

**IN THE SUPREME COURT OF CANADA**

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

**CHIPPEWAS OF THE THAMES FIRST NATION**

**APPELLANT**  
(Appellant)

- and -

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

**RESPONDENTS**  
(Respondents)

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**FACTUM OF THE RESPONDENT  
ATTORNEY GENERAL OF CANADA**  
(Pursuant to r.42 of the *Rules of the Supreme Court of Canada*)

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## PART I – STATEMENT OF FACTS

### A. OVERVIEW

1. The National Energy Board (Board) is required by section 35 of the *Constitution Act, 1982*, to make regulatory decisions that are consistent with the constitutional recognition of Aboriginal and treaty rights. Therefore, when Board approval of a proposed project may adversely impact the rights of an Aboriginal group, the Board requires extensive Aboriginal consultation. It then applies the information obtained through that process to accommodate Aboriginal concerns, where appropriate, in the conditions it imposes if it gives regulatory approval. The Crown may rely on the Board's processes and decisions as satisfying the Crown's duty to consult. By so relying, the Crown is not delegating its duty. It is using the administrative process as an appropriate means to ensure that Aboriginal concerns have been heard and accommodated.

2. In this case, Enbridge sought Board approval of a proposal to change the direction of the flow in a pipeline built in Ontario in 1976. Enbridge also sought approval to include heavy crude as product that could be transported in that pipeline (as had been allowed between 1976 and 1996), and to increase the flow of product in the pipeline by one-third (returning to capacities approved between 1976 and 1996). The Crown's duty to consult was triggered by the Board's consideration of whether to approve the project. The Enbridge application also triggered a formal Board hearing process involving 111 commenters and 60 interveners, including the appellant. The Board carried out extensive Aboriginal consultation, as did the proponent Enbridge. That consultation was reflected in the Board's licensing decision, which imposed accommodation measures on the project that were a direct consequence of the Aboriginal consultation. The Board requires a process that exceeds the requirements of a deep consultation process that might apply to a Crown proponent or decision-maker under this Court's *Haida* test, whenever an Aboriginal group asserts that a licensing approval might affect asserted Aboriginal rights.

3. Before the Board made its licensing decision, the Minister of Natural Resources rejected the appellant's request that the Crown carry out a separate process of consultation, in addition to the consultation process being conducted by the Board. The Minister explained that the Board's consultative process and its statutory jurisdiction would be sufficient to be relied upon by the Crown. The appellant's treaty rights to hunt and fish on their traditional territory was accepted by the Board without question, as were the potential adverse impacts arising from the proposed increased flow of product, and the greater variety of product that could be transported. The Board required 36 conditions of the proponent, including at least three conditions specifically addressing the Aboriginal concerns that it heard, and concluded that any potential project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated.

4. The Crown's duty to consult was triggered by the application to the Board. The presence of the Crown at a Board hearing should not determine whether the Crown's duty is triggered (although in this case representatives of a federal department actively participated in the Board's hearing process). If the Board can provide consultation and, if necessary, accommodation of all relevant Aboriginal concerns within its jurisdiction, a parallel consultation process is unnecessary. A parallel process would simply duplicate the expert deliberation of the statutory tribunal and would not further the honour of the Crown, which is upheld by the Board's Aboriginal consultation process. Only where the concerns raised or the possible accommodation required are beyond the jurisdiction of the tribunal should other organs of the Executive be required to satisfy that aspect of the duty. This approach is 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. SUMMARY OF THE FACTS**

### **i. History of the Line 9 Pipeline**

5. The Line 9 Pipeline (Line 9) is approximately 830 km long and runs between Sarnia, Ontario and Montreal, Quebec. Line 9A is the approximately 194 km segment of Line 9 that runs between Sarnia and North Westover (near Cambridge) in Ontario.<sup>1</sup> A segment of Line 9A is located within the appellant's asserted traditional territory.<sup>2</sup> Line 9B is the approximately 639 km segment of Line 9 that runs between North Westover, Ontario and Montreal, Quebec.<sup>3</sup>

6. The entire Line 9 has been subject to the Board's oversight, compliance and legislative requirements since it was first constructed in 1976.<sup>4</sup> The potential environmental effects of the Line 9 facilities are addressed in the Board's ongoing regulation and compliance verification activities, including all engineering, integrity, emergency response and environmental aspects.<sup>5</sup>

#### **(a) *Initial Construction and Operation***

7. In May 1975, following a public hearing, the Board authorized the construction and operation of Line 9 (then called the "Montreal Extension") through Certificate of Public Convenience and Necessity OC-30, which was approved by the Governor in Council.<sup>6</sup> The

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<sup>1</sup> OH-002-2013 (Line 9B Reversal and Line 9 Capacity Expansion Project), Board Reasons for Decision, March 2014 [Board Reasons], p vii, definition of "Line 9B Reversal and Line 9 Capacity Expansion Project", **Appellant's Record (AR), Vol I, Tab 1, p 10**.

<sup>2</sup> Board Reasons, p vii, definition of "Line 9A", **AR, Vol I, Tab 1, p 10**; Chippewas of the Thames First Nation Application to Participate dated 12 April 2013, Appendix "A", **AR, Vol VI, Tab 13, p 112**; OH-005-2011, National Energy Board Letter Decision, Line 9 Reversal Phase I Project, July 2012 [OH-005-2011 Decision], p 9, **Respondent Attorney General of Canada's Book of Authorities (RBA), Tab 5**.

<sup>3</sup> Board Reasons, p vii, definition of "Line 9B", **AR, Vol I, Tab 1, p 10**.

<sup>4</sup> Board Reasons, p 1, **AR, Vol I, Tab 1, p 18**.

<sup>5</sup> Board Reasons, pp 1 and 5-8, **AR, Vol I, Tab 1, pp 18 and 22-25**.

<sup>6</sup> Certificate of Public Convenience and Necessity No. OC-30, issued May 21, 1975, **RBA, Tab 4**; Order in Council P.C. 1975-1136, dated May 20, 1975, **RBA, Tab 9**; OH-1-74, National Energy Board Report to the Governor in Council, May 1975 [OH-1-74 Decision], **RBA, Tab 6**.

Board first considered the environmental impacts of the proposed pipeline and related facilities at that time.<sup>7</sup>

8. Line 9 began operating on June 4, 1976. From 1976 to 1996, it transported heavy crude, including diluted bitumen, in an eastward direction at a capacity slightly in excess of 315,000 barrels per day (bpd).<sup>8</sup> Line 9A continued to transport heavy crude until 1999, while operations in Line 9B were temporarily suspended between 1996 and 1999 because of reduced demand.<sup>9</sup>

***(b) 1999 Reversal of Line 9***

9. In 1997, Line 9's owner (then Interprovincial Pipe Line Inc.) applied to the Board for approval to reverse the direction of the flow of crude oil in Line 9. The project was designed to provide Line 9's owner with the ability to re-reverse (return) the flow to an eastward direction in the future, as well as to expand Line 9's future annual capacity to up to 496,000 bpd.<sup>10</sup> Based on market demands, the capacity applied for in 1997 was 240,000 bpd, with Line 9 shipping light crude oil and condensate.<sup>11</sup>

10. The Board held a public hearing respecting the application and considered issues such as the integrity of Line 9,<sup>12</sup> the potentially adverse environmental and socio-economic effects of the proposed project<sup>13</sup> and the potential future flow re-reversal.<sup>14</sup> Following the hearing, in 1999 the Board approved the reversal of flow in the entire Line 9 to a westward direction at a capacity of 240,000 bpd.<sup>15</sup>

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<sup>7</sup> OH-1-74 Decision, pp 25-46, **RBA, Tab 6**; Board Reasons, p 72, **AR, Vol 1, Tab 1, p 89**.

<sup>8</sup> Board Reasons, pp 8 and 35, **AR, Vol I, Tab 1, pp 25 and 52**.

<sup>9</sup> OH-2-97, Board Reasons for Decision, December 1997 [OH-2-97 Decision], p 11, **RBA, Tab 7**.

<sup>10</sup> OH-2-97 Decision, pp 11 and 15-16, **RBA, Tab 7**.

<sup>11</sup> Board Reasons, p 8, **AR, Vol 1, Tab 1, p 25**; OH-2-97 Decision, pp xii, 1 and 11, **RBA, Tab 7**.

