SCC File No. 36692 & 36776

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

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

APPELLANTS
(Applicants)

-and-

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

RESPONDENTS
(Respondents)

AND BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

APPELLANT
(Appellant)

-and-

ENBRIDGE PIPELINES INC., THE NATIONAL ENERGY BOARD, and ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Respondents)

FACTUM OF THE INTERVENER, THE NUNAVUT WILDLIFE MANAGEMENT BOARD

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

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, The Nunavut Wildlife Management Board

MICHAEL D'EÇA
Barrister & Solicitor
159 Holmwood Avenue
Ottawa, ON, K1S 2P3

Tel.: (613) 569-6868
Fax: (613) 569-2552
Email: mdeca@decalaw.ca

Counsel for the Intervener, The Nunavut Wildlife Management Board

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RESPONDENTS
(Respondents)

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, NUNAVUT TUNNGAVIK INCORPORATED, NUNAVUT WILDLIFE MANAGEMENT BOARD, INUVIALUIT REGIONAL CORPORATION and CHIEFS OF ONTARIO

INTERVENERS

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CHIPPEWAS OF THE THAMES FIRST NATION

APPELLANT
(Appellant)

-and-

ENBRIDGE PIPELINES INC., THE NATIONAL ENERGY BOARD, and ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Respondents)

-and-

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, NUNAVUT WILDLIFE MANAGEMENT BOARD, SUNCOR ENERGY MARKETING INC., MOHAWK COUNCIL OF KAHNAWÀ:KE, MISSISSAUGAS OF THE NEW CREDIT FIRST NATION and CHIEFS OF ONTARIO

INTERVENERS

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Nader R. Hasan
Justin Safayeni
Pam Hrick
Tel: (416) 593-7200
Fax: (416) 593-9345
Email: naderh@stockwoods.ca

Counsel for the Appellants, Hamlet of Clyde River, and Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine (SCC File 36692)

BLAKE, CASSELS & GRAYDON LLP
Suite 3500, Bankers Hall East tower
855-2nd St. S.W.
Calgary, AB T2P 4J8

A. (Sandy) W. Carpenter
Ian Breneman
Tel: (403) 260-9600
Fax: (403) 260-9700
Email: sandy.carpenter@blakes.com

Counsel for the Respondents, Petroleum Geo-Services Inc. (PGS), Multi Klient Invest AS (MKI) and TGS-Nopec Geophysical Company ASA (TGS) (SCC File 36692)

POWER LAW LLP
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

David Taylor
Tel.: (613) 702-5563
Fax: (613) 702-5563
Email: dtaylor@powerlaw.ca

Ottawa Agent for Counsel for the Appellants, Hamlet of Clyde River, and Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine (SCC File 36692)

BLAKE, CASSELS & GRAYDON LLP
340 Albert Street, Suite 1750
Ottawa ON K1R 7Y6

Nancy Brooks
Tel.: (613) 788-2218
Fax: (613) 788-2247
Email: nancy.brooks@blakes.com

Ottawa Agent for Counsel for the Respondents, Petroleum Geo-Services Inc. (PGS), Multi Klient Invest AS (MKI) and TGS-Nopec Geophysical Company ASA (TGS) (SCC File 36692)

ATTORNEY GENERAL OF CANADA
Northern Regional Office
P.O. Box 2052, 5019 - 52nd Street, 2nd Floor, Nova Plaza Bld
Yellowknife, NT X1A 2P5

Andrew E. Fox
Donna Keats
Tel: (867) 920-6001
Fax: (867) 920-6025
Email: afox@justice.gc.ca

Counsel for the Respondent, Attorney General of Canada (SCC File 36692)

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rupar
Tel.: (613) 941-2351
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Respondent, Attorney General of Canada (SCC File 36692)

NAHWEGAHBOW, CORBIERE GENOODMAGEJIG
5884 Rama Road, Suite 109
Rama, ON L3V 6H6

David C. Nahwegahbow
Scott Robertson
Tel: (705) 325-0520
Fax: (705) 325-7204
Email: dndaystar@nncfirm.ca

Counsel for the Appellants, Chippewas of the Thames First Nation (SCC File 36776)

SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9

Moira Dillon
Tel.: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for Counsel for the Appellants, Chippewas of the Thames First Nation (SCC File 36776)

DENTONS CANADA LLP
15th Floor, Bankers Court
850-2nd Street SW
Calgary, AB T2P 0R8

Douglas Crowther
Joshua Jantzi
Tel: (403) 268-7000
Fax: (403) 268-3100
Email: douglas.crowthers@dentons.com

Counsel for the Respondents, Enbridge Pipelines Inc. (SCC File 36776)

DENTONS CANADA LLP
1420 - 99 Bank Street
Ottawa, ON K1P 1H4

K. Scott McLean
Tel.: (613) 783-9600
Fax: (613) 783-9690
Email: scott.mclean@dentons.com

Ottawa Agent for Counsel for the Respondents, Enbridge Pipelines Inc. (SCC File 36776)

NATIONAL ENERGY BOARD
517 - 10th Avenue S.W.
Calgary, AB T2R 0A8

Andrew Hudson
Jody Saunders
Kristen Lozynsky
Tel: (403) 299-2708
Fax: (403) 299-2710
Email: Andrew.hudson@neb-one.gc.ca

Counsel for the Respondents, National Energy Board (SCC File 36776)

CONWAY BAXTER WILSON LLP
1111 Prince of Wales, Suite 401
Ottawa, ON K2C 3T2

Colin S. Baxter
Tel.: (613) 780-2012
Fax: (613) 688-0271
Email: CBaxter@conway.pro

Ottawa Agent for Counsel for the Respondents, National Energy Board (SCC File 36776)

ATTORNEY GENERAL OF CANADA
The Exchange Tower, Box 36
Suite 3400, 130 King Street West
Toronto, ON M5X 1K6

Peter Southey
Dayna S. Anderson
Sarah Bird
Tel: (416) 973-2240
Fax: (416) 973-0809
Email: peter.southey@justice.gc.ca

Counsel for the Respondent, Attorney General of Canada (SCC File 36776)

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 0'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rupar
Tel.: (613) 941-2351
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Respondent, Attorney General of Canada (SCC File 36776)

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Manizeh Fancy
Richard Ogden
Tel.: (416) 314-2177
Fax: (416) 326-4181
Email: manizeh.fancy@ontario.ca

Counsel for the Intervener, Attorney General of Ontario (SCC Files 36692 and 36776)

BURKE-ROBERTSON
441 MacLaren Street, Suite 200
Ottawa, ON K2P 2H3

Robert E. Houston, Q.C.
Tel.: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Ontario (SCC Files 36692 and 36776)

ATTORNEY GENERAL FOR SASKATCHEWAN
Constitutional Law Branch, 8th Floor
820, 1874 Scarth St.
Regina, SK S4P 4B3

Richard James Fyfe
Tel.: (306) 787-7886
Fax: (306) 787-9111
Email: james.fyfe@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan (SCC Files 36692 and 36776)

GOWLING WLG (Canada) LLP
2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Saskatchewan (SCC Files 36692 and 36776)

WOODWARD & COMPANY
200-1022 Government Street
Victoria, BC V8W 1X7

Dominique Nouvet
Tel.: (250) 383-2356
Fax: (250) 380-6560

Counsel for the Intervener, Nunavut Tunngavik Incorporated (SCC File 36692)

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset St. W.
Ottawa, Ontario K2P 0R3

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Intervener, Nunavut Tunngavik Incorporated (SCC File 36692)

OLTHUIS, KLEER, TOWNSHEND LLP
107 MacKenzie Road
Inuvik, NT X0E 0T0

Kate Darling
Lorraine Land
Tel.: (867) 777-7077
Fax: (877) 289-2389
Email: kdarling@inuvialuit.com

Counsel for the Intervener, Inuvialuit Regional Corporation (SCC File 36692)

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Inuvialuit Regional Corporation (SCC File 36692)

GOWLING WLG (CANADA) LLP
2600-160 Elgin Street
P.O. Box 466, Station D
Ottawa, ON K1P 1C3

Maxime Faille
Jaimie Lickers
Tel.: (613) 233-1781
Fax: (613) 563-9869
Email: maxime.faille@gowlingwlg.com

