3 May 2012, **RR, Vol I, Tab 5,** p 180; response to the Board Information Request No 3 received 7 June 2012, **RR, Vol I, Tab 7,** p 186; response to the Board Information Request No 3 dated 15 April 2013, **RR, Vol I, Tab 16,** p 247.

[32] June 2012 Community Engagement Report, **RR, Vol I, Tab 14,** p 230; October 2012 Community Engagement Report, **RR, Vol I, Tab 10,** p 195; November-December 2012 Community Engagement Report, addendum and supplementary report, **RR, Vol I, Tab 11,** p 204**, RR, Vol I, Tab 12,** p 221**, RR, Vol I, Tab 13,** p 223.

[33] See the Board Decision Record dated June 14, 2011, **AR, Vol III, Tab 23**. An example of a translated document is the 30 August 30 2013 filing with the Board, **AR, Vol IV, Tab 36.**

information regarding the Project, including proposed mitigation measures, for public comment (similar to posting a draft environmental screening report for public comment under the former *CEAA 1992*);[34]

(vi) The Board chaired public meetings with Inuktitut interpreters in Clyde River, Pond Inlet, Qikiqtarjuaq and Iqaluit in late April and early May, 2013 to hear directly from Aboriginal groups respecting the Discussion Paper and their project-related concerns, including their directly questioning representatives of the proponents;[35]

(vii) The Board suspended its environmental assessment pending the proponents specifically answering all questions raised at the April/May meetings, and in particular respecting Inuit consultation and Inuit traditional knowledge, along with further specific questions put by the Board;[36]

(viii) referred the proponents to the Board's Filing Manual for assistance in understanding the information sought by the Board in relation to the consultation of potentially affected Inuit groups;[37]

22. On August 30, 2013 the proponents filed the additional information required by the Board.[38] The entire August 30, 2013 filing was made available through the Board's website, and through a dedicated file transfer protocol website to enable interested parties to download and view them, even where internet service is slow. The document was also sent through email directly to the HTOs of Pond Inlet, Qikiqtarjuaq, Kimmirut, Pangnirtung, Iqaluit and Clyde River, and to each of the Hamlet Councils.[39] Physical copies of these Supplementary Reports were couriered or delivered by hand to each of the four communities in which the Board held public consultations.[40]

23. On or before May 17, 2013 the Hamlet of Clyde River and the HTO jointly wrote to the Board requesting that the application for the GOA be denied.[41] This May 17,

[34] Process Update and Discussion Paper, **AR, Vol III, Tab 27.**
[35] Process Update, **AR, Vol III, Tab 27**; Transcript of hearing at Clyde River, **AR, Vol III, Tab 30.**
[36] 31 May 2013 letter from the Board to proponents, **AR, Vol IV, Tab 35.**
[37] Ibid, p 776.
[38] 30 August 2013 proponents' filing with the Board, **AR, Vol IV, Tab 36.**
[39] Affidavit of Darlene Davis, **AR, Vol II, Tab 18,** paras 69-70.
[40] Affidavit of Darlene Davis, **AR, Vol II, Tab 18,** paras 71-72.
[41] Clyde River letter to the Board, **AR, Vol IV, Tab 53.**

2013 letter was the last communication from the appellants to the Board regarding the Project.

24. In an email dated August 21, 2013, the Hamlet of Clyde River declined to participate with the proponents in a traditional knowledge study regarding the Project, stating that the Hamlet is "firmly against any and all such development in our area and throughout Nunavut as a whole."[42]

25. On April 8, 2014, shortly before the Board issued its decision, Nunavut Tunngavik Inc. (NTI) and the Qikiqtani Inuit Association (QIA), in part representing Clyde River, jointly wrote to the Minister of Aboriginal Affairs and Northern Development ("Aboriginal Affairs") and the Chair of the Board. NTI and QIA took the position that the Board should not make a decision on the application until a Strategic Environmental Assessment (SEA) is completed for the Baffin Bay area.[43]

26. In separate correspondence to the Board, the Nunavut Marine Council (NMC) also requested that an SEA precede approval of any GOA.[44] The Board responded to the NMC, copying NTI and the QIA, advising that while the Board had yet to release its environmental assessment report, the Board had consulted with Inuit communities and was considering all of the submissions from Inuit organizations.[45]

[42] Affidavit of C. Milley, Exhibit B, **AR, Vol II, Tab 19B,** p 240.
[43] 8 April 2014 letter from QIA to the Board, **AR, Vol IV, Tab 60.**
[44] Letter from NMC, **AR, Vol IV, Tab 61.** The Nunavut Marine Council is an organization whose members are the Nunavut Water Board, the Nunavut Wildlife Management Board, the Nunavut Planning Commission and the Nunavut Impact Review Board.
[45] The Board response to NMC, **AR, Vol IV, Tab 62,** p 964.

27. The Aboriginal Affairs Minister responded to the April 8, 2014 letter noting that:

- the proposed project had been under review by the Board since 2011;
- the Board process would carefully weigh all evidence and views in its decision-making process;
- the Board's mandate is sufficiently broad to deal with all matters before it, including NTI and QIA's concerns respecting impacts on the Inuit, the marine environment and marine mammals;
- a Strategic Environmental Assessment was under development and would inform policy decisions respecting bids on parcels of land for exploration drilling in Baffin Bay and Davis Strait under the Canada Petroleum Resources Act, but there was no need or benefit to putting all seismic exploration on hold while strategic environmental assessment is under way.[46]

iv. <u>Conditions imposed on the licensing decision</u>

28. After considering Member Hamilton's report and recommendations, the Board issued a GOA authorization letter to the proponents, together with terms and conditions and the Board's Environmental Assessment Report (EA Report).[47]

29. The EA Report described that hunting, fishing, and harvesting activities occur within coastal areas removed from the offshore area of the proposed project. The seismic survey will take place entirely in waters no closer than 12 nautical miles from the Canadian coastline.[48]