<sup>12</sup> OH-2-97 Decision, pp 17-21, **RBA, Tab 7**.

<sup>13</sup> OH-2-97 Decision, pp 22-24 and 81, **RBA, Tab 7**; Board Reasons, p 72, **AR, Vol I, Tab 1, p 89**.

<sup>14</sup> OH-2-97 Decision, pp 74-75 and 81, **RBA, Tab 7**.

<sup>15</sup> Board Reasons, pp 8-9, **AR, Vol 1, Tab 1, pp 25-26**; OH-2-97 Decision, including Appendix II (Order XO-J1-34-97), **RBA, Tab 7**.

***(c) 2012 Re-Reversal of Line 9A***

11. In 2011, Enbridge applied for Board approval under section 58 of the *National Energy Board Act (NEBA)*<sup>16</sup> to re-reverse the flow in Line 9A to an eastward direction.<sup>17</sup> The Board held a public hearing and conducted an environmental assessment of the application.<sup>18</sup>

12. The Board carried out its Enhanced Aboriginal Engagement initiative and proactively contacted Aboriginal groups that could be affected by the project.<sup>19</sup> Enbridge also engaged directly with the appellant respecting the application.<sup>20</sup> The appellant filed letters of comment with the Board but did not seek intervener status.<sup>21</sup>

13. The Board concluded that there had been meaningful engagement with Aboriginal groups, including the Appellant, in respect of the application to return the flow in Line 9A to an easterly direction. The Board also concluded that any potential project impacts on Aboriginal interests would be minimal and appropriately mitigated.<sup>22</sup> The Board approved Enbridge's application in July, 2012.<sup>23</sup>

**ii. The Application in Question in this Proceeding and the Board Decision (Line 9B Reversal and Line 9 Capacity Expansion Project)**

14. On November 29, 2012, Enbridge filed an application with the Board under section 58 of the *NEBA* for the Line 9B Reversal and Line 9 Capacity Expansion Project (the Project). Enbridge sought the Board's approval:

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<sup>16</sup> *National Energy Board Act*, RSC 1985, c N-7 [*NEBA*].

<sup>17</sup> Board Reasons, p 9, **AR, Vol 1, Tab 1, p 26**.

<sup>18</sup> OH-005-2011 Decision, pp 2, 12 and 13 and Appendix 1 (Environmental Assessment Report), **RBA, Tab 5**; Board Reasons, p 72, **AR, Vol 1, Tab 1, p 89**.

<sup>19</sup> OH-005-2011 Decision, p 2, **RBA, Tab 5**.

<sup>20</sup> OH-005-2011 Decision, pp 9-10, **RBA, Tab 5**.

<sup>21</sup> OH-005-2011 Decision, pp 8-10, **RBA, Tab 5**.

<sup>22</sup> OH-005-2011 Decision, pp 8-11, **RBA, Tab 5**.

<sup>23</sup> Board Decision, pp 8-9, **AR, Vol I, Tab 1, pp 25-26**; OH-005-2011 Decision, Appendix II (Order XO-E101-010-2012), **RBA, Tab 5**.

- a. to re-reverse the flow of product in Line 9B to its original eastward direction from North Westover to Montreal (as had already occurred in 2012 for Line 9A);
- b. to increase the capacity of the entire Line 9 to 300,000 bpd (slightly below Line 9's original approved capacity of 315,000 bpd), with operating pressures not to exceed those which had been previously approved; and
- c. to transport light, medium and heavy crude in all of Line 9 (heavy crude already having been shipped on Line 9 between 1976 and 1999).<sup>24</sup>

15. Following an extensive public hearing process, the Board released its decision approving the Project on March 6, 2014, including 36 conditions.<sup>25</sup> With respect to Aboriginal matters in particular, the Board explained that:

- a. as a quasi-judicial decision-maker, the Board must ensure that its process complies with the principles of fairness and the rules of natural justice;
- b. the Board interprets its responsibilities, including those outlined in section 58 of the *National Energy Board Act*, in a manner consistent with the *Constitution Act, 1982*, including section 35;
- c. the Board takes the interests and concerns of Aboriginal groups into consideration prior to making a decision;
- d. the Board obtains as much information as possible respecting potential impacts to Aboriginal groups through its hearing process and its Enhanced Aboriginal Engagement initiative;
- e. proponents are most often in the best position to respond to Aboriginal concerns before filing a project application and while a project is still in the early stages of development. As such, the Board requires that

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<sup>24</sup> Board Reasons, pp 1 and 8-10, **AR, Vol I, Tab 1, pp 18 and 25-27.**

<sup>25</sup> Board Reasons, **AR, Vol I, Tab 1.**

- project proponents identify, engage and consult with potentially affected Aboriginal groups before filing a project application;
- f. the Board evaluates the sufficiency of the proponent's consultation process along with any other evidence filed on its record;
  - g. Aboriginal groups who are concerned with the potential impact of a project may present their views directly to the Board in a variety of ways (as an intervenor, by filing a letter of comment, etc.); and
  - h. the Board's hearing process itself forms part of the overall consultative process.<sup>26</sup>

16. The Board also noted that the Project operates within Enbridge's existing right-of-way on previously disturbed lands and that no Crown lands are involved. The Board concluded that impacts on traditional land use by Aboriginal groups were unlikely.<sup>27</sup>

17. The Board noted the concerns of Aboriginal groups and concluded that, given the scope and nature of the Project, the implementation of Enbridge's commitments and mitigation measures, and the implementation of particular conditions designed to address the concerns of Aboriginal groups (particularly Conditions 6, 24 and 26, which are more particularly described in paragraphs 43(c), 46(a) and 50, below), any potential impacts on the rights and interests of Aboriginal groups were likely minimal and would be appropriately mitigated.<sup>28</sup>

**iii. Summary of the Applicable Statutory Scheme**

***(a) Construction & Operation requires a Certificate of Public Convenience and Necessity***

18. No one is permitted to operate a pipeline unless the Board has issued a certificate of public convenience and necessity (Certificate) under section 52 of the *NEBA* (formerly

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<sup>26</sup> Board Reasons, pp 87-88, **AR, Vol I, Tab 1, pp 104-105.**

<sup>27</sup> Board Reasons, p 98, **AR, Vol I, Tab 1, p 115.**

<sup>28</sup> Board Reasons, pp 98-99, **AR, Vol I, Tab 1, pp 115-116.**

section 44<sup>29</sup>) and has been granted leave to open with respect to that pipeline.<sup>30</sup> The Board is required to hold a public hearing when considering an application for a Certificate.<sup>31</sup>

19. Following a public hearing, the Board must recommend to the Governor in Council whether the proposed pipeline project is and will be required by the present and future public convenience and necessity, taking into account any public interest that may be affected by the issuance of a Certificate or the dismissal of the application, including environmental matters.<sup>32</sup> The Board cannot issue a Certificate without the Governor in Council's approval.<sup>33</sup>

*(b) Section 58 Exemptions*

20. If a proponent wants to make physical modifications to an existing pipeline or to operate it in a manner different than described in an existing Certificate, it requires the Board's approval pursuant to section 58 of the *NEBA*. Section 58 enables the Board to exempt proposed changes to an existing pipeline from the requirement of obtaining a new Certificate where it meets certain criteria.<sup>34</sup>

21. While applications made under section 58 do not automatically trigger a public hearing, the Board has the discretion to hold a public hearing if it considers it advisable.<sup>35</sup> Whether or not a public hearing is held, the Board always assesses section 58 applications with respect to Aboriginal engagement, public consultation, engineering and environmental and socio-economics.<sup>36</sup>

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<sup>29</sup> *National Energy Board Act*, RS 1970, Chap N-6, s 44.

<sup>30</sup> *NEBA*, ss 29, 30 and 52-54.

<sup>31</sup> *NEBA*, s 24; *National Energy Board Act*, RS 1970, Chap N-6, s 20.

<sup>32</sup> *NEBA*, s 52.

<sup>33</sup> *NEBA*, s 54. See *National Energy Board Act*, RS 1970, Chap N-6, s 44 for the similar version of the legislation that was in force in 1976.

<sup>34</sup> *NEBA*, s 58.

<sup>35</sup> *NEBA*, s 24(3); *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, s 23 [*Board Rules*].

