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

Respondents

-and-

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

Interveners

Court File No. 36776

B E T W E E N:

CHIPPEWAS OF THE THAMES FIRST NATION

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-and-

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

Respondents

-and-

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PARTS I & II – OVERVIEW AND POSITIONS

1. These appeals raise issues relating to the role of administrative tribunals in discharging the Crown's duty to consult with Aboriginal communities.[1] The Attorney General for Ontario ("Ontario") intervenes to submit that where a tribunal is properly authorized and engages in an honourable and respectful process that otherwise satisfies the Crown's consultation obligations, there is no need for additional Crown consultation or review. These appeals provide an opportunity for this Court to assist tribunals that have been empowered to discharge the duty to consult and accommodate to do so in a manner that promotes the honour of the Crown and reconciliation, which is the ultimate goal of section 35 of the *Constitution Act, 1982*.

2. A further issue before this Court concerns the parameters of the Crown's obligations for "deep consultation."[2] Ontario submits that the requirements of deep consultation depend on the facts of each case and, as such, any guidance this Court provides should encourage flexibility and responsiveness to the facts, rather than consist of a fixed checklist of procedural requirements. Appropriate flexible parameters should be informed by the principles of the honour of the Crown and reconciliation.

3. Ontario takes no position on any facts that may be in dispute, the interpretation of the relevant statutory regimes, or whether the appeals should be allowed or dismissed.

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[1] The term "Aboriginal" is used in this factum to be consistent with section 35 of the *Constitution Act, 1982*.

[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 44, Book of Authorities of the Appellants Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization – Clyde River, and Jerry Natanine ("Clyde River's BOA"), Vol. I, Tab 18 ("*Haida Nation*").

PART III – ARGUMENT

A) Tribunals and the Duty to Consult

4. Administrative tribunals, boards and commissions are state actors that make a range of decisions that may trigger the duty to consult and, where appropriate, accommodate. A central issue before this Court is whether, in appropriate circumstances, a tribunal can discharge the Crown's duty to consult and accommodate Aboriginal communities in relation to a project under consideration by the tribunal, without further review by a minister or ministry official. These appeals do not call into question a proposition established and confirmed by this Court's jurisprudence: that a properly empowered tribunal, acting as a quasi-judicial decision-maker, can and in some circumstances must assess and make determinations about the adequacy of Crown consultation.[3]

5. Ontario submits that the consideration of whether an administrative tribunal can discharge the Crown's duty to consult and accommodate Aboriginal communities should take into account the larger context of the relationship between Aboriginal peoples and the Crown.

6. Recent commitments from governments across the country, including Ontario, in response to the Truth and Reconciliation Commission of Canada's *Calls to Action* demonstrate that reconciliation is being embraced as a key concept in the repair of

[3] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paras. 55-58, Clyde River's BOA, Vol. II, Tab 39 ("*Rio Tinto*").

relationships between Aboriginal peoples and non-Aboriginal Canadians. Importantly, this Court has identified reconciliation as the "grand purpose" of section 35:[4]

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*.

7. Reconciliation can be understood as the rebuilding of relationships through mutual respect, as noted above, but also through trust and understanding.[5] The rebuilding of relationships, and the concepts of mutual respect, trust and understanding are part of the larger context of the relationship between Aboriginal peoples and the Crown, and may help guide the development of the duty to consult and accommodate.

8. In the context of resource development decisions, the implications of the duty to consult and accommodate can be profound. Resource development projects take place within traditional territories of Aboriginal communities. Where consultation occurs in a manner that lacks respect for a potentially impacted Aboriginal community, further harm to the Crown's relationship with the community will occur. Conversely, where consultation occurs in a respectful manner, relationships between Aboriginal communities and the Crown, and between Aboriginal and non-Aboriginal communities, can be strengthened.