30. In the EA Report, the Board describes the consultation required of and carried out by the proponents, the participation of Aboriginal groups in the Board's regulatory process, the issues and concerns raised by Aboriginal peoples throughout the EA process, and the actions and commitments made by the proponents as a result of

[46] Letter from Minister of AANDC to QIA and NTI dated 10 June 2014, **AR, Vol IV, Tab 63,** p 966.
[47] GOA Authorization and Report of EA, **AR, Vol I, Tab 1.**
[48] Ibid, p 11.

the Aboriginal consultation.[49] The Board concluded that the proponents made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised, and that Aboriginal groups had an adequate opportunity to participate in the Board's EA process to allow the Board to meet its statutory and constitutional responsibilities.[50]

31. The issues and concerns heard by the Board and reflected in its EA decision included: environmental impacts on marine mammals, fish and invertebrates; effects on traditional and commercial harvesting, including compensation for losses; adequacy of mitigation of potential harm to marine mammals including ramp up times, low visibility procedures ; need for discussions with communities and use of Aboriginal Traditional Knowledge Study; employment opportunities, training and benefits including plans for Marine Mammal Observers; and the use of seismic data, and future exploration plans and the impacts of offshore drilling.[51]

32. Changes to the project resulting from the Aboriginal consultation included:

- the employment of two Inuit Marine Mammal Observers to monitor marine mammal activity within a 500-metre safety zone,[52] with the authority to shut down operations if any sea mammals are sighted within that safety zone;[53]
- the installation of Passive Acoustic Monitoring to listen for marine mammals;[54]
- the completion of an Aboriginal Traditional Knowledge Study and working with Inuit communities on the study's design;[55]
- consultations with Inuit communities throughout the duration of the project and after field operations including full documentation of mammal sighting and operation shutdowns in a regularly shared report;[56]

[49] Ibid, pp 20-25.
[50] Ibid, p 24.
[51] Ibid, p 14.
[52] Ibid, p 30
[53] Ibid.
[54] Ibid, p 24.
[55] Ibid.
[56] Ibid; detailed reporting requirements are set out at p 35.

- hiring Community Liaison Officers in four communities, including Clyde River;[57]
- sharing a final observation report with Inuit communities;[58] and
- working with fisheries associations to avoid interaction between operations.[59]

v. Judicial review decision of the Federal Court of Appeal

33. The Inuit sought judicial review of the Board's decision to authorize the seismic surveying, alleging, among other things, that the Board decision was unreasonable and procedurally unfair and that the Crown had breached section 35 of the *Constitution Act, 1982*, by failing to engage in adequate Aboriginal consultation.[60]

34. The unanimous judgment of the Federal Court of Appeal dismissed the application, finding among other things, that the Board's regulatory and environmental process was sufficient to be relied upon by the Crown in discharging the Crown's duty to consult.[61]

35. The Court of Appeal reviewed Parliament's requirement that, in an EA of a licensing decision, the Board is required to specifically consider whether the project would affect the current use of land and resources by Aboriginal persons.[62] The Court reviewed the Board's guidance documents that express the Board's commitment to obtaining sufficient information regarding the potential impact of a proposed project on Aboriginal people to make any decision, its contemplation of oral hearings to obtain such information, and the Board's contemplation that the Crown will rely on the Board's processes to the extent possible to meet any duty the Crown may have to consult with Aboriginal groups.[63]

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[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Notice of Application, **AR, Vol I, Tab 7,** pp 111-116.
[61] *Clyde River,* **AR, Vol I, Tab 6,** para 100.
[62] Ibid, paras 54-57.
[63] Ibid, paras 62-64.

36. The Federal Court of Appeal found that the Board had a mandate to engage in a consultation process such that the Crown's reliance on that process and decision met, at least in part, the Crown's duty to consult with Aboriginal people.[64]

37. The Court of Appeal found this procedural mandate of the Board to be consistent with this Court's jurisprudence in *Haida, Taku,* and *Beckman,*[65] and the court cited with approval academic articles concluding that the integration of Aboriginal consultation in a robust environmental assessment and review of projects will foster potential for reconciliation and productive relationships in project development.[66]

38. The Court of Appeal acknowledged that there was no additional or independent Crown consultation apart from that performed by the Board.[67]

39. It found that the acknowledged Treaty right of the appellants to hunt and fish and the potential for the seismic surveying to have a serious impact on that admitted right required deep Aboriginal consultation.[68]

40. Following a careful review of the Board's extensive Aboriginal consultation process,[69] the Court of Appeal determined that in this case reliance on that process allowed the Crown to satisfy its duty to consult:

> For these reasons, I am satisfied that to date the Board's process afforded meaningful consultation sufficient that the Crown may rely upon it to fulfill its duty to consult. The environmental assessment and Terms and Conditions imposed upon the GOA provide a reasonable degree of accommodation of the applicants' concerns

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[64] Ibid, para 65.
[65] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511 [*Haida*], **Appellants' Book of Authorities (ABA), Vol I, Tab 18**; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74, [2004] 3 SCR 550 [*Taku*], **ABA, Vol II, Tab 44**; *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*], **ABA, Vol I, Tab 3.**
[66] *Clyde River,* **AR, Vol I, Tab 6,** paras 66-69.
[67] Ibid, para 70.
[68] Ibid, para74.
[69] Ibid, paras 75-99.

> about potential impacts caused by the Project upon their section 35 harvesting rights.[70]

41. Applying a deferential standard of judicial review, the Court of Appeal found that the Board's environmental assessment decision that the seismic surveying was not likely to result in significant environmental effects was reasonable.[71] On that same standard the Court of Appeal found the Board's reasons adequate, as the licensing decision was rendered together with the Board's EA decision which extensively addresses the "potential impacts of the Project on the section 35 Aboriginal right to harvest wildlife."[72]

[70] Ibid, para100.
[71] Ibid, paras 106-110.
[72] Ibid, paras 101-105.

