

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

BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

APPELLANT
(Appellant)

- and -

**ENBRIDGE PIPELINES INC.
NATIONAL ENERGY BOARD
ATTORNEY GENERAL OF CANADA**

RESPONDENTS
(Respondents)

- and -

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SUNCOR ENERGY MARKETING INC.
MISSISSAUGAS OF THE NEW CREDIT FIRST NATION**

INTERVENERS

**REPLY FACTUM OF THE RESPONDENT,
ENBRIDGE PIPELINES INC.**

(filed pursuant to the Order of Justice Gascon dated September 13, 2016)

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PART I. INTRODUCTION

1. This is the reply of Enbridge Pipelines Inc. ("Enbridge") to certain of the arguments raised in the factums filed by the Mohawk Council of Kahnawà:ke ("MCK"), the Mississaugas of the New Credit First Nation ("MNCFN") and the Chiefs of Ontario. No reply to any other intervener is necessary.
2. A lack of reply should not be taken as agreement with any particular assertion or argument.

PART II. ARGUMENT

3. This is not a case of running roughshod over the honour of the Crown.¹ Nothing could be further from the truth.
4. The National Energy Board ("Board" or "NEB") carried out the required Aboriginal consultation. By any fair and reasonable measure that consultation was more than adequate.
5. The MCK alleges that interveners were denied the opportunity to express all concerns related to the Project² and that the list of issues for the NEB hearing "only covered some subjects on which consultation was required and was narrower than the Crown's duty."³ The MCK cites "concerns related to energy policy, the upstream or downstream [greenhouse gas] emissions related to the project and cumulative impacts" as examples.⁴
6. The MNCFN similarly argues that the Board process "utterly failed as a mechanism to appreciate and reconcile the 'rights, interests and ambitions'" of unspecified First Nations.⁵ The specific complaint is that the process before the NEB precluded any discussion about "'replacement for the livelihood' that have [sic] long been lost or are being eroded."⁶

¹ Factum of the Mohawk Council of Kahnawà:ke [MCK Factum] at para 21.

² As defined in the Factum of Enbridge Pipelines Inc. at para 19.

³ MCK Factum at para 29.

⁴ *Ibid.*

⁵ Factum of the Mississaugas of the New Credit First Nation [MNCFN Factum] at para 10.

⁶ *Ibid.*

7. It must first be mentioned that Hearing Order OH-002-2013 invited suggestions for amendments to the list of issues that the Board would consider.⁷ No such suggestion was made by the Appellant, the MCK, the MNCFN or any other Aboriginal group.⁸ The list of issues included consultation with Aboriginal groups and the potential impact of the Project on Aboriginal interests.⁹
8. Further, the MCK is simply incorrect that it was not possible to raise concerns about cumulative impacts. The NEB properly considered cumulative impacts and recorded its approach and findings in its Reasons for Decision.¹⁰
9. The claim by the Chiefs of Ontario that "pipeline rupture events" were not brought within the scope of the hearing (or that Enbridge argued that they should not be) is also patently incorrect.¹¹
10. In any event, the arguments from the MCK and MNCFN stretch the scope of the duty to consult far beyond its parameters as established by this Court.
11. The duty does not extend to include *any* possible complaint about the relevant government conduct but rather only non-speculative potential impacts on Aboriginal claims or rights that may be causally connected to that conduct.¹² Unspecified concerns about "energy policy" lack this essential connection. Likewise, as the NEB reasonably determined, environmental effects (including greenhouse gas emissions) associated with either the source of the crude oil to be transported or downstream consumption of oil were outside the scope of the issues properly raised by the Enbridge application.¹³
12. Equally clearly, past wrongs – including previous breaches of the duty to consult – do not trigger the duty.¹⁴ Concerns about a livelihood that may have "long been lost" or about

⁷ NEB Hearing Order OH-002-2013 (Enbridge Pipelines Inc) (19 February 2013), **AR, Vol II, Tab 4** at 10-11.

⁸ NEB Procedural Update No 1 (4 April 2013), **RR, Vol 1, Tab 8** at 203-10.

⁹ *Ibid* at 213.