9. This Court has said that consultation requires "good faith efforts to understand each other's concerns and move to address them."[6] The development of the law of consultation should, Ontario submits, take into account the ability of tribunals to balance competing interests, as well as the expertise and flexible procedures that tribunals offer

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[4] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 10, Clyde River's BOA, Vol. I, Tab 3 ("*Beckman*").
[5] See *Haida Nation*, paras. 43, 49 and 54, Clyde River's BOA, Vol. I, Tab 18.
[6] *Haida Nation*, para. 49, Clyde River's BOA, Vol. I, Tab 18.

within complex regulatory regimes. Like other parts of the Crown, tribunals that are entrusted with consultation must discharge that duty in accordance with reconciliation and the honour of the Crown. They should be aware of that role and make efforts to discharge it honourably.

Crown Review not Necessary

10. In *Rio Tinto*, this Court held that a tribunal may have the duty to consult, the duty to determine the adequacy of consultation, or both.[7] The role of a tribunal in relation to the duty to consult depends on the duties and powers the legislature has conferred on it.[8] A tribunal will have a duty to consult with Aboriginal communities where its enabling legislation gives it authority to do so, either expressly or implicitly.[9] A tribunal empowered to consult can "engage in consultations in order to discharge the Crown's constitutional obligation to consult."[10] Ontario respectfully submits that it is not necessary for the Court to alter these principles by adding a further overlay of Crown engagement.

11. In some circumstances, tribunals may be in a better position to engage in effective and meaningful consultation than other parts of government. Tribunals offer expertise in their given subject area, have consultation processes in place to hear from interested parties, may be able to develop special consultation processes with Aboriginal communities if needed, and are required to conduct their business in a public, impartial manner. Extensive technical evidence may be put before tribunals, and tribunals may also hear from Elders, Aboriginal community witnesses and other lay witnesses when considering Aboriginal and treaty rights and the potential impacts of proposed projects.

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[7] *Rio Tinto*, paras. 56-58, Clyde River's BOA, Vol. II, Tab 39.
[8] *Rio Tinto*, para. 55, Clyde River's BOA, Vol. II, Tab 39.
[9] *Rio Tinto*, para. 60, Clyde River's BOA, Vol. II, Tab 39.
[10] *Rio Tinto*, para. 74, Clyde River's BOA, Vol. II, Tab 39.

Where a tribunal has been empowered to engage in consultation and sufficiently discharges this duty, no further Crown involvement is necessary.

12. Although Ontario submits that the principles articulated in *Rio Tinto* do not need to be revisited, this Court may provide useful clarification regarding remedial and other powers that indicate whether a tribunal is empowered to engage in consultation processes with Aboriginal communities; guidance that may assist tribunals themselves in better understanding their role.

13. For instance, the ability to provide notice, share information, provide capacity funding, carry out public engagement activities with an appropriate degree of informality to elicit community feedback, and consider and adopt mitigation measures, may indicate that a tribunal is empowered to engage in consultation. By contrast, a tribunal that can only carry out formal quasi-adjudicative hearings may not be able to engage in the kinds of activities that are necessary to discharge the duty to consult and, where appropriate, to accommodate; such a tribunal may be limited to assessing, rather than carrying out, consultation and accommodation.

14. Ontario submits that these appeals provide the Court with an opportunity to make it clear to tribunals and governments that in appropriate circumstances tribunals can engage in the Crown's duty to consult with Aboriginal communities in a manner that promotes reconciliation. This is a profoundly important duty. Tribunals should understand and reflect on their role in fulfilling the duty to consult, including the "grand purpose" of reconciliation between Aboriginal and non-Aboriginal peoples. This may encourage tribunals and government to provide appropriate training and education for tribunal members and staff regarding the duty to consult. This may also encourage

tribunals to communicate clearly to Aboriginal communities and others about the tribunal's role in fulfilling the duty to consult.

B) Requirements of Deep Consultation

15. Also at issue before this Court are the requirements arising from a duty to consult and accommodate where "a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high."[11] In such cases, deep consultation is required.[12]

16. According to this Court, while precise requirements will vary with the circumstances, deep consultation may include the opportunity for the Aboriginal rights-holder to make submissions to the decision-maker for consideration, formal participation in the decision-making process, and the provision of written reasons that show that its concerns were considered and that outline the impact those concerns had on the decision.[13] Deep consultation may also mean that relevant expertise needs to be made available to identify and assess potential impacts on asserted or proven rights, as well as to identify suitable mitigation measures and recommendations that may then be incorporated as conditions of any approvals being granted to a proponent.