PART II – ISSUES

42. The Attorney General restates the issues raised by the appellants as follows:

(a) Whether the Crown's reliance on the consultation process adopted by the Board satisfied the Crown's duty to consult in this case;

(b) Whether the honour of the Crown and the reconciliation that is required by section 35 can be achieved by the Crown's reliance on consultation by statutory tribunals carrying out their regulatory responsibilities.

PART III – ARGUMENT

A. THE RELATIONSHIP BETWEEN THE BOARD AND THE CROWN

43. The proponents' application to the Board for a GOA triggered the Crown's duty to consult. Although the Board is not an agent of the Crown and although Parliament has not given the Board jurisdiction to discharge the Crown's duty to consult, the Board is part of the state, and its regulatory decision-making could have an adverse impact on asserted or existing Aboriginal or treaty rights. This is sufficient to trigger the Crown's duty to consult.

44. The Board is required by the *Constitution Act, 1982* and the honour of the Crown to ensure that its decision-making is consistent with existing or asserted Aboriginal rights when it makes a decision under COGOA (and in this case, under the CEAA until its repeal in 2012). Its statutory responsibilities and common-law duties oblige it to consult with Aboriginal people who assert that its regulatory decisions could have an adverse impact on their rights. As a result, the Board requires proponents to consult with Aboriginal people regarding the potential impacts of any proposed project on their rights. The Board structures its regulatory decision-making to encourage Aboriginal groups to bring any concerns about a proposed project to it, before it makes its regulatory decision. In carrying out its responsibilities, the Board recognizes that the Crown may rely, to the extent possible, on the Board's consultation and accommodation to satisfy the Crown's duty to consult.

45. The Crown can rely on the Aboriginal consultation that occurs within the Board's regulatory and environmental review processes to discharge even a deep obligation of consultation. Reliance on the processes of an expert statutory body whose decision-making is governed by the Constitution and reviewable by the courts upholds the honour of the Crown and can achieve the reconciliation

required by section 35. If the regulatory decision of the tribunal is sufficient to fully address Aboriginal concerns, the Crown's reliance requires no parallel or subsequent process.

46. As a quasi-judicial tribunal, the Board has the legal capacity to decide constitutional questions that are necessary to its statutory decision-making responsibilities. The appellants did not bring a formal motion before the Board requesting that it decide whether the Crown could rely on the Board's process and decision as adequate to discharge the Crown's duty to consult. Nevertheless, as part of its environmental assessment decision, the Board considered the adequacy of the Aboriginal consultation that it required from the proponents, and that it provided in its own administrative process and decision, and concluded that it was adequate.

47. Although not required by the legislation in force at the time of its decision, the Board conducted an environmental assessment of whether an approval of the proposed seismic surveying would have any significant adverse environmental effects, including, most importantly, any significant effect on the appellants' right to hunt and fish. The Board answered that legal and factual question in a proceeding designed to give all those asserting adverse impacts on Aboriginal rights broad procedural rights designed by the Board to be sufficient to be relied upon by the Crown. This was a significant response to Aboriginal concerns. The determination of the impacts of the proposed seismic surveying, the concerns those impacts raised in Aboriginal communities and the alteration of the project to accommodate Aboriginal concerns was entirely within the Board's expert jurisdiction. The issue before the Board was the licensing of seismic surveying, not the possible uses which might later be made of the results of that surveying.

48. Regardless of the standard of review applied to this decision, the consultation carried out by the Board, and the consequent changes to the proposed project, including ongoing conditions for the approval of the licence, constituted adequate deep consultation which the Crown could rely on as discharging its duty to consult. Representatives of the Crown participated in the Board process, although this has no bearing on the Board's ability to provide consultation sufficient to be relied upon by the Crown. Where the Board is able to identify Aboriginal concerns and, where necessary, to accommodate them within its statutory jurisdiction, as it did in this case, the Crown may rely on the result without doing anything further. If Aboriginal groups assert that the concerns at issue or the measures needed to accommodate them fall outside the Board's jurisdiction, they must raise that issue directly with the Crown or seek judicial recourse.

B. THE DUTY TO CONSULT

i. Scope of the duty

49. In its 2004 *Haida*[73] and *Taku*[74] decisions, this Court first articulated the principle that the Crown has a duty to consult with Aboriginal peoples before it undertakes conduct which may have an adverse impact on asserted Aboriginal rights and title. The duty is grounded in the honour of the Crown, which must be given full effect in order to promote the process of reconciliation held within section 35 of the *Constitution Act, 1982*.[75] The duty arises where the Crown has real or constructive knowledge of the existence or assertion of Aboriginal or treaty rights and contemplates conduct that might adversely affect those rights.[76]

[73] *Haida*, **ABA, Vol I, Tab 18,** para 11.
[74] *Taku*, **ABA, Vol II, Tab 44.**
[75] Ibid, paras 24-25.
[76] *Haida*, para 35.

50. The duty to consult must be applied generously and purposively.[77] As a result, the trigger for the Crown's duty to consult should include any state activity that engages a risk of harm to a section 35 right. All acts of the executive government can be seen as acts of the Crown, even licensing decisions of non-agent tribunals created by Parliament.[78]

51. The duty to consult is prospective; past wrongs, including previous breaches of the duty to consult, do not engage the duty but may be remedied in other ways (for example, by an action for damages).[79]

52. Consultations are to be focussed on adverse impacts flowing from the specific Crown conduct at issue in any given case, as opposed to larger adverse impacts of Crown conduct of which the specific proposal is but a part. The subject of consultation is always the current Crown conduct under consideration.[80]

53. The scope of the Crown's duty to consult is proportionate to the strength of the claim and the seriousness of the potential adverse effect on the asserted or extant Aboriginal right.[81] The scope of the duty falls within a spectrum that is assessed on a case-by-case basis. Where the strength of claim is weak, the Aboriginal right is limited, or the potential for adverse impact is minor, the only duty may be to give notice, disclose information, and discuss any issues raised in response to the notice.[82] Where a strong *prima facie* case for a right or title is established, and the potential adverse impact is of high significance, deep consultation aimed at finding a satisfactory interim solution may be required.[83]