<sup>36</sup> National Energy Board, *Filing Manual* (Calgary: National Energy Board, 2004) [*Filing Manual*], Chapter 4, Guide A, p 4A-1, **RBA, Tab 8**.

22. Once a section 58 application is received, the Board reviews it and determines whether it is complete. From the day the Board decides the application is complete, it has fifteen months to either make an order or dismiss the application, subject to any extensions of time allowed under the *NEBA*.<sup>37</sup>

23. In any order made under section 58 of the *NEBA*, the Board may impose any terms and conditions upon the proponent that it considers appropriate.<sup>38</sup>

*(c) Common Aboriginal Consultation Requirements*

24. The Board imposes common requirements upon project proponents, whether they apply for a Certificate or a section 58 exemption. This includes a requirement that the proponent consult with potentially affected Aboriginal groups early in the project design process, before filing an application with the Board. The Board expects proponents to address the concerns of Aboriginal groups through project design or other means if possible. Where there is a greater risk of serious impacts on Aboriginal rights and interests, the Board has greater expectations of the proponent's consultations.<sup>39</sup>

25. In addition to the Aboriginal consultation that it requires of the proponent, the Board relies on its own Enhanced Aboriginal Engagement initiative and public hearing process to ensure that the interests and concerns of Aboriginal groups are fully considered before the Board makes a decision that might have an impact on those interests.<sup>40</sup> Under the Board's Enhanced Aboriginal Engagement initiative, it proactively contacts Aboriginal groups that may be affected by a proposed project, and seeks to assist Aboriginal groups with understanding the Board's regulatory process and how to participate in that process.<sup>41</sup>

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<sup>37</sup> *NEBA*, ss 58(4), (5) and (10).

<sup>38</sup> *NEBA*, s 58(3).

<sup>39</sup> Board Reasons, pp 87-88, **AR, Vol 1, Tab 1, pp 104-105**; *Filing Manual*, Chapter 3, pp 3-3 to 3-10, **RBA, Tab 8**.

<sup>40</sup> Board Reasons, pp 87-88, **AR, Vol I, Tab 1, pp 104-105**.

<sup>41</sup> Board Reasons, p 87, **AR, Vol I, Tab 1, p 104**.

26. During the hearing process itself, Aboriginal groups who are concerned with the potential impact of a proposed project on their rights and interests may present their views directly to the Board. They may do so in a variety of ways, including submitting evidence, letters of comment and final argument. Those groups who choose to intervene may also test the evidence filed by others (including evidence filed by the proponent).<sup>42</sup>

***(d) Participant Funding Program***

27. To support the participation and meaningful engagement of participants, the Board administers a Participant Funding Program that provides financial assistance to individuals, Aboriginal groups, landowners, incorporated non-industry not-for-profit organizations, or other interest groups that seek to intervene in the review process.<sup>43</sup> An independent funding review committee considers the applications for funding and make recommendations on the allocation of funds.<sup>44</sup>

**iv. The Board's Project Hearing Process**

28. Pursuant to the Board's common filing requirements,<sup>45</sup> Enbridge identified and engaged with Aboriginal groups who might be adversely affected by the Project, including the appellant, in advance of filing its Project application.<sup>46</sup> In accordance with the Board's requirements, Enbridge's application and subsequent written evidence included information respecting its ongoing and extensive direct engagement with the appellant.<sup>47</sup>

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<sup>42</sup> Board Reasons, pp 87-88, **AR, Vol I, Tab 1, pp 104-105**.

<sup>43</sup> Board Reasons, pp 13-14 and 87-88, **AR, Vol 1, Tab 1, pp 30-31 and 104-105**; *NEBA*, s 16.3.

<sup>44</sup> NEB Public Notice, attached to Board Letter dated 6 February 2013 to Chippewas of the Thames First Nation (Exh A2-8), **Joint Record of the Respondents (JRR), Vol 1, Tab 5, p 84**.

<sup>45</sup> Board Reasons, pp 87-88, **AR, Vol I, Tab 1, pp 104-105**; *Board Rules*, r 15(1)(b); *Filing Manual*, Chapter 3, pp 3-3 to 3-10, **RBA, Tab 8**.

<sup>46</sup> Board Reasons, pp 88-90, **AR, Vol I, Tab 1, pp 105-107**; Line 9B Reversal and Line 9 Capacity Expansion Project Application, dated November 29, 2012, section 5, **AR, Vol VI, Tab 12, pp 80-83**; and Line 9B Reversal and Line 9 Capacity Expansion Project Application, dated November 29, 2012, Attachment 6 - Aboriginal Engagement Activities Summary (Exh B1-14), **JRR, Vol 1, Tab 4, p 67**.

<sup>47</sup> See for example: Exh B18-10 - Attachment 1 to Enbridge Response dated 25 June 2013 to AFN and COTTFN IR 1.10, **JRR, Vol 2, Tab 15, pp 366-367**; and Exhs B43-2, B43-8 - Enbridge Reply Evidence dated 17 September 2013, pp 11-13 and Attachment 6, **JRR, Vol 3, Tab 23, pp 632-634 and 640-641**.

29. Although not obliged to do so by statute, the Board exercised its discretion to hold a public hearing respecting Enbridge's application.<sup>48</sup> Under its Enhanced Aboriginal Engagement initiative, the Board first contacted the appellant on February 6, 2013 to provide notice of the Project application, information respecting the public hearing process and options to participate, information about the Board's Participant Funding Program and contact information for the Board's Aboriginal Engagement Specialist.<sup>49</sup> Board staff followed up with the appellant and were available to respond to questions or conduct information meetings if requested.<sup>50</sup>

30. The Board issued Hearing Order OH-002-2013 on February 19, 2013 establishing the hearing process.<sup>51</sup> The Board also issued a List of Issues to be considered in the course of the hearing process,<sup>52</sup> including:

- a. the potential environmental and socio-economic effects of the proposed Project, including the potential effects of malfunctions or accidents that may occur, and any cumulative environmental effects that are likely to result from the proposed Project;
- b. the safety, security, and contingency planning associated with the construction and operation of the proposed Project, including emergency response planning and third-party damage prevention; and
- c. consultation with Aboriginal groups and the potential impacts of the proposed Project on Aboriginal interests, including a consideration of

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<sup>48</sup> *NEBA*, ss 24(3) and 58; Board Reasons, pp 11-12, **AR, Vol I, Tab 1, pp 28-29**.

<sup>49</sup> Board Reasons, pp 88-90, **AR, Vol I, Tab 1, pp 105-107**; Board Letter dated 6 February 2013 to Chippewas of the Thames First Nation (Exh A2-8), **JRR, Vol 1, Tab 5, pp 80-86**.

<sup>50</sup> Board Reasons, p 87, **AR, Vol I, Tab 1, p 104**.

<sup>51</sup> Board Reasons, p 12, **AR, Vol I, Tab 1, p 29**.

<sup>52</sup> Board Reasons, p 12, **AR, Vol I, Tab 1, p 29**.

impacts on Treaty rights.<sup>53</sup>

31. The Board heard the views of 171 participants regarding the Project,<sup>54</sup> including Environment Canada, which intervened in the public hearing as a Government Participant.<sup>55</sup> Environment Canada filed written evidence (including information on its role in emergency response and management in the event of a pipeline accident or malfunction),<sup>56</sup> questioned Enbridge<sup>57</sup> and responded to questions from other parties.<sup>58</sup> In response to questions regarding the duty to consult posed by a member of the appellant First Nation who intervened in the hearing in his individual capacity, Environment Canada advised that Canada had not delegated procedural aspects of Aboriginal consultation to Enbridge and that, as a party to the Board's proceedings, Environment Canada was engaged in a consideration of the concerns raised by First Nations in the hearing process.<sup>59</sup>

32. The appellant intervened in the Board's proceedings and received funding from the Board's Participant Funding Program.<sup>60</sup> It participated in all aspects of the hearing process,

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<sup>53</sup> Board Reasons, p 126 (Appendix I), **AR, Vol I, Tab 1, p 143**; Board Letter dated 4 April 2013 attaching Procedural Update No. 1 (Exh A5-1), p 6 (re: Issue 7), **JRR, Vol 1, Tab 8, p 208**.

<sup>54</sup> Board Reasons, p 2, **AR, Vol I, Tab 1, p 19**.