Counsel for the Intervener, Chiefs of Ontario (SCC Files 36692 and 36776)

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald
Tel.: (613) 786-0197
Fax: (613) 563-9869
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Chiefs of Ontario (SCC Files 36692 and 36776)

OSLER, HOSKIN & HARCOURT LLP
450 - 1st Street S.W.
Suite 2500, TransCanada Tower
Calgary, AB T2P 5H1

Martin Ignasiak
W. David Rankin
Heather Weberg
Tel.: (403) 260-7007
Fax: (403) 260-7024
Email: mignasiak@osler.com

Counsel for the Intervener, Suncor Energy Marketing Inc. (SCC File 36776)

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Patricia J. Wilson
Tel.: (613) 787-1009
Fax: (613) 235-2867
Email: pwilson@osler.com

Ottawa Agent for Counsel for the Intervener, Suncor Energy Marketing Inc. (SCC File 36776)

MOHAWK COUNCIL OF KAHNAWAKE LEGAL SERVICES
P.O. Box 720
Mohawk Terr. of Kahnawà:ke, QC J0L 1B0

Francis Walsh
Tel.: (450) 632-7500
Fax: (450) 638-3663
E-mail: francis.walsh@mck.ca

Counsel for the Intervener, Mohawk Council of Kahnawà:ke (SCC File 36776)

POWER LAW LLP
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Justin Dubois
Tel.: (613) 702-5560
Fax: (613) 702-5560
Email: jdubois@juristespower.ca

Ottawa Agent for Counsel for the Intervener, Mohawk Council of Kahnawà:ke (SCC File 36776)

PAPE SALTER TEILLET
546 Euclid Avenue
Toronto, ON M6G 2T2

Jason Madden
Nuri G. Frame
Jessica Labranche
Tel.: (416) 916-2989
Fax: (416) 916-3726
Email: jmadden@pstlaw.ca

Counsel for the Intervener, Mississaugas of the New Credit First Nation (SCC File 36776)

GOWLING WLG (Canada) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks
Tel.: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Mississaugas of the New Credit First Nation (SCC File 36776)

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PART I – OVERVIEW & STATEMENT OF FACTS

1.1 Overview of NWMB's Position

1. The Nunavut Wildlife Management Board ("NWMB") is interested in the present appeals to the extent that they raise issues about the role of administrative tribunals and regulatory agencies in the process of consultation. The NWMB seeks to ensure that principles and rules regarding consultation are developed in such a way that those principles and rules are capable of being responsive to the context in which a particular administrative tribunal operates.

2. The NWMB operates pursuant to the *Nunavut Land Claims Agreement* ("*NLCA*")[1]. Its very purpose is the protection of Inuit rights and interests, while respecting the principles of conservation. It achieves that purpose by evaluating and adjudicating the constitutionally protected position of the Inuit people, especially in relation to harvesting.

3. To that extent, the NWMB is an example of a tribunal which, by its very nature, has the implicit authority to:

a. determine if the Crown has fulfilled any constitutional duty to consult and, where appropriate, accommodate indigenous peoples;

b. fulfill in whole or in part – through its own hearing and decision-making processes – the Crown's duty to consult and, where appropriate, accommodate indigenous peoples; and

c. take steps to remedy issues when it determines that there has been inadequate consultation and/or accommodation.

4. As a result, the determinations of this Honourable Court on issues regarding consultation could very well have a significant impact on the way in which the NWMB conducts itself.

5. Whatever view this Honourable Court takes of the issue of National Energy Board ("NEB") consultation, the NWMB respectfully takes the position that it should be without prejudice to the established role of the NWMB in the assessment of the Crown's efforts at consultation and accommodation and in rectifying any consultation and accommodation deficiencies on the part of the Crown.

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[1] Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, as amended, Indian and Northern Affairs Canada, May, 2013 [Nunavut Wildlife Management Board Book of Authorities ("NWMB BA") Tab 7].