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[77] Ibid, paras 16-17.
[78] *Constitution Act, 1867*, UK, 30 & 31 Victoria, c 3, s 9.
[79] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani*], **ABA, Vol II, Tab 39,** paras 45, 48-49.
[80] *Carrier Sekani*, paras 35 and 53-54.
[81] *Haida*, para 39; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, [*Ka'a'Gee Tu*] **ABA, Vol II, Tab 24,** paras 94-99.
[82] *Haida*, para 43.
[83] *Haida*, para 44.

ii. Crown may rely on regulatory processes to discharge its duty to consult

54. Satisfying the duty to consult is about substance, not form. Where consultation involves matters requiring specialized knowledge – such as the licensing of seismic surveys – it makes sense to use that expertise to ensure that the duty is observed in a responsible way. In *Taku*, this Court established that the Crown's duty to consult may be satisfied through Aboriginal participation in a forum created for other purposes, such as an environmental review process.[84] The Court reiterated this principle in *Beckman*.[85]

55. Courts have held that the Crown may properly consider opportunities for Aboriginal consultation that are available within existing regulatory and environmental review processes.[86] In some circumstances, those processes may be sufficient in themselves to address Aboriginal concerns.[87] Since this Court's decision in *Taku*, federal and provincial courts have repeatedly found that Aboriginal engagement in environmental assessment processes can meet the requirement for a deep consultation process.[88]

56. The government may also rely on the consultative process of administrative boards and tribunals, and the steps taken by these bodies within their jurisdiction may be sufficient to fully discharge the duty to consult. The consultation of the tribunal is carried out as a necessary part of its decision-making, but that process can be

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[84] *Taku*, paras 40-41.

[85] *Beckman*, para 39; see also *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 SCR 557, **RBA, Tab 8,** para 45; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189, 376 DLR (4th) 348, **RBA, Tab 4**, para 99; *Nunatsiavut v Canada (Attorney General)*, 2015 FC 492, paras 195-197; *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458, **RBA, Tab 5** [*Katlodeeche*], **RBA, Tab 5,** para 97.

[86] *Haida*, para 51; *Taku*, para 40; *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484, 345 FTR 119, **RBA, Tab 2** [*Brokenhead*], para 25.

[87] *Brokenhead*, para 25.

[88] *Adam v Canada (Environment)*, 2014 FC 1185, **RBA, Tab 1**, paras 1-5, 71 and 86; *Upper Nicola Band v British Columbia (Minister of Environment)*, 2011 BCSC 388 [*Upper Nicola*], **ABA, Vol II, Tab 47,** para 129.

relied upon by the Crown as assuring that Aboriginal concerns have been heard, and where appropriate, accommodated. As one author put it:

> This strongly suggests that a robust tribunal may reasonably conclude a project will not adversely impact actual or asserted Aboriginal or Treaty rights, and that the tribunal may then itself validly exercise final project approval authority. The Crown does not necessarily need to have, outside of that tribunal process in that context, a separate process of Crown consultation. [89]

57. Tribunals are created to manage complicated elements of Crown business (for example, the disposal of nuclear waste, or the approval of major energy projects). The Crown relies on the tribunal to manage the complex technical questions while determining what concerns have been raised by Aboriginal groups about potential impacts on their rights and considering what accommodation within the tribunal's regulatory jurisdiction can address those concerns. The tribunal best knows the complicated projects and activities that it administers, and can best determine how to identify Aboriginal concerns with those projects and, if possible, accommodate them within the limits of its jurisdiction. As the Federal Court of Appeal described in *Standing Buffalo*: "That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it."[90]

58. In cases where the concerns raised by Aboriginal people can be fully understood by the consultative processes of a regulatory tribunal, and where accommodation of those concerns can be effected within the jurisdiction of the tribunal – from changes to the project for which a licence is sought, up to a refusal of the licence if serious impacts cannot be avoided – the honour of the Crown is upheld in the process and decision of the tribunal. Such a process provides a more effective form of consultation than would a parallel or subsequent engagement with Crown

[89] Lambrecht, Kirk. *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013), **RBA, Tab 9,** p 118.
[90] *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc,* 2009 FCA 308, [2010] 4 FCR 500, **ABA, Vol II, Tab 43,** para 44.

bodies that are less well-equipped to understand and deal with the technical or specialized issues in play. The reasonableness of the tribunal's decision (and therefore the Crown's full reliance on it) can be reviewed by the courts if Aboriginal people are dissatisfied with either the process or the outcome. Crown reliance on the tribunal allows an effective achievement of reconciliation.

59. In this case, the Board required the proponents to provide detailed responses to stated Aboriginal concerns respecting the impacts of seismic surveying on their traditional hunting and fishing rights. The Board chaired community meetings to allow the appellants to question the proponents and to enable the tribunal to hear, understand and consider their stated concerns. The proponents made changes to the project based on the concerns stated by the appellants and the Board required those changes to be incorporated as conditions to the GOA. The Board specifically addressed the appellants' request that it withhold its GOA decision until after a Strategic Environmental Assessment had been carried out by the Government. In the Board's expert view, the baseline information required for the GOA assessment had already been gathered in its more specific GOA regulatory process. While the appellants remained opposed to the seismic surveying, the Board had provided adequate consultation to be relied upon by the Crown and the Board was then entitled to make a decision.

iii. Limits on the use of regulatory tribunals to satisfy the Crown's duty to consult

60. Tribunal involvement alone will not always satisfy the Crown's duty to consult. A tribunal whose constituting statute provides it with the jurisdiction to answer legal questions can adjudicate the legal questions (including constitutional questions) that must be decided as part of its decision-making responsibilities. A tribunal can have the power to engage in consultation, the power to assess the adequacy of consultation, both of these powers, or neither of these powers. A tribunal does not need an express conferral of statutory authority to discharge the

duty to consult in order for the Crown to be able to rely on its processes as satisfying that duty.