<sup>55</sup> Environment Canada Application to Participate dated 19 April 2013 (Exh C36-1-1), **JRR, Vol 1, Tab 10, pp 241-250**; Board Letter dated 22 May 2013 attaching Procedural Direction Update No 2 (Exhs A11-1, A11-2, A11-3, A11-4, A11-5 and A11-6) (see Procedural Update No 2, p 1, para 2; and List of Parties, pp 1 and 16), **JRR, Vol 2, Tab 12, pp 292, 301 and 316**.

<sup>56</sup> Environment Canada Affidavit of Caroline Caza sworn 3 October 2013 (Exh C36-8-1, **JRR, Vol 3, Tab 25, p 700**; Environment Canada Written Evidence dated 6 August 2013 (Exh C36-3-1), **JRR, Vol 3, Tab 20, pp 493-512**.

<sup>57</sup> Environment Canada IR dated 11 June 2013 to Enbridge (Exh C36-2-1), **JRR, Vol 2, Tab 14, pp 360-365**.

<sup>58</sup> Environment Canada Response dated 12 September 2013 to IR No 1 of Jesse McCormick (Exhs C36-5-1, C36-5-2 and C36-6-1), **JRR, Vol 3, Tab 22, pp 551-621**.

<sup>59</sup> Environment Canada Response dated 12 September 2013 to IR No 1 of Jesse McCormick (Exhs C36-5-1, C36-5-2 and C36-6-1), response 1.8, **JRR, Vol 3, Tab 22, pp 563 and 620-621**.

<sup>60</sup> Board Reasons, pp 13-14 and 92, **AR, Vol I, Tab 1, pp 30-31 and 109**.

including filing written evidence that included a traditional land use study,<sup>61</sup> questioning Enbridge<sup>62</sup> and providing final argument.<sup>63</sup>

33. During the course of the proceedings, the appellant submitted that:
- a. Enbridge's efforts to engage with them did not meaningfully address their concerns about potential health impacts and impacts on their Aboriginal and Treaty rights;<sup>64</sup>
  - b. spills from Line 9 have the potential to cause new adverse impacts on their traditional land use and use of the Thames River;
  - c. spills from Line 9 would cause direct health impacts to them; and
  - d. spills from Line 9 would destroy or severely and irreparably damage their traditional territory, causing severe health, environmental and socio-economic effects and infringement of their rights.<sup>65</sup>

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<sup>61</sup> Written Evidence of Chippewas of the Thames First Nation, Affidavit of Chief Miskokomon, sworn August 8, 2013, **AR, Vol II, Tab 9(A), pp 69-115**; Exhibit G to the Affidavit of Chief Miskokomon, sworn August 8, 2013, **AR, Vol II, Tab 9(A), pp 155-180**.

<sup>62</sup> Aamjiwnaang First Nation and COTTFN IR No 1 dated 11 June 2013 to Enbridge (Exh C1-3-1), **JRR, Vol 2, Tab 13, pp 347-359**; AFN and COTTFN IR No 2 dated 9 July 2013 to Enbridge (Exh C1-4-1), **JRR, Vol 2, Tab 18, pp 473-481**.

<sup>63</sup> National Energy Board, OH-002-2013 Hearing Transcript Vol 5, dated October 16, 2013 (Final Argument by Aamjiwnaang First Nation and Chippewas of the Thames First Nation), **AR, Vol VI, Tab 10, pp 1-42**.

<sup>64</sup> Board Reasons, p 92, **AR, Vol I, Tab 1, p 109**.

<sup>65</sup> Board Reasons, pp 94-95, **AR, Vol I, Tab 1, p 111-112**; National Energy Board, OH-002-2013 Hearing Transcript Vol 5, dated October 16, 2013 (Final Argument by Aamjiwnaang First Nation and Chippewas of the Thames First Nation), line 3233, **AR, Vol VI, Tab 10, pp 10-11 (line 3233)**; Chippewas of the Thames First Nation Application to Participate, dated 12 April 2013, **AR, Vol VI, Tab 13, pp 102-115**.

34. Shortly before the close of the Board's public hearing process, on September 27, 2013, the appellant wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development respecting the Project. The appellant requested that Canada: (i) immediately initiate a Crown consultation process; and (ii) advise the Board that procedural steps may need to be taken in the hearing process to address the Crown's alleged failure to consult with them and other potentially impacted Aboriginal peoples.<sup>66</sup>

35. In final argument on October 16, 2013, the appellant argued that the Board did not have jurisdiction to issue a decision until the Crown developed and carried out a parallel consultation process.<sup>67</sup> The Board's public hearings closed on October 25, 2013.<sup>68</sup>

36. On January 30, 2014, the Minister of Natural Resources replied to the appellant's letter of September 27, 2013. The Minister wrote that "the Government of Canada is committed to meeting its legal duty to consult whenever it contemplates conduct that could adversely affect an established or potential Aboriginal or Treaty right." The Minister went on to note that the Board operates a Participant Funding Program and indicated that all potentially impacted Aboriginal groups were encouraged to apply to participate in the Board's process:

The National Energy Board's (NEB) regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate. The NEB provides an open, comprehensive and participatory venue for all affected parties to express their project-related concerns and interests.<sup>69</sup>

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<sup>66</sup> Letter from Aamjiwnaang First Nation and Chippewas of the Thames First Nation to the Prime Minister, Minister of Aboriginal Affairs and Northern Development and Minister of Natural Resources Canada dated September 27, 2013, **AR, Vol VI, Tab 14, pp 116-119**.

<sup>67</sup> National Energy Board, OH-002-2013 Hearing Transcript Vol 5, dated October 16, 2013 (Final Argument by Aamjiwnaang First Nation and Chippewas of the Thames First Nation), lines 3223, 3411 and 3447, **AR, Vol VI, Tab 10, pp 9 (line 3223), 35 (line 3411) and 40-41 (line 3447)**.

<sup>68</sup> Board Reasons, p 13, **AR, Vol I, Tab 1, p 30**.

<sup>69</sup> Letter from Minister of Natural Resources to Chippewas of the Thames First Nation and Aamjiwnaang First Nation, dated January 30, 2014, **AR, Vol VI, Tab 11, pp 46-47**.

v. **Conditions imposed on the Project's approval**

37. In rendering its decision, the Board acknowledged the current social context in which the Project application was being considered. This included increased social awareness and concern regarding Board regulated projects generally, as well as major incidents such as the Enbridge Energy, Limited Partnership Line 6B spill at Marshall, Michigan in July 2012 and the train derailment in Lac-Mégantic, Quebec in July 2013.<sup>70</sup> Of the 171 participants who provided their views, the Board primarily heard concerns regarding pipeline safety and integrity and the environmental impact of potential spills.<sup>71</sup>

38. As part of its hearing process, the Board considered the integrity of the existing Line 9 and assessed the incremental increased risk of failure arising from the Project and the incremental potential effects of such a failure,<sup>72</sup> concluding that Line 9 can be operated safely after Project implementation.<sup>73</sup> The Board stated that through its ongoing compliance and verification activities, it regularly reviews the current and ongoing operations and maintenance of Line 9, as well as Enbridge's existing integrity management program and existing emergence response and environmental management systems. As such, the Board did not conduct a full review or audit of those existing and ongoing aspects of Line 9 in the course of its hearing process.<sup>74</sup>

39. The Board denied Enbridge's request for an exemption from the requirement to apply to the Board for leave to open and imposed a number of conditions with which Enbridge was required to comply in advance of seeking leave to open.<sup>75</sup>

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<sup>70</sup> Board Reasons, pp 1-3, **AR, Vol I, Tab 1, pp 18-20.**

<sup>71</sup> Board Reasons, p 2, **AR, Vol I, Tab 1, p 19.**

<sup>72</sup> Board Reasons, pp 9-10, **AR, Vol I, Tab 1, pp 26-27.**

<sup>73</sup> Board Reasons, p 38, **AR, Vol I, Tab 1, p 55.**

<sup>74</sup> Board Reasons, p 10, **AR, Vol I, Tab 1, p 27.**

<sup>75</sup> Board Reasons, pp 3, 46 and 49, **AR, Vol I, Tab 1, pp 20, 63 and 66.**

*(a) Conditions to address the potential for spills*

40. In considering the concerns raised by the appellant and others respecting the potential for spills from Line 9, the Board considered pipeline integrity issues at length, including:

- a. the effects of heavy crude and diluted bitumen to pipeline corrosivity;<sup>76</sup>
- b. the effects of the drag reducing agent (DRA) to pressure surges;<sup>77</sup>
- c. the effects of the DRA to toxicity in the event of a spill;<sup>78</sup>
- d. the use of sectionalizing valves to minimize release volumes;<sup>79</sup>
- e. the use of surge mitigation measures to address pressure transients;<sup>80</sup>
- f. Enbridge's pipeline control centre operations;<sup>81</sup>
- g. Enbridge's leak detection system;<sup>82</sup>
- h. right-of-way inspections and maintenance, including the need for more proactive monitoring of pipeline exposures, especially in areas that present an enhanced geohazard risk such as water crossings;<sup>83</sup>
- i. an emergency shutdown system that includes an adequate alternative power source;<sup>84</sup>
- j. Enbridge's integrity management program and commitment to conduct a number of integrity-related tasks on Line 9 prior to bringing the Project into service;<sup>85</sup>
- k. mitigation measures respecting external corrosion, metal loss and cracking;<sup>86</sup>
- l. geohazard and mechanical damage plans;<sup>87</sup> and

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<sup>76</sup> Board Reasons, p 35, **AR, Vol I, Tab 1, p 52.**

<sup>77</sup> Board Reasons, p 36, **AR, Vol I, Tab 1, p 53.**

<sup>78</sup> Board Reasons, p 36, **AR, Vol I, Tab 1, p 53.**

<sup>79</sup> Board Reasons, p 36-37, **AR, Vol I, Tab 1, p 53-54.**

<sup>80</sup> Board Reasons, p 37, **AR, Vol I, Tab 1, p 54.**

<sup>81</sup> Board Reasons, p 37, **AR, Vol I, Tab 1, p 54.**

<sup>82</sup> Board Reasons, p 37-38, **AR, Vol I, Tab 1, p 54-55.**

<sup>83</sup> Board Reasons, p 38, **AR, Vol I, Tab 1, p 55.**

<sup>84</sup> Board Reasons, p 38, **AR, Vol I, Tab 1, p 55.**

<sup>85</sup> Board Reasons, pp 45-47, **AR, Vol I, Tab 1, pp 62-64.**

<sup>86</sup> Board Reasons, p 47-48, **AR, Vol I, Tab 1, pp 64-65.**

<sup>87</sup> Board Reasons, p 48-49, **AR, Vol I, Tab 1, pp 65-66.**

- m. whether hydrotesting was required prior to the commencement of Project operations.<sup>88</sup>

41. In order to address these issues, and in addition to the requirements of the *NEBA* and the *National Energy Board Onshore Pipeline Regulations*,<sup>89</sup> the Board imposed Conditions 9, 10, 11, 12, 15, 16, 17, 19, 22, 27 and 28, all of which contain integrity-related requirements. To name just a few examples of the additional requirements imposed by these Conditions:

- a. prior to requesting leave to open, Enbridge was required to file an updated pipeline engineering assessment; complete pipeline repairs; file details of their hydrostatic pressure testing program; file a leak detection system manual that demonstrates that Enbridge's leak detection system meets or exceeds specified standards and that includes performance indicators; file confirmation that their emergency shutdown system, backup power supplies and updated mainline valves system meet specified requirements; file an updated geohazard study; and file a plan to manage cracking features;<sup>90</sup> and
- b. post construction, Enbridge is required to file detailed engineering and associated studies to validate the sensitivity and reliability performance of its leak detection computational monitoring system; file a long-term integrity improvement plan to mitigate and monitor remaining internal and external corrosion, geometry and cracking features; and file a deterministic remaining life evaluation for each segment of Line 9 so the Board can ensure that Enbridge is managing pressure cycling appropriately under the Project's new operating conditions.<sup>91</sup>

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<sup>88</sup> Board Reasons, p 49, **AR, Vol I, Tab 1, p 66.**

<sup>89</sup> SOR/99-294.

<sup>90</sup> Board Reasons, pp 35-38, 45-50 and 132-136, **AR, Vol I, Tab 1, pp 52-55, 62-67 and 149-152, Conditions 9-12, 15-17 and 19.**

<sup>91</sup> Board Reasons, pp 35-38, 45-50, 137 and 139-140, **AR, Vol I, Tab 1, pp 52-55, 62-67 and 154 and 156-157, Conditions 22, 27 and 28.**

*(b) Conditions to address the effects of spills*

42. In considering the concerns raised by the appellant and others respecting the environmental and socio-economic effects (including health effects) of potential spills from Line 9, the Board considered accidents, malfunctions and emergency response issues at length, including:

- a. regulatory requirements regarding emergency procedures;<sup>92</sup>
- b. potential effects of accidents and malfunctions (spills), including interactions between spills and the surrounding bio-physical and socio-economic elements;<sup>93</sup>
- c. the significant risk of negative consequences to human health that could result from a pollutant entering drinking water sources;<sup>94</sup>
- d. emergency response plans and manuals;<sup>95</sup>
- e. emergency response exercises and training;<sup>96</sup> and
- f. incident response and financial capability.<sup>97</sup>

43. In order to address these issues, and in addition to the requirements of the *NEBA* and the *National Energy Board Onshore Pipeline Regulations*,<sup>98</sup> the Board imposed Conditions 3, 13, 14, 20 and 26, all of which contain environmental protection and emergency response requirements.<sup>99</sup> To name just a few examples of the additional requirements imposed by these Conditions:

- a. Enbridge is required to implement all of the policies, practices, programs, mitigation measures, recommendations, procedures and commitments for the protection of the environment that are referred to in its application or related submissions, including its commitments:

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<sup>92</sup> Board Reasons, pp 51-53, **AR, Vol I, Tab 1, pp 68-70.**

<sup>93</sup> Board Reasons, pp 53-58, **AR, Vol I, Tab 1, pp 70-75.**

<sup>94</sup> Board Reasons, pp 56-58, **AR, Vol I, Tab 1, pp 73-75.**

<sup>95</sup> Board Reasons, pp 59-61, **AR, Vol I, Tab 1, pp 76-78.**

<sup>96</sup> Board Reasons, pp 61-63, **AR, Vol I, Tab 1, pp 78-80.**

<sup>97</sup> Board Reasons, pp 63-71, **AR, Vol I, Tab 1, pp 80-88.**

<sup>98</sup> SOR/99-294.

<sup>99</sup> Board Reasons, pp 57-58, 60-63 and 67, **AR, Vol I, Tab 1, pp 74-75, 77-80 and 84.**

- i. to work with Environment Canada to refine its emergency management program;<sup>100</sup> and
  - ii. to have the financial capability to fulfill its obligations arising from an accident or malfunction of the Project;<sup>101</sup>
- b. prior to requesting leave to open, Enbridge was required to file an environmental protection and emergency response coordination framework that addresses the objectives of risk assessment, protection, mitigation and monitoring;<sup>102</sup> file a plan to update its continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response, including a list of Aboriginal groups that have been or will be consulted and the methods used to track commitments made during consultation;<sup>103</sup> and file an emergency response plan that demonstrates compliance with specified standards in respect of each major watercourse crossing;<sup>104</sup>
- c. post construction, Enbridge is required to file annual reports for three years detailing the status of its continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response with Aboriginal groups and others.<sup>105</sup>

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<sup>100</sup> Board Reasons, pp 55 and 131, **AR, Vol I, Tab 1, pp 72 and 148, Condition 3.**

<sup>101</sup> Board Reasons, pp 67 and 131, **AR, Vol I, Tab 1, pp 84 and 148, Condition 3.**

<sup>102</sup> Board Reasons, pp 57-58 and 134, **AR, Vol I, Tab 1, pp 74-75 and 151, Condition 13.**

<sup>103</sup> Board Reasons, pp 62 and 134-135, **AR, Vol I, Tab 1, pp 79 and 151-152, Condition 14.**

<sup>104</sup> Board Reasons, pp 60-61 and 136-137, **AR, Vol I, Tab 1, pp 77-78 and 153-154, Condition 20.**

<sup>105</sup> Board Reasons, pp 62-63 and 139, **AR, Vol I, Tab 1, pp 79-80 and 156, Condition 26.**