1.2 Background on the NWMB

6. The NWMB is the main instrument of wildlife management and the main regulator of access to wildlife in the Nunavut Settlement Area. Where the Nunavut or Canadian Government files a "Proposal for a Decision" ("Proposal"), the NWMB, as a preliminary matter, assesses whether the proponent has adequately consulted affected Inuit as part of the process of developing the Proposal. Thereafter, only if one or more parties to the NWMB hearing makes the matter of consultation an issue will the NWMB again deal with the issue of consultation and accommodation.

7. The *NLCA* provides that the NWMB shall accord full party status to Inuit at any hearing (Article 5.2.28) and contemplates that those with full party status (including Inuit) have superior participatory entitlements to others (Article 5.2.27).

8. As a result, the NWMB has had to develop a principled practice with respect to assessing whether the Crown has fulfilled consultation or accommodation obligations and remedying inadequate consultation or accommodation.

PART II – POSITION ON THE APPELLANT'S ISSUES

9. The NWMB accepts the issues as stated by the Appellants in *Clyde River* and *Chippewas*. The NWMB will only address the aspects of the issues on appeal which deal with a tribunal's capacity to assess whether the Crown has fulfilled its obligation to consult and whether a tribunal's proceedings can fulfill in whole or in part obligations to consult.

10. The NWMB proposes:

a. **Capacity to assess**: An administrative tribunal in the nature of the NWMB has the legal capacity to assess whether the Crown has fulfilled its constitutional obligation to consult with and, where appropriate, accommodate affected aboriginal peoples;

b. **Statutory authorization to assess**: The legislated structure and mandate of such an administrative tribunal constitutes implicit statutory authorization of the right

to assess whether the Crown has fulfilled its constitutional obligations to consult and, where appropriate, accommodate;

c. **Power to make rulings on satisfying duty**: Such tribunals and agencies have the power to make rulings to discharge their statutory mandate and, to the extent this involves whether consultation and accommodation has taken place, the administrative tribunal can give directions as to what is required to satisfy at least the consultation component of the exercise of its powers;

d. **Tribunal has authority to fulfill duty**: Such an administrative tribunal has the implicit legislative authority to fulfill the Crown's constitutional obligation to consult and accommodate in circumstances where the administrative tribunal determines that its own hearing and decision-making processes can rectify a failure by the governments of Canada and/or Nunavut to adequately consult with and, where appropriate, accommodate affected Inuit; and

e. **Crown can treat tribunal proceeding as fulfilling duty**: The Crown will be justified in treating proceedings before such an administrative tribunal as fulfilling in whole or in part its constitutional obligations only when the administrative tribunal independently determines its own hearing and decision-making processes can rectify a failure to consult.

11. If this Honourable Court rules against the NEB with respect to its ability to either fulfill the Crown's duty to consult and accommodate or to assess the Crown's fulfillment of that duty, then the NWMB requests the Court do so in a manner that does not preclude the NWMB (or other similar tribunals or agencies) from fulfilling consultation and accommodation functions.

PART III – STATEMENT OF ARGUMENT

3.1 The Crown's duty to consult and, where appropriate, accommodate

12. In a series of cases starting in 2004, the Supreme Court set out the essential elements of the Crown's duty to consult.[2] The Crown has a solemn obligation to reasonably ensure:

[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [Clyde Appellant's Book of Authorities ("ABA") Tab 18]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 [ABA Tab 44]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [ABA Tab

- that affected aboriginal peoples are provided with all necessary information in a timely manner so that they have an opportunity to express their interests and concerns;
- that the affected aboriginal peoples' representations are reasonably considered; and
- when the consultation process suggests amendment of Crown policy, that – in accordance with the duty to accommodate – good faith efforts are made not only to understand each other's concerns, but to move to address them.

13. The present appeal raises the issue of the role of administrative tribunals and regulatory agencies in the process of consultation and accommodation.

14. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the Supreme Court addressed both the capacity of tribunals and regulatory agencies to assess the adequacy of the Crown's fulfilment of its obligations of consultation and accommodation, and the extent to which administrative tribunals and agencies can themselves fulfill those obligations. The standards are different and will be assessed separately.