61. In *Carrier Sekani* this Court was asked to consider the decision of a provincial quasi-judicial tribunal (the British Columbia Utilities Commission) which was asked to approve the renewal of an energy purchase agreement through a 2007 contract between a provincial Crown agent (the British Columbia Hydro and Power Authority, or BC Hydro) and Rio Tinto Alcan Inc. for the purchase of excess power. A First Nation appealed the Commission's decision that B.C. Hydro had no duty to consult in relation to the initial damming of the river that had occurred in the 1950s.[91]

[91] *Carrier Sekani*, **ABA, Vol II, Tab 39**.

62. The Court observed that the Commission was not given the statutory power to discharge the Crown's constitutional obligation to consult.[92] While the British Columbia Utilities Commission (BCUC) was not expressly delegated the duty to consider the adequacy of consultation, this Court found that the tribunal was empowered to consider adequacy of the Crown proponent's consultation by virtue of its jurisdiction to consider questions of law and mandate to consider factors "relevant to the public interest".[93]

63. As previously noted, the Board has the jurisdiction to answer legal questions that arise in the course of its regulatory decision-making.[94] The Board recognizes that the Crown relies, to the extent possible, on the Board's processes and decision-making, to satisfy the Crown's duty to consult. Parliament need not confer express statutory responsibility on the Board to discharge the Crown's duty to consult, in order for the Board to assume the obligation to make its decisions consistent with section 35. The Federal Court of Appeal properly interpreted this Court's jurisprudence as meaning that the Crown may fairly may rely on the actions of the Board in its fulfillment of the duty to consult.[95]

64. If the tribunal can provide consultation, and where necessary accommodation, of all Aboriginal concerns within its jurisdiction, a parallel consultation process is unnecessary. An additional review by the Crown would be duplicative, bringing with it the possibility of a less expert decision-maker carrying out that review. Only when the concerns raised or the accommodation required are beyond the jurisdiction of the tribunal should other organs of the Executive be asked or judicially required to carry out that aspect of the duty.

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[92] Ibid, para 74.
[93] Ibid, paras 60, 70.
[94] *National Energy Board Act*, RSC 1985 c N-7 subs 12(2) [*NEBA*].
[95] *Clyde River,* **AR, Vol I, Tab 6,** paras 62-65**;** see also *Brokenhead Ojibway*, **RBA, Tab 2,** para 25.

C. APPLICATION OF THESE PRINCIPLES TO THIS CASE

65. The Board is an executive body, even though it is not an agent of the Crown.[96] The duty to consult arises when a regulatory tribunal such as the Board considers giving authority to do anything that may have an adverse impact on asserted or existing Aboriginal or treaty rights.[97] The proponents' application for a GOA triggered the Crown's duty to consult. The Board's regulatory decision-making could have an adverse impact on the appellants' treaty right to hunt and fish in the Nunavut Settlement Area. The Board's environmental assessment specifically considered environmental impacts on marine mammals, fish and invertebrates, and potential effects on traditional and commercial harvesting, as the animals may swim through the proposed area in which the seismic surveying would be carried out, before arriving at the hunting grounds.[98]

66. The issue in this case is the licensing of seismic surveying sought by the proponents, not the possible use to which the results of that exploration might later be put.

67. The Aboriginal consultation provided by the Board in this case was extensive and met the requirements of deep consultation. All persons concerned with the potential impacts of seismic surveying on Aboriginal rights were given the opportunity to make submissions for consideration and response by the proponents and the Board. The regulatory process adopted by the Board in this case allowed formal participation by those expressing concerns over potential impacts on Aboriginal rights in the decision-making process through written intervention, the provision of oral evidence to the Board at the community meetings, and the

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[96] *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 SCR 781, **RBA, Tab 7**, para 24; *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308, [2010] 4 FCR 500, **ABA, Vol II, Tab 43,** para 34.
[97] *Carrier Sekani*, **ABA, Vol II, Tab 39,** paras 43-44.
[98] GOA Authorization and Report of EA, **AR, Vol I, Tab 1,** p 14.

opportunity within the process to submit evidence contradicting the information provided by the proponents. The Board provided extensive reasons in its environmental decision setting out the Aboriginal concerns that were raised and considered and listing the impacts that those concerns had on the decision.[99]

68. The appellants asked the then Minister of Aboriginal Affairs to intervene and delay the Board GOA decision based on their concerns. The Minister responded that the jurisdiction of the Board was broad enough to consider and address the appellants' concerns:

> I see from your letter and the enclosure that you have appropriately put your concerns and evidence before the National Energy Board. I have confidence that the National Energy Board will carefully weigh all the evidence and views in its decision-making process and the scope of the National Energy Board's mandate is sufficiently broad to deal with the all of the matters before it and, in particular, the issues that you raise about the potential for impacts on Inuit or on the marine environment and marine mammals within the Nunavut Settlement Area.[100]

D. THE SUFFICIENCY OF THE NEB'S CONSULTATION

(i) The Board's EA identified and considered the potential impacts of the Project on the section 35 Aboriginal right to harvest wildlife

69. The Court of Appeal reviewed the record and properly concluded that the Board's regulatory decision issuing the GOA was released with and was informed by the extensive reasons in its decision on the EA. That EA decision accurately identified and described the concerns raised by Aboriginal groups. Those reasons explained the Board's conclusion that authorizing the seismic surveying would not be likely to result in any significant adverse environmental effect, including to Aboriginal hunting and fishing, when the required conditions imposed on the testing were implemented.[101] Those conditions included specific accommodation of the listed

[99] Ibid, pp 20-25.
[100] Letter from Minister of AANDC to QIA and NTI dated 10 June 2014, **AR, Vol IV, Tab 63,** p 966.
[101] *Clyde River*, **AR, Vol I, Tab 6,** para 102.