¹⁰ NEB Reasons for Decision, **AR, Vol I, Tab 1** at 99-100.

¹¹ See Factum of the Chiefs of Ontario at para 18; and see e.g. NEB Reasons for Decision, **AR, Vol I, Tab 1** at 52, 38, 55, 65, 75, 98.

¹² *Carrier Sekani Tribal Council v British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 SCR 650, **EBA Vol 1, Tab 3** [*Carrier Sekani*] at paras 46, 51 [emphasis added].

¹³ NEB Procedural Update No 1 (4 April 2013), **RR, Vol 1, Tab 8** at 206-07.

¹⁴ *Carrier Sekani*, **EBA, Vol 1, Tab 3** at para 45.

long-standing constraints on harvesting rights and traditional practices must be concerns about prior breaches.¹⁵

13. Moreover, as was the case with the Appellant, the evidence and argument that the MCK and the MNCFN presented to the Board were focused on the potential physical effects of the Project.
14. For example, the MNCFN addressed the requirements for protection of archaeological resources and concerns about the impact that an oil spill from the pipeline would have on the First Nation's ability to practice Aboriginal rights and traditional activities, such as harvesting plants for medicine.¹⁶ The MCK similarly spoke to the safety, security and contingency planning associated with construction and operation of the Project, including emergency response planning.¹⁷
15. The MCK opposed approval on the basis that a release of oil from the pipeline would directly impact the rights, interests and traditional territories of the MCK.¹⁸ Although the MCK now asserts that the NEB lacked the power to "order the creation of intergovernmental monitoring bodies that include Indigenous governments" it made no such request in the hearing.¹⁹
16. All of the matters of concern that the MNCFN and the MCK *did* bring to the Board were addressed at length in the NEB Reasons for Decision.²⁰
17. Of note is the fact that, unlike the Appellant, the MNCFN and the MCK took advantage of the opportunity afforded by the NEB to all hearing participants to recommend approval conditions.²¹ The MNCFN and MCK recommendations – together with those

¹⁵ *Ibid* at para 48. There is, of course, no such thing as a "Crown consultation-free zone" (see MNCFN Factum at paras 6 and 13) in southern Ontario or elsewhere in Canada. Under section 35 of the *Constitution Act, 1982*, there can be no such place in this country. See MNCFN Factum at para 8 for the assertions regarding impairments of, and constraints on, harvesting rights and traditional practices.

¹⁶ NEB Reasons for Decision, **AR, Vol I, Tab 1** at 112.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ MCK Factum at para 32.

²⁰ See e.g. NEB Reasons for Decision, **AR, Vol I, Tab 1** at 48, 53-54, 57, 62-64, 72-75, 97-98, 112, 115.

²¹ NEB Reasons for Decision, *ibid* at 112.

offered by other parties – resulted in the conditions that were attached to the section 58 order that was ultimately issued.²²

18. Any fair and reasonable assessment of the NEB Reasons for Decision and the record show that:

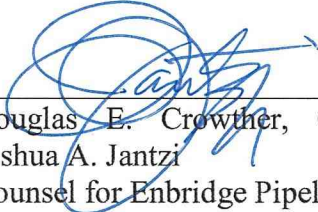
- the Appellant and all other participating Aboriginal groups – including the MCK and the MNCFN – were afforded the opportunity to formulate and voice their concerns about potential impacts of the Project on their rights; and
- those concerns were heard, understood, and appropriately addressed by the Board including through the imposition of approval conditions.

19. The duty was discharged and the honour of the Crown upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, November 15 2016:

DENTONS CANADA LLP

Per:



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Joshua A. Jantzi
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²² See e.g. NEB Reasons for Decision, **AR, Vol I, Tab 1** at 115 (noting MNCFN's concerns regarding heritage resources and the Board's imposition of Condition 6 in response, requiring Enbridge to produce an Archaeological Resource Contingency Plan) and at 48, 135 (recording, respectively, MCK's concerns about the sufficiency of sectionalizing valves and Condition 16, imposing extensive requirements relating to Enbridge's updating the Line 9 valves system). See generally NEB Reasons for Decision, **AR, Vol I, Tab 1** at 148-57 (listing all 30 conditions applicable to the Project).