3.2 Legal capacity of tribunal to assess adequacy of consultation & accommodation

15. The NWMB operates on the basis that it has the legal capacity to conduct an assessment to determine whether the Crown not only has consulted adequately but also, where appropriate, in the formulation of its various proposals, accommodated the affected aboriginal peoples. It has both the authority and the responsibility to assess the adequacy of the consultation measures undertaken by the Crown.

3.2.1 Established Principles

16. McLachlin C.J., delivering the judgment of the Court in *Carrier Sekani*, held, in the context of an application in which the Crown was the proponent, that the British Columbia Utilities Commission had both the capacity and the responsibility to consider whether the Crown had consulted adequately with the affected aboriginal peoples.[3]

17. There were two principal reasons for the Court's finding of this capacity:

30]; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [ABA Tab 39] and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [ABA Tab 3]. Duty to consult has also been discussed more recently by this Court in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 [NWMB BA Tab 1] and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [ABA Tab 45].

[3] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paras. 66-75 [ABA Tab 39].

a. the Commission's general capacity to consider questions of law; and

b. the legislative criteria by reference to which the Commission was to consider whether to approve an application and the requirement that it consider "any other factor that the Commission considers relevant to the public interest."

18. With respect to the first criterion, McLachlin C.J. stated that "[i]t was common ground the [Act] empowers the Commission to decide questions of law."[4] What becomes clear, however, from a reading of the judgment of the British Columbia Court of Appeal is that the capacity to determine questions of law was not expressly or explicitly conferred by the empowering statute but derived by implication from a range of other provisions and, in particular, the Act's appeal provision and privative clauses.[5]

19. That is significant because of its connection with other Supreme Court decisions. In both *Nova Scotia (Workers' Compensation Board) v. Martin and Laseur*[6] and *Paul v. British Columbia (Forest Appeals Commission),*[7] this Honourable Court ruled that, where the legislature conferred explicitly on an administrative tribunal the capacity to determine questions of law, there was a very strong presumption that that tribunal had the legal capacity, indeed responsibility to deal with constitutional questions that arose in matters otherwise properly before it. However, the Court went on to accept that the capacity to consider questions of law (and hence constitutional questions) could also arise by implication from the terms of the tribunal's constitutive legislation.

20. *Paul v. British Columbia (Forest Appeals Commission)* is significant in that it involved an assertion of the capacity of the Forest Appeals Commission to deal with issues arising by virtue of s. 35 of the *Constitution Act, 1982* and its protection of aboriginal rights. It was also a case in which the relevant statute did not explicitly confer on the Commission the capacity to deal with questions of law. Rather, Bastarache J. for the Court held that capacity arose by way of inference from the provisions entitling parties to make submissions "as to the facts, law and

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[4] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 69 [ABA Tab 39].
[5] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 36-41 [NWMB BA Tab 2].
[6] *Nova Scotia (Workers' Compensation Board) v. Martin and Laseur*, 2003 SCC 54 [NWMB BA Tab 5].
[7] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 [ABA Tab 36].

jurisdiction" and the confining of appeals to the British Columbia Supreme Court to "a question of law or jurisdiction."[8]

21. Bastarache J. in *Paul* also minimized the extent to which practical considerations could serve to rebut the presumption that arose from the capacity to determine questions of law, suggesting that such considerations would come into play only where there was another more appropriate way of handling a particular dispute.[9] He went on to refuse (in a non-*Charter* context) the invitation to link the issue of the Commission's capacity to deal with s. 35 issues to a consideration of the Commission's remedial capacities. The Commission's remedial powers were not determinative.

3.2.2 The NWMB's capacity to assess adequacy

22. One purpose of the *NLCA*, which in part establishes the NWMB, is to manage wildlife in a way that meets the principles of conservation while protecting and prioritizing Inuit rights to harvest.[10] The *NLCA* makes it clear that the NWMB is responsible to consider the constitutional rights of Inuit as an essential ingredient in any public hearing on a Proposal affecting the harvesting rights of Inuit.

23. Furthermore, the *NLCA* confers on the NWMB the same powers possessed by Commissioners of Inquiry appointed pursuant to Part I of the federal *Inquiries Act*, which amounts to an implicit authority to determine all questions of law that arise in any of its proceedings.[11]

24. As such, by its very nature and in accordance with the principles laid down in *Carrier Sekani*, the NWMB has the implicit authority and responsibility to consider issues of consultation and accommodation as part of its mandate, as well as the authority to deal with assertions by the Crown and others that sufficient consultation has already taken place.