Aboriginal concerns that the Board took into account. The Court of Appeal found that the EA reasons accepted the appellants' asserted right to hunt and fish, and dealt with the essential issue: "what are the potential impacts of the Project on the section 35 Aboriginal right to harvest wildlife."[102]

70. The Court of Appeal correctly found that the Board decision clearly considered and accepted the appellants' section 35 right to hunt and fish.

(ii) The Board provided adequate Aboriginal consultation.

71. The appellants complain that the Board did not explicitly conduct a *Haida* analysis. Given that the Board does not have the authority to discharge the Crown's duty to consult, the only question that it could have been asked was whether the consultation it conducted was adequate to be relied upon by the Crown as discharging its duty. No such motion was brought. Nevertheless, the Environmental Assessment Decision of the Board considered the issue and found the consultation to be adequate. Its findings are both reasonable and correct.

72. The Federal Court of Appeal correctly determined that the *Haida* test was satisfied by the Board's EA reasons – the traditional Aboriginal right to hunt and fish was accepted, the potentially serious impacts on those rights from seismic surveying outside the hunting and fishing grounds were identified, and the requirements of deep consultation were met by the Board's process. The Board imposed conditions on the GOA that reflected the Aboriginal concerns identified during consultation: the Board reasonably concluded that the seismic surveying would not be likely to cause significant adverse environmental effects if those conditions were implemented.

[102] Ibid.

73. The appellants argue that the Board must at least turn its mind to the question of whether its own process is sufficient to discharge the Crown's duty to consult, when it is aware that the Crown will be relying on its consultation.[103] But the Board did so: it concluded that significant environmental effects (including effects on hunting and fishing) were not likely if the conditions it prescribed were implemented. It should not be faulted for failing to explicitly use the language of the *Haida* test. The Board was aware of the need to fully canvass Aboriginal concerns so that the Crown could rely on its specialized work.

74. A rational process must encourage parties to air their concerns in a timely way. If a party asserting an Aboriginal right is of the view that the Board's consultation is procedurally or substantively deficient, that party must raise its concern with the Board so that it can correct any deficiency. If the concern is that accommodation is owed to the rights-holding party and that accommodation is outside the Board's jurisdiction, the party must so advise the Board and the Crown, and seek judicial relief if none is forthcoming from those parties.

75. Parties who engage in consultation each have roles to play in its success. Good faith is required on both sides: "[t]he common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised …, through a meaningful process of consultation."[104] Raising concerns in a timely way allows the Crown to address them more quickly, promotes a healthier relationship, and diminishes the prospect of litigation.[105]

[103] Appellants' Factum, para 52.
[104] *Haida*, para 42.
[105] *Haida*, para 42.

76. In this case, the appellants did not raise any issue that could not be understood and accommodated by the Board. The appellants were concerned about harm to their right to hunt and fish in their traditional territory. Those concerns were accurately documented in the Board's reasons. After three years of Aboriginal consultation the proposed project was amended to accommodate those concerns.

(iii) The FCA Reasons appear to decide adequacy of the Board consultation at first instance

77. The Court of Appeal properly identified the standard for reviewing the Aboriginal consultation of a Crown proponent. Correctness is the standard for reviewing both the Crown proponent's decisions regarding an Aboriginal right, and the potential seriousness of an infringement of that right. Reasonableness governs the evaluation of the adequacy of consultation.[106]

78. The appellants never asserted to the Board that it had failed to understand that their right to hunt and fish in their traditional hunting grounds was a treaty right. The reasons likely did not directly address this question because the Board accepted that the right exists. Similarly, at the outset of the EA, the proponents' Environmental Impact Statement listed as potential impacts injury to sea animals and impacts on traditional and commercial hunting and fishing. Again there was no issue during the EA about the seriousness of those potential impacts. The issue was whether those serious impacts were likely to occur when seismic surveying was occurring 12 miles away from the coastal hunting and fishing area according to strict conditions.

[106] Haida at para 63; see also *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443, 88 Alta LR (5th) 179, paras 35-38

79. The Court of Appeal carefully reviewed all the evidence of the extensive consultative process undertaken by the Board and then reached a conclusion that the Board's process afforded meaningful consultation that the Crown may rely upon it to fulfil its duty to consult.[107]

80. The decision of the Board that its consultation was adequate was both reasonable and correct, as was the conclusion of the Court of Appeal, deciding at first instance whether the Board's consultation was adequate to be relied upon by the Crown.

(iv) The FCA properly decided that the Board's consultation in this case was sufficient to be relied upon by the Crown as discharging its duty to consult

81. At paragraphs 66-127 of their factum, the appellants argue that the Federal Court of Appeal erred in its finding that the consultation process carried out by the Board in this case was sufficient to be relied upon by the Crown in discharging the Crown's duty to consult. The appellants argue that a duty of deep consultation requires direct participation by the Crown even when a regulatory process was designed to be relied upon by it. They further argue that the actual process employed by the Board did not satisfy the procedural requirements of deep consultation.

82. Crown participation or independent Crown review is not necessary for the Crown to rely on the regulatory consultation process of a tribunal as discharging the duty to consult. The honour of the Crown and the reconciliation that underlies section 35 are achieved by the expert tribunal engaging in Aboriginal consultation to the extent of its jurisdiction (knowing that the consultation will be relied on by the Crown), and by the Aboriginal rights-holder participating fully in the regulatory process, and raising with the Crown any issues that are outside the tribunal's

[107] *Clyde River*, **AR, Vol I, Tab 6,** paras 75-100.

jurisdiction. Deep consultation was required and was provided by the Board processes in this case.

83. Deep consultation is warranted in this case, where the appellants have an undisputed treaty right to hunt and fish and where the activity proposed by the proponents has the potential to have a serious impact on that acknowledged right.