17. Ontario respectfully submits that the requirements of deep consultation depend on the particular facts of each case and therefore any additional guidance that this Court provides on deep consultation should continue to encourage flexibility and responsiveness to the facts, rather than consist of a fixed checklist of procedural requirements. Flexibility allows the Crown and Aboriginal communities to work together

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[11] *Haida Nation*, para. 44, Clyde River's BOA, Vol. I, Tab 18.
[12] *Ibid*.
[13] *Ibid*.

to tailor consultation and accommodation processes to the particular decision being made, the geographical location of the project, and the interests of the affected Aboriginal communities.

18. One way to maintain flexibility while providing parameters for deep consultation is to outline guiding principles for the duty to consult and accommodate. Principles centred on reconciliation can provide useful guidance for the Crown to design and implement consultation and accommodation processes, as well as to assess the sufficiency of consultation. Particularly where deep consultation is required, the consultation process should be capable of responding to the unique circumstances of each potentially affected Aboriginal community and should be respectful of Aboriginal cultural customs and values. Accordingly, to the extent reasonably possible, a deep consultation process should reflect input from potentially affected Aboriginal communities. Aspects of the process that might usefully be tailored in response to community input could include, for example: adequacy of timelines; resources and opportunities for review of relevant information; the location of meetings; and face-to-face interaction.

19. Consultation should always be guided by the goals of the duty to consult and accommodate that this Court described in *Haida Nation*:

- Understanding and addressing of Aboriginal concerns;[14]
- Promoting reconciliation between Aboriginal and non-Aboriginal Canadians;[15]
- Maintaining the honour of the Crown;[16] and
- In the context of rights assertions, fostering a relationship that makes it possible for the Crown and Aboriginal parties to negotiate[17] and preserving Aboriginal interests pending claims resolution.[18]

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[14] *Haida Nation*, paras. 40, 42, 47, and 49, Clyde River's BOA, Vol. I, Tab 18.
[15] *Haida Nation*, paras. 14, 17, 32-33, 35, 38, 45, and 49-51, Clyde River's BOA, Vol. I, Tab 18.
[16] *Haida Nation*, paras. 25, 38, 43, and 45, Clyde River's BOA, Vol. I, Tab 18.

20. Achieving these goals through consultation becomes particularly important when impacts to rights are significant and non-compensable. After all attempts have been made to reach consensus but the parties are still apart, as Binnie J. wrote in *Beckman*, at some point a decision must be made.[19] In cases that demand deep consultation, where the aim is "finding a satisfactory interim solution",[20] it is particularly important that a decision should only be made after meaningful engagement of the affected Aboriginal community throughout the decision-making process and where the constitutional status of Aboriginal interests has been taken into account in the final determination.

C) Conclusion

21. Ontario respectfully submits that where an administrative tribunal can further the goals described in *Haida Nation*, set out above at paragraph 19, there is no need for additional Crown engagement to oversee the tribunal process or review the tribunal's decision. Ontario further submits that even in cases involving deep consultation, flexibility is necessary to ensure that consultation and accommodation processes can be designed and adapted to highly variable situations. This flexibility will provide sufficient room for government to promote reconciliation and satisfy the honour of the Crown.

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[17] *Haida Nation*, para. 38, Clyde River's BOA, Vol. I, Tab 18.
[18] *Haida Nation*, paras. 38 and 77, Clyde River's BOA, Vol. I, Tab 18.
[19] *Beckman*, paras. 84-88, Clyde River's BOA, Vol. I, Tab 3.
[20] *Haida Nation*, para. 44, Clyde River's BOA, Vol. I, Tab 18.

PARTS IV & V – COSTS AND ORAL SUBMISSIONS

22. Ontario does not seek costs. Ontario requests permission to present oral argument at the hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 3, 2016

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PART VI – AUTHORITIES

Case	**Paragraph where cited**
Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53 (Clyde River's BOA, Vol. I, Tab 3)	6, 20
Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 (Clyde River's BOA, Vol. I, Tab 18)	2, 7, 9, 15, 16, 19, 20
Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 (Clyde River's BOA, Vol. II, Tab 39)	4, 10