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[8] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at paras. 41-42 [ABA Tab 36].
[9] *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at para. 39 [ABA Tab 36].
[10] See *NLCA* Sections 5.1.2 and 5.1.3 [NWMB BA Tab 7].
[11] *NLCA*, s. 5.2.30 [NWMB BA Tab 7].

25. Moreover, in so far as this Honourable Court might hold that these principles apply only where the Crown is a proponent or a party to the proceedings before the tribunal or agency, it is a matter of public record that the Crown is always a party to NWMB public hearings.[12]

3.3 Power to make rulings to discharge statutory mandate

26. Where an administrative tribunal has made an assessment and determines there has been inadequate consultation or accommodation, then the first issue becomes what steps it may legitimately take to remedy the situation.

27. To the extent that the issue of whether consultation and, where appropriate, accommodation have taken place bears upon the capacity of a tribunal to decide a matter, the tribunal in the control of its own processes should have the capacity to give directions as to what is required to satisfy at least the Crown's consultation obligation, so as to permit the tribunal to proceed to decide the matter.[13]

28. As Zena Charowsky asserts in an article titled "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals":

> [U]ntil the administrative tribunal is satisfied that consultation has been satisfactorily completed, it should decline to make a decision on the application before it.[14]

29. The NWMB has followed this approach and taken the position that until it is satisfied an application or proposal conforms to the law on consultation, the tribunal should not make a final decision on the Proposal.

3.3.1 Specific remedies where there has been inadequate consultation or accommodation

30. In applying the principle articulated above by Charowsky, where the NWMB declines to proceed in the face of a failure to consult, the NWMB can:

a. formally adjourn the proceedings,

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[12] See the NWMB Public Hearings Registry. See also NLCA Articles 5.3.7 and 5.3.16 [NWMB BA Tab 7].

[13] *Re: Therrien*, 2001 SCC 35, at para. 88 [NWMB BA Tab 6]; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 685 [NWMB BA Tab 3]; *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59, at para. 50 [NWMB BA Tab 4].

[14] Zena Charowsky, "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" (2011), 74 Sask. Law Rev. 213, at p. 229 [NWMB BA Tab 8] citing *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1077-1078; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 17; *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 at para. 75.

b. provide parties with directions as to what it would take to satisfy the NWMB as to consultation and possibly accommodation, and

c. propose a timetable to meet the obligation.

31. This approach is in line with this Honourable Court's decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage).*[15] In *Mikisew*, the Court held that the appropriate judicial remedy following a finding that the Crown had failed to consult adequately on a proposal for the building of a winter road was a remission of the matter to the designated Minister for reconsideration in accordance with the consultation findings of the Court. While the setting was an application for judicial review, it would be appropriate to recognize the same remedial response as vesting in the NWMB.

3.4 When tribunal proceedings can fulfill Crown obligations to consult

32. The second issue is whether an administrative tribunal's proceedings can operate to fulfill Crown obligations to consult or accommodate. While most of the case law on the duty to consult involves consultation by Ministers of the Crown, there is nothing in that case law to suggest that an independent administrative tribunal cannot meet the obligation. Thus, in *Haida Nation v. British Columbia (Minister of Forests)*, McLachlin C.J., delivering the judgment of the Supreme Court of Canada, stated:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.[16]

33. As however recognized in *Carrier Sekani*, this depends on different criteria than apply to the issue of the capacity to assess the Crown's fulfillment of the duty to consult and accommodate. More particularly, in assessing whether the legislature has expressly or impliedly authorized a tribunal or agency to fulfill in whole or in part the Crown's duty to consult and, where appropriate accommodate, no presumption of such authority arises from the capacity to determine questions of law. Rather it depends on an evaluation of the tribunal's governing

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[15] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69; [2005] 3 S.C.R. 388 [ABA Tab 30].