***(c) Conditions to address environmental protection, including watercourse protection***

44. In addition to considering the concerns raised by the appellant and others respecting the environmental and socio-economic effects of potential spills, the Board conducted an environmental assessment of the Project itself, including a consideration of environmental protection issues and cumulative effects.<sup>106</sup>

45. The Project as scoped included construction activities at six project sites, including the Sarnia terminal.<sup>107</sup> The Board considered whether the proposed Project activities would adversely interact with surrounding bio-physical and socio-economic elements, including water quality and quantity, fish and fish habitat, wildlife and wildlife habitat, heritage resources and air quality.<sup>108</sup> The Board concluded that the majority of bio-physical and socio-economic interactions (excluding accidents and malfunctions) would be negligible or managed effectively through standard mitigation.<sup>109</sup>

46. In order to address environmental protection issues, and in addition to the requirements of the *NEBA* and the *National Energy Board Onshore Pipeline Regulations*,<sup>110</sup> the Board imposed Conditions 6, 16, 18, 23 and 25.<sup>111</sup> These Conditions include the following requirements:

- a. prior to construction, Enbridge was required to file a Project-specific environmental protection plan, including a Project-specific archaeological resource contingency plan;<sup>112</sup>
- b. prior to requesting leave to open, Enbridge was required to file for approval a Project-specific watercourse crossing management plan to

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<sup>106</sup> Board Reasons, pp 72-86, **AR, Vol I, Tab 1, pp 89-103.**

<sup>107</sup> Board Reasons, pp ix and 72-74, **AR, Vol I, Tab 1, pp 12 and 89-91.**

<sup>108</sup> Board Reasons, pp 76-86, **AR, Vol I, Tab 1, pp 93-103.**

<sup>109</sup> Board Reasons, p 76, **AR, Vol I, Tab 1, p 93.**

<sup>110</sup> SOR/99-294.

<sup>111</sup> Board Reasons, pp 77, 81-82, 132 and 135-138, **AR, Vol I, Tab 1, pp 94, 98-99, 149 and 152-155.**

<sup>112</sup> Board Reasons, pp 77 and 132, **AR, Vol I, Tab 1, pp 94 and 149, Condition 6.**

- identify current watercourse crossing conditions and to proactively manage watercourse crossings along the entire existing Line 9;<sup>113</sup> and
- c. post construction, Enbridge is required to file for approval an update to its watercourse crossing management plan, including a description of how data will be used to address the requirements to manage environmental risks and evidence of consultation with Environment Canada.<sup>114</sup>

***(d) Conditions to address potential impacts to the rights and interests of Aboriginal groups***

47. The Board considered the specific concerns raised by the appellant and other Aboriginal groups respecting Enbridge's Aboriginal engagement program, the potential impacts of the Project upon each of the groups' rights and interests (including traditional land use) and proposed mitigation measures.<sup>115</sup>

48. Most of the Aboriginal groups who intervened in the Board's hearing process, including the appellant, expressed concerns regarding the impact of a spill upon their traditional activities.<sup>116</sup> The appellant submitted a preliminary traditional land use study to the Board that identified specific sites and hunting grounds throughout the Thames River watershed where they engage in traditional activities, including sites that are adjacent to the existing Line 9 right of way.<sup>117</sup>

49. Given that the Project occurs within Enbridge's existing right of way, and the limited nature and scope of the Project, the Board found that the Project is unlikely to cause

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<sup>113</sup> Board Reasons, pp 81 and 136, **AR, Vol I, Tab 1, pp 98 and 153, Condition 18.**

<sup>114</sup> Board Reasons, pp 81 and 138-139, **AR, Vol I, Tab 1, pp 98 and 155-156, Condition 25.**

<sup>115</sup> Board Reasons, pp 87-99, **AR, Vol 1, Tab I, pp 104-116.**

<sup>116</sup> Board Reasons, pp 94-95, **AR, Vol 1, Tab I, pp 111-112.**

<sup>117</sup> Board Reasons, p 94, **AR, Vol 1, Tab I, p 111;** Exhibit G to the Affidavit of Chief Miskokomon, sworn August 8, 2013, **AR, Vol II, Tab 9A, pp 155-180.**

impacts to traditional Aboriginal use.<sup>118</sup> The Board nonetheless addressed the appellant's spill related concerns through the Conditions discussed above.

50. In addition to the Conditions respecting pipeline integrity, effects of a spill and environmental protection, the Board specifically addressed the concerns of the appellant and others respecting ongoing engagement with Enbridge, spill response and water safety through Conditions 24, 26 and 29,<sup>119</sup> which require that Enbridge, post construction, file a series of ongoing engagement reports for the continued operation of Line 9, including confirmation that Enbridge consulted or offered to consult with any Aboriginal groups whose land, jurisdiction or traditional territory is traversed by Line 9;<sup>120</sup> file annual reports for three years detailing the status of its continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response with Aboriginal groups and others;<sup>121</sup> and file for approval a plan describing how Enbridge will continue to engage persons and groups during the operation of Line 9.<sup>122</sup>

51. As noted above, and given the extensive avoidance and mitigation measures required of Enbridge, the Board concluded that any potential Project impacts on the rights and interests of Aboriginal groups, including the appellant, are likely to be minimal and will be appropriately mitigated.<sup>123</sup>

**vi. Appeal Decision of the Federal Court of Appeal**

52. The Federal Court of Appeal granted the appellant leave to appeal the Board's decision under section 22(1) of the *NEBA* on June 4, 2014.<sup>124</sup> The Notice of Appeal was

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<sup>118</sup> Board Reasons, p 98, **AR, Vol I, Tab 1, p 115.**

<sup>119</sup> Board Reasons, pp 97-99, **AR, Vol I, Tab 1, pp 114-116.**

<sup>120</sup> Board Reasons, pp 97-99 and 137-138, **AR, Vol I, Tab 1, pp 114-116 and 154-155, Condition 24.**

<sup>121</sup> Board Reasons, pp 62-63, 99 and 139, **AR, Vol I, Tab 1, pp 79-80, 116 and 156, Condition 26.**

<sup>122</sup> Board Reasons, pp 21-22, 98 and 140, **AR, Vol I, Tab 1, pp 38-39, 115 and 157, Condition 29.**

<sup>123</sup> Board Reasons, p 99, **AR, Vol I, Tab 1, p 116.**

<sup>124</sup> *Chippewas of the Thames First Nation v Enbridge*, 2015 FCA 22, para 18 [*Chippewas*], **AR, Vol I, Tab 3, p 166.**

filed on August 5, 2014, naming the Board and Enbridge as Respondents. The Attorney General of Canada was later added as a Respondent.

53. On June 16, 2015, the Federal Court of Appeal released its decision on the appeal. The majority found that:

- a. the Board must act within the dictates of the *Constitution Act, 1982*, including section 35;<sup>125</sup>
- b. the Board's mandate includes ensuring that the interests of Aboriginal groups in relation to project approval are considered by both the Board and the project proponent;<sup>126</sup>
- c. the Board's process, which requires extensive dialogue between the project proponent and Aboriginal groups, ensures that the Board adheres to its constitutional obligations;<sup>127</sup>
- d. the Board has the authority and jurisdiction to proceed with its decision-making without first determining whether the Crown owes a duty to consult and if so, whether that duty has been discharged;<sup>128</sup>
- e. implicit in the above, if the Board fails to appropriately consider the interests of Aboriginal groups in exercising its decision-making authority, then it will have erred and a remedy will lie with the courts;<sup>129</sup>
- f. the Crown did not explicitly or implicitly delegate the duty to consult to the Board.<sup>130</sup> This is confirmed by a review of the Board's constituting legislation and by the fact that the Board may not have the remedial powers necessary to fully discharge the duty to consult in all

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<sup>125</sup> *Chippewas*, para 61, **AR, Vol I, Tab 3, 179**.

<sup>126</sup> *Chippewas*, para 62, **AR, Vol I, Tab 3, p 179**.

<sup>127</sup> *Chippewas*, para 62, **AR, Vol I, Tab 3, p 179**.

<sup>128</sup> *Chippewas*, paras 58-59, **AR, Vol I, Tab 3, p 178**.

<sup>129</sup> *Chippewas*, para 62, **AR, Vol I, Tab 3, p 179**.

<sup>130</sup> *Chippewas*, paras 64-68 and 79, **AR, Vol I, Tab 3, pp 180-181 and 184**.