84. Deep consultation describes the extent of procedural steps that should be provided to Aboriginal rights-holders, it does not involve a requirement that a different Executive entity participate in or review the Board's Aboriginal consultation. The requirements of deep consultation are met by providing: (a) early notice of the consultation process; (b) sufficient information about the project; (c) the opportunity to make submissions and formal participation in the decision-making process; and (d) written reasons showing that Aboriginal concerns were identified and considered. [108]

85. These processes will be sufficient to be relied upon by the Crown as discharging its duty to consult, unless the concerns raised or the accommodations that are required, as determined by the tribunal, fall outside the tribunal's jurisdiction. In those cases the Crown must become involved, to consider if it must take additional steps unavailable to the tribunal to discharge the duty to consult. The Court of Appeal's reference to Crown involvement after a tribunal decision must be understood in this more limited context.[109]

86. The Crown is not required to formally review and endorse the adequacy of a regulatory tribunal's process of Aboriginal consultation. However, representatives of the Crown did participate in the Board's environmental assessment in this case. Environment Canada, Department of Fisheries and

[108] *Haida*, **ABA, Vol I, Tab 18,** para 44.
[109] *Clyde River*, **AR, Vol I, Tab 6,** para 65.

Oceans (DFO), and Natural Resources Canada all originally participated as Federal Authorities in possession of specialist or expert information necessary for the assessment.[110] DFO provided the Board with its Framework for reducing impacts of seismic surveying on marine life, and DFO provided the Board with a letter finding reasonable the conclusion that with the proposed conditions the project was not likely to cause significant environmental effects.[111]

87. The then Minister of Aboriginal Affairs responded to a letter from some of the appellants stating their opposition to the project, by acknowledging that they had put their concerns before the Board, and that the Board's mandate is sufficiently broad to deal with "all matters before it".[112]

(v) The procedural requirements for deep consultation were met

88. In this case the Crown's duty of deep consultation was fully satisfied through the Board's independent regulatory process. The scope and content of a deep consultation process is variable and entirely dependent on the particular facts of a given case.[113] In this case, the critical facts are: (a) Clyde River has an established treaty right to hunt, fish and harvest in the Nunavut settlement area; (b) this right is fully acknowledged by the federal Crown; (c) migratory marine mammals harvested by Clyde River move through the Project area; and (d) potential adverse environmental effects include sensory and physical disturbance of marine mammals, disturbance of traditional and commercial resource use if the survey changes the migration routes of marine mammals or fish, and accidental release of hydrocarbons into the marine environment.[114]

[110] GOA Authorization and Report of EA, **AR, Vol I, Tab 1,** p 3.
[111] DFO letter, **AR, Vol IV, Tab 44,** p 832.
[112] Letter from Minister of AANDC to QIA and NTI dated 10 June 2014, **AR, Vol IV, Tab 63,** p 966.
[113] *Haida*, **ABA, Vol I, Tab 18,** paras 37-39, 44-45.
[114] *Clyde River*, **AR, Vol I, Tab 6,** para 73.

89. Based on these facts, the Federal Court of Appeal determined that a deep consultation process was required in this case, including the following elements:

- timely notice of the Project to potentially affected Aboriginal groups;[115]
- the provision of detailed information to Aboriginal groups about the Project area and design;[116]
- the provision of responses by the proponent to Aboriginal groups' comments, questions and concerns;[117]
- opportunities for participation by Aboriginal groups in the environmental assessment process itself, including opportunities for Aboriginal groups to make submissions for consideration by the Board;[118]
- a willingness by the proponent and the Board to alter the original Project proposal;[119]
- the provision of written reasons by the Board to demonstrate how Aboriginal concerns were considered and taken into account;[120] and
- a process for the continued expression and accommodation of Aboriginal concerns throughout the life of the Project.[121]

90. This is entirely consistent with the jurisprudence, which indicates that a deep consultation process may include: (a) early communication with Aboriginal groups;[122] (b) participation in the development of the environmental assessment process;[123] (c) participation in the environmental assessment process itself;[124] (d) formal participation by Aboriginal groups in the decision-making process, including the opportunity to make submissions for consideration by the decision-maker;[125] (e) opportunities to comment on proposed mitigative measures;[126] and (f)

[115] Ibid, para 92.
[116] Ibid, para 93.
[117] Ibid.
[118] Ibid, paras 94, 96.
[119] Ibid, para 95.
[120] Ibid, para 97.
[121] Ibid, paras 98-99.
[122] *Upper Nicola,* **ABA, Vol II, Tab 47,** para 129.
[123] Ibid.
[124] *Taku,* **ABA, Vol II, Tab 44,** para 40; *Beckman,* **ABA, Vol I, Tab 3,** para 39.
[125] *Haida,* **ABA, Vol I, Tab 18,** para 44.
[126] *Upper Nicola,* **ABA, Vol II, Tab 47,** para 129.

written reasons to show how Aboriginal concerns were considered and how they affected the decision.[127]

91. All of these elements were provided for in this case:

- the proponent engaged with and provided Project information to Clyde River and other Inuit groups in advance of filing their Environmental Impact Statement and related GOA application;
- in response to comments from Inuit groups, the Board withdrew the Chief Conservation Officer's delegated authority to issue the GOA and facilitated public participation in the environmental assessment process, including Clyde River's participation;
- the Board required the proponents to address the questions and concerns posed by Clyde River and other Inuit groups;
- the Board ensured the translation of important documents into Inuktitut;
- the Board heard directly from Clyde River through written and oral submissions;
- the Board provided opportunities for Clyde River to comment on proposed mitigative measures;
- the proponent altered the original Project design;
- the Board issued written reasons for its decision that included an explanation of how Clyde River's concerns were addressed; and
- the Board imposed Project conditions that require the ongoing opportunity to raise and address Aboriginal concerns throughout the life of the Project.

92. The conditions requiring ongoing consultations during the course of the Project were imposed to allow verification that the Project will not have significant adverse effects. They are not (as the appellants assert) an attempt to rehabilitate a defective scheme of consultation.