[16] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 51 [ABA Tab 18]. There is no suggestion here that the regulatory scheme has to be one in which the consultation is conducted by the Crown or someone acting under ministerial direction or control. Indeed, McLachlin C.J. then went on to refer approvingly to the British Columbia government's 2002 Provincial Policy for Consultation with aboriginal groups. That Policy clearly contemplates the duty to consult resting on and being fulfilled by regulatory agencies and tribunals.

legislation and constituting documents to determine whether the authority is necessary in order to further its purposes.

34. The NWMB is designated as a joint Inuit-Crown institution of public government and is not subject to the direction of the governments of either Canada or Nunavut, except as specifically set out in the *NLCA*. Thus, neither government may delegate its constitutional duty to consult to the NWMB. The NWMB has both a treaty and a statutory basis and is impressed with a duty to accord procedural rights to Inuit of a kind that may exceed the rights of those who are not full parties.

35. Accordingly, this leaves the NWMB free to decide whether – in the event of a failure on the part of the relevant government to adequately consult and, where appropriate, accommodate – it is able, through its usual hearing and decision-making procedures, to rectify that failure. If the NWMB should decide that it is in a position to correct the inadequacy, the NWMB does so while remaining in full compliance with its duties under the *NLCA* and preserving the independence and lack of bias required in tribunal decision-making.

36. Should the NWMB determine that its own processes will not rectify that failure, it has the implicit legislative authority to unilaterally adjourn consideration of the matter (as discussed above), pending the fulfilment of the Crown's duty by either or both of the governments of Nunavut and Canada to consult, and where necessary accommodate.

37. Of note however, in *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, Blanchard J. refused to allow a group of Ministers the benefit of an adequate consultation as part of an earlier administrative process.[17] Once the Ministers were of a mind to modify the recommendations of the relevant Review Board, they were impressed with a separate obligation to consult, the silence of the statute notwithstanding.

38. An administrative tribunal ought to be in control of when it engages in consultation itself. For the NWMB, this is strongly implied from its governing legislation which explicitly sets out an objective to provide for clarity and certainty as to the participatory rights of Inuit in decision-making,[18] as well as the delegation of procedural rule-making powers.[19]

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[17] *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, at paras. 120-124 [ABA Tab 24].
[18] *NLCA*, preamble [NWMB BA Tab 7].

39. Most tribunals would be very concerned from a staffing and financial perspective if the Crown were able to delegate its duty to consult to the tribunal. Consultations are expensive in terms of both human and financial capital, and the NWMB operates with a small staff under a modest, fixed budget for successive 10-year implementation periods (current implementation period is from 2013 to 2023).

3.5 Considering the context in which the NEB operates (in contrast to the NWMB)

40. The NEB is a very different tribunal than the NWMB, operating under a dissimilar context and set of instructions. The NEB is an independent economic regulatory agency that oversees international and inter-provincial aspects of the oil, gas and electric utility industries.

41. In contrast, the NWMB is an Inuit-Crown institution of public government, operating under a unique land claims agreement (*NLCA*), with its primary purpose being to protect Inuit rights and interests while respecting the principles of conservation. Any NWMB constitutional obligation to consult Inuit parties to the *NLCA* is confined to that which arises out of the express provisions of or by implication from the terms of the *NLCA*. The NWMB is under no separate or independently existing common law constitutional duty to consult when taking decisions under the NLCA.[20] It is on this unique basis that the NWMB has a strong claim for jurisdiction over consultation and accommodation matters.

PARTS IV & V – ORDERS SOUGHT

42. The NWMB takes no position on the disposition of the within appeal.

43. The Applicant respectfully requests permission to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2016

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Eugene Meehan, Q.C.
Thomas Slade
Michael D'eca
Counsel for the Applicant

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[19] *NLCA*, s. 5.2.23 [NWMB BA Tab 7].
[20] Decisions taken under *NLCA*, ss. 5.3.8 and 5.3.17 [NWMB BA Tab 7].

PART VI – TABLE OF AUTHORITIES

PARA.

Cases

Other

PART VII – STATUTES, REGULATIONS, RULES, ETC.

***Constitution Act, 1982,* s. 35**

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (96)

Confirmation des droits existants des peuples autochtones

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Accords sur des revendications territoriales

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes. (96)