- circumstances;<sup>131</sup>
- g. the Crown can rely on the Board's process to discharge its own duty to consult to the extent possible;<sup>132</sup>
  - h. if there is a circumstance in which the Board lacks practical and effective remedial powers to deal with potential adverse impacts to Aboriginal rights or title arising from the project under consideration, then appropriate remedies may be sought in the courts.<sup>133</sup>

54. The majority reasons concluded that because the Crown was not a party to the section 58 proceeding before the Board, the Board was not required to determine if the Crown was under a *Haida* duty, and whether the Crown had discharged its duty.<sup>134</sup> The majority also found that there had been no delegation of the Crown's duty to consult to the Board.<sup>135</sup>

55. In dissent, Rennie J.A. stated that whether or not the Crown shows up at regulatory proceedings cannot alter the responsibilities of the Board with respect to the Crown's duty of consultation. That dissenting judgment further opined that the Board had to consider whether the Crown had engaged in its own process of Aboriginal consultation, and if not, the Board should have withheld the regulatory approval.<sup>136</sup>

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<sup>131</sup> *Chippewas*, paras 45, 53 and 65, **AR, Vol I, Tab 3, pp 173-174, 176 and 180.**

<sup>132</sup> *Chippewas*, para 63, **AR, Vol I, Tab 3, p 179.**

<sup>133</sup> *Chippewas*, paras 47 and 72-75, **AR, Vol I, Tab 3, pp 174 and 182-183.**

<sup>134</sup> *Chippewas*, para 59, **AR, Vol I, Tab 3, p 178.**

<sup>135</sup> *Chippewas*, para 79, **AR, Vol I, Tab 3, p 184.**

<sup>136</sup> *Chippewas*, paras 104, 106, 111-112, **AR, Vol I, Tab 3, pp 193-194 and 195-196.**

**PART II – POINTS IN ISSUE**

56. The Attorney General of Canada addresses the issues raised by the appellant but restated in a more neutral fashion:

- (1) Whether the Crown's duty to consult was triggered in this case;
- (2) Whether the Board has the jurisdiction and the obligation to assess the adequacy of the Crown's consultation prior to issuing a decision under section 58 of the *NEBA*; and
- (3) Whether the obligations of the duty to consult are met by the Crown's reliance on the Board's Aboriginal consultation.

### **PART III – ARGUMENT**

57. The Attorney General of Canada (AGC) adopts and relies on her factum in *Hamlet of Clyde River* (SCC File No. 36692 – *Clyde River*) which is to be heard together with this appeal. Paragraphs 49 to 64 of the *Clyde River* factum set out the governing principles, which find their source in this Court's jurisprudence:

- a) a statutory tribunal exercising a licensing power of decision that may affect asserted Aboriginal rights triggers the Crown's duty to consult even when the tribunal is not the Crown;
- b) tribunals such as the Board, with the required statutory power, may answer constitutional questions necessary to carry out their decision-making, but when such questions are not asked by parties to the Board's proceedings, the tribunal may nevertheless consider the asserted rights of Aboriginal groups and provide what this Court has described as a deep level of Aboriginal consultation, while not expressly articulating the elements of this Court's *Haida* analysis; and
- c) when a tribunal provides such a robust process, and no issues arise that are outside the tribunal's jurisdiction, the Crown may rely on the tribunal process as satisfying the duty to consult without doing anything further.

#### **A. THE CROWN'S DUTY TO CONSULT WAS TRIGGERED BY THE BOARD'S LICENSING DECISION**

58. The Attorney General agrees with the appellant that the Crown's duty to consult is triggered when a tribunal created by Parliament contemplates conduct that may have an adverse impact on an asserted Aboriginal right. As explained in the *Clyde River* factum, the Board is neither the Crown nor a Crown agent, but it is part of the executive branch of

government. A broad and purposive application of the Crown's duty to consult requires that the Crown's duty is triggered by the licensing decision of the Board.<sup>137</sup>

59. In every case where Aboriginal groups assert that a project requiring a Board licence has the potential to adversely affect their asserted rights, the Board requires the following Aboriginal consultation:

- that proponents identify, engage, and consult with the potentially affected Aboriginal groups before filing a project application;
- the Board then evaluates the sufficiency of the proponent's consultation process along with other evidence filed on its record;
- the Board encourages Aboriginal groups to become directly involved in its hearing process through its Enhanced Aboriginal engagement process and its provision of participant funding;
- the Board's hearing process forms part of its overall consultative process; and
- the Board takes the interests and concerns of Aboriginal groups into consideration before making a decision.<sup>138</sup>

60. These consultative requirements would meet this Court's description of deep consultation if the Crown were carrying out consultation. Those requirements may include: (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.<sup>139</sup>

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<sup>137</sup> *Hamlet of Clyde River et al v Petroleum Geo-Services Inc*, SCC Court File No. 36692, Factum of the Respondent Attorney General of Canada [Clyde River Factum], at paras 49-50 and 65.

<sup>138</sup> See para 15 above.

<sup>139</sup> Clyde River Factum, paras 88, 90, 95; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, **RBA, Tab 1**, paras 37-39 and 44-45; *Upper Nicola Band v British Columbia (Minister of Environment)*, 2011 BCSC 388, **RBA, Tab 3**, para 129; *Taku River Tlingit First Nation v*

61. In this case, the Board's decision reviewed the appellant's evidence of their treaty right to hunt and fish in their traditional territory.<sup>140</sup> The Board stated the appellant's concern that a reversal of the flow, and a return to the volume and type of product that the pipeline had been built to carry in 1975, might increase the likelihood of a spill from the *status quo*, with serious impacts on those rights.<sup>141</sup>

62. The Board's section 58 decision concluded that its approval of the proponent's application to resume the transportation of heavy crude with a drag reducing agent at the requested increased volume would likely have minimal impacts on the rights and interests of Aboriginal groups, and that those minimal impacts would be appropriately mitigated.<sup>142</sup> The Board further found that while the return to the capacity approved between 1975 and 1999 would incrementally increase the risk and volume of a spill, with the fulfillment of regulatory requirements, Enbridge's commitments and the Project's conditions, any potential Project impacts would be minimal and would be mitigated.<sup>143</sup> Specifically in relation to the concerns of the appellant and others respecting the potential for spills and the effects of spills, the decision also required that Enbridge comply with conditions respecting pipeline integrity, the potential effects of spills, emergency management and response and environmental protection (including the protection of watercourse crossings).<sup>144</sup>

63. As a result of the foregoing, the Board's consultative process and statutory powers were sufficient to provide extensive Aboriginal consultation and appropriate accommodation of the appellants' Aboriginal concerns within the Board's expertise and its regulatory authority.

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*British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, **Appellant's Book of Authorities (ABA), Vol 1, Tab 26**, para 40; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 [*Beckman*], **ABA, Vol 1, Tab 1**, para 39.

<sup>140</sup> Board Reasons, pp 94-95, **AR, Vol I, Tab 1, pp 111-112**.

<sup>141</sup> Board Reasons, pp 94-95 and 99, **AR, Vol I, Tab 1, pp 111-112 and 116**.

<sup>142</sup> Board Reasons, pp 98-99, **AR, Vol I, Tab 1, pp 115-116**.

<sup>143</sup> Board Reasons, p 38, **AR, Vol I, Tab 1, p 55**.

<sup>144</sup> Board Reasons, pp 131-139, **AR, Vol I, Tab 1, pp 148-157, Conditions 3, 6, 9-20 and 22-29**.

**i. Irrelevance of direct Crown Participation in Triggering the Duty**

64. The presence or absence of representatives of the Crown should make no difference to the triggering of the Crown's duty to consult. Instead, the essential question in this case is whether a process of Aboriginal consultation undertaken by a statutory decision-maker in carrying out its own regulatory responsibilities can be relied upon by the Crown to satisfy the Crown's duty to consult. What is required is that the tribunal adequately hear Aboriginal concerns and take those concerns into account in its regulatory decision, and that to the extent possible within the tribunal's jurisdiction, those concerns are appropriately accommodated.