93. The Project conditions imposed by the Board constitute accommodations that flowed from the meaningful consultation that took place in the Board process. If the appellants were of the view that other procedural steps were necessary for

[127] *Haida*, **ABA, Vol I, Tab 18,** para 44.

meaningful consultation they should have asked the Board to include those additional procedures.

(vi) Deep consultation does not require additional direct Crown engagement

94. Canadian courts have repeatedly found that consultation can be completely discharged through reliance on a regulatory process.[128] The authorities cited by the appellants do not support their general assertion that deep consultation always requires direct engagement with other Executive entities on behalf of the Crown.

95. Each of the cases put forward by the appellants can be distinguished on its facts, and falls into one of the following categories:

(a) Crown engagement was required because it was part of the contemplated legislative scheme for consultation;[129]

(b) Crown engagement was required because of a gap or deficiency in the contemplated legislative scheme;[130]

(c) Direct Crown engagement was required where the Crown relied on a general public consultation process that failed to address Aboriginal rights adequately;[131]

(d) Crown consultation was required because no other consultation was provided.[132]

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[128] *Taku*, **ABA, Vol II, Tab 44,** para 40; *Carrier Sekani*, **ABA, Vol II, Tab 39,** para 56; *Beckman*, **ABA, Vol I, Tab 3,** para 39.

[129] *Taku*, **ABA, Vol II, Tab 44,** para 40.

[130] *Ka'a'Gee Tu*, **ABA, Vol II, Tab 24**; *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139, 377 FTR 267, **ABA Vol II Tab 51**; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, [2014] 8 WWR 742, **ABA, Vol II, Tab 42**.

[131] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, **ABA, Vol II, Tab 30**; *Enge v Mandeville*, 2013 NWTSC 33, [2013] 8 WWR 562, **ABA, Vol II, Tab 15**; *Dene Tha'* First Nation v Canada, (Minister of Environment), 2006 FC 1354, 303 FTR 106, affirmed sub nom *Canada (Environment) v. Imperial Oil Resources Ventures Ltd*, 2008 FCA 20, 378 NR 251, **ABA, Vol I, Tab 11**; *Da'naxada'xw/Awaetlala First Nation v British Columbia (Environment),* 2011 BCSC 620, **ABA, Vol I, Tab 8.**

[132] *Sambaa K'e Dene Band v Duncan,* 2012 FC 204, 405 FTR 182, **ABA, Vol II, Tab 40**.

96. In this case, however, the Board did have the decision-making and remedial powers to hear, understand and address the issues arising *on these particular facts*. The Board provided a robust consultative process that met the requirements for deep consultation without the need for direct engagement with other Executive entities. Nonetheless, various federal government departments did participate in the Board's environmental assessment process to ensure that the Board was provided with the specialist and expert information required to complete its assessment.

(vii) The decision is consistent with international standards

97. Canada supports the *United Nations Declaration on the Rights of Indigenous Peoples,*[133] and is taking steps to engage with Indigenous peoples and other Canadians on the implementation of the Declaration. These efforts form part of the Government of Canada's commitments to pursue reconciliation and move toward a renewed nation-to-nation relationship with Indigenous peoples based on recognition, rights, respect, co-operation and partnership.

98. The UNDRIP sets out minimum international standards and principles which may be used as a contextual aid in the interpretation of domestic law, including section 35 of the *Constitution Act, 1982*.

99. Article 38 of the UNDRIP provides that the role of the state, in consultation and co-operation with Indigenous peoples, is to take the appropriate measures to achieve the ends of the Declaration. The implementation of the UNDRIP will ultimately be achieved through a combination of legislation, state action and action initiated and taken by Indigenous nations themselves. The UNDRIP will be articulated in Canadian law through the constitutional framework of section 35 of the *Constitution Act, 1982*.

[133] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007), **ABA, Vol III, Tab 62**.

100. The constitutional recognition of Aboriginal and treaty rights in section 35 is consistent with the UNDRIP and the rights it affirms. So is the Crown's duty to consult and accommodate and the Crown's ability to rely on the work of regulatory tribunals which respect Aboriginal rights, consult with Aboriginal peoples, and accommodate Aboriginal concerns in their decision-making processes.

Conclusion

101. The decision of the Federal Court of Appeal respects the letter and spirit of this Court's jurisprudence on the Crown's duty to consult. The governing principles can be briefly stated:

(a) Statutory tribunals may accept the asserted rights of Aboriginal groups intervening in regulatory proceedings and provide for a deep level of Aboriginal consultation, without specifically articulating the constituent elements of this Court's *Haida* analysis;

(b) If a regulatory tribunal provides the procedural requirements of deep Aboriginal consultation, and makes a decision that identifies, understands and accommodates Aboriginal concerns within its jurisdiction, the Crown may rely on the tribunal's process as satisfying the Crown's duty to consult;

(c) Deep consultation does not require a formal legal process, but it does require (as was provided here) the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were understood and considered, and revealing the impact of those considerations on the decision;

(d) The honour of the Crown is maintained when an administrative tribunal carries out the deep consultation described above, concludes that with the accommodative measures built into a project no significant adverse environmental impact is likely to occur, and requires ongoing consultation and monitoring to ensure that this conclusion is well-founded.

PART IV – COSTS

102. The Attorney General does not seek her costs of this appeal.

PART V – NATURE OF ORDER SOUGHT

103. The Attorney General asks that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Saskatoon this 22nd day of August, 2016.

Mark Kindrachuk, Q.C.

Peter Southey

Counsel for the Attorney General of Canada

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTES RELIED ON

Canada Oil and Gas Operations Act, R.S.C., 1985, c 0-7 (See separate Part VII Book)

Constitution Act, 1867, UK, 30 & 31 Victoria, c 3

Constitution Act, 1982, enacted as Schedule B to the *Canada Act, 1982***,** UK, 1982, c 11

National Energy Board Act, RSC 1985 c N-7 (See separate Part VII Book)

Canadian Environmental Assessment Act, S.C. 1992, c 37