65. Rennie J.A.'s dissent in the appellate decision below correctly found that the presence or absence of the Crown at a regulatory proceeding has no effect in determining when the Crown's duty to consult is triggered. The duty should be triggered by any state action that might adversely affect an existing or asserted Aboriginal right. However, he erred in asserting that the Board was obliged to decide whether a second independent Crown consultation had occurred, and was obliged to withhold its regulatory approval if it had not.<sup>145</sup> No parallel Crown consultation process is required when, as in this case, the Board is able to consult, and where appropriate, accommodate Aboriginal concerns within its jurisdiction.

66. Moreover, the observation of the Federal Court of Appeal that the Crown was not a party to this section 58 proceeding (and to the section 52 Certificate process in *Standing Buffalo*) is incorrect. Representatives of government departments participated in both processes. In this case, representatives of Environment Canada participated in the Board's section 58 process.<sup>146</sup> The same was true of the section 52 Certificate process in *Standing Buffalo*, though that case is completely distinguishable because the Governor in Council

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<sup>145</sup> *Chippewas*, para 120, AR, Vol 1, Tab 3, p 198.

<sup>146</sup> See paragraph 31 above.

was the final decision-maker, and the Board process was only the first step in the Aboriginal consultation for that very different regulatory scheme.

67. The duty to consult does not require Aboriginal consultation to take on any particular form so long as the process allows the tribunal to fully hear, consider, and where appropriate, accommodate asserted Aboriginal rights. In this case, the Board's process satisfied those requirements. The treaty and title rights asserted by the appellant were not questioned, and the potential adverse impacts were carefully considered. The appellant was given participant funding; it had a full opportunity to challenge the proponent in written submissions and oral hearings; its concerns were heard, considered and acknowledged; and conditions were imposed on the Project to address those concerns. The Board's expert conclusion was that the potential adverse impacts were likely to be minimal and would be appropriately mitigated.<sup>147</sup>

68. The adjudication carried out by the Board is open, transparent, expert and effective in addressing the concerns of Aboriginal people. The process and decisions of tribunals such as the Board appropriately uphold the honour of the Crown and give effect to the constitutional recognition of Aboriginal rights in section 35.

**B. THE BOARD CAN ANSWER CONSTITUTIONAL QUESTIONS PROPERLY ASKED OF IT, BUT IN ANY EVENT MAKES DECISIONS CONSISTENT WITH SECTION 35**

69. The Board has the legal capacity to answer constitutional questions necessary to its decision-making.<sup>148</sup> It does not have the statutory power to discharge the Crown's duty to consult, although it is aware that the Crown may rely on the Board's section 35 Aboriginal consultation as discharging the Crown's duty to consult. The appellant did not ask the Board to consider whether the Board's process was adequate to discharge the Crown's duty to consult, either generally, or in the specific circumstances of this case. Instead, the appellant asked the Board to conclude that it did not have the jurisdiction to make its

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<sup>147</sup> Board Reasons, p 98-99, AR, Vol I, Tab 1, pp 115-116.

<sup>148</sup> Clyde River Factum, paras 62-63, 46

decision until the Crown had carried out a parallel process. The Board clearly had the jurisdiction to carry out its statutory responsibility without the need to consider what, if anything the Crown was going to do in addition. The Board did not have to carry out a formal *Haida* analysis to reject the appellant's argument. However, the Board did recognize that it must make its decisions consistent with section 35, and its decision explained the extensive Aboriginal consultation that allowed the Board to meet that requirement.<sup>149</sup>

70. In this case, and in *Clyde River*, the Board's Aboriginal consultation process and decisions fully complied with the principles underpinning section 35 and the honour of the Crown. They promoted reconciliation and the protection of Aboriginal and treaty rights. When the Board's processes provide for this, the Crown is then able to rely on that Board process and decision as discharging the Crown's duty to consult.

71. Such Crown reliance will be justified in every Board proceeding where potential serious impacts on asserted Aboriginal rights can be dealt with by the Board within its jurisdiction. The Board has the jurisdiction to require changes or even to refuse project applications where that is necessary to accommodate Aboriginal concerns. The Crown need only involve itself if there are issues of consultation and possible accommodation arising in a Board proceeding that are beyond the Board's jurisdiction to address.

### **C. THE BOARD'S CONSULTATION PROCESS AND DECISION WERE ADEQUATE IN THIS CASE**

#### **i. The Board has the Constitutional responsibility to carry out Aboriginal Consultation**

72. The Board had the remedial jurisdiction to address adverse impacts on the appellant's Aboriginal and treaty rights that might arise from the Project. The Project is not the construction of Line 9; it is the reversal of flow in an operating pipeline, the return of the approved capacity of product transported in the existing pipeline to capacities

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<sup>149</sup> Board Reasons, p 87-99, AR, Vol I, Tab 1, pp 104-116.

previously approved when it was constructed, and approval of the transportation of a product that had previously been approved to be carried by the pipeline for 20 years. The appellant did not intervene or object to the re-reversal (return to easterly flow) of the segment of Line 9 (Line 9A) that is proximate to its traditional territories in 2012 when the Board gave section 58 approval to that change.<sup>150</sup>

73. The main concerns expressed by the appellant are adverse impacts on its treaty right to hunt and fish resulting from a spill on its traditional territory or in the Thames River. The essential business of the Board is to regulate pipeline operators in a manner that ensures the prevention of spills, and ensures that if a spill occurs it will cause the least possible injury. The Board is well-equipped to accommodate Aboriginal concerns about these impacts. Its decision in this case addresses the issues of prevention of spills, the lessons learned by the proponent after a previous spill in Michigan and improvements to prevent recurrence. It requires the proponent to have sufficient insurance to compensate for any damages suffered if the preventative measures are unsuccessful, and in specific reference to the appellant's concerns, it required conditions respecting pipeline integrity, the potential effects of spills, emergency management and response and environmental protection (including the protection of watercourse crossings).<sup>151</sup>

74. These substantive responses to the concerns expressed by the appellants and other Aboriginal groups are not "blowing off steam", as the appellant contends. They are substantive and responsive measures imposed by a tribunal that is seriously applying its expertise and section 35 responsibilities.

75. Ryer J.A. was correct in finding that the Board's responsible application of its section 35 responsibilities achieved the same result as consultation carried out by the Crown under a *Haida* duty. The Board is not, as the appellant alleges, simply fulfilling an

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<sup>150</sup> See para 12 above.

<sup>151</sup> Board Reasons, pp 131-139, **AR, Vol I, Tab 1, pp 148-157, Conditions 3, 6, 9-20 and 22-29.**

administrative responsibility. The Board acknowledges that it is making decisions consistent with its constitutional responsibilities.

76. The appellant quotes from the Board's description of its mandate, but fails to quote what the Board says about its responsibilities for Aboriginal consultation:

As a quasi-judicial decision-maker, the Board must ensure that its process complies with the principle of fairness and the rules of natural justice. In addition, the Board interprets its responsibilities, including those outlined in section 58 of the NEB Act, in a manner consistent with the *Constitution Act, 1982*, including section 35.

The Board takes the interests and concerns of Aboriginal groups into consideration before it makes a decision that could have an impact on those interests. Whenever a project has the potential to impact the rights and interests of Aboriginal groups, the Board obtains as much evidence as possible in that regard so that it may assess and consider the potential impacts in its final decision. The Board relies on both its hearing process and its Enhanced Aboriginal Engagement (EAE) initiative. The Board's EAE initiative involves proactive contact with Aboriginal groups that may be affected by a proposed project, and seeks to assist Aboriginal groups with understanding the Board's regulatory process and how to participate in that process.

...

In addition to the one-on-one consultation that occurs between proponents and Aboriginal groups, it should also be understood that the Board's hearing process itself is part of the overall consultative process. Aboriginal groups who are concerned with the potential impact of a proposed project on their rights and interests may present their views directly to the Board.

...

Before making its decision on a project, the Board will assess the completeness of its process to ensure all potentially affected Aboriginal groups had a reasonable opportunity to make their concerns known to the Board. It will consider all of the relevant information before it, including information regarding the consultation undertaken with Aboriginal groups, the views of Aboriginal groups, project impacts on rights and interests of Aboriginal groups and proposed mitigation measures. In assessing the potential impacts of a project and determining whether it is in the public convenience and necessity, the Board considers the nature and extent of the interests and concerns of Aboriginal groups in the context of how the project may affect such interests.<sup>152</sup> [Emphasis added]

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<sup>152</sup> Board Reasons, pp 87-88, AR, Vol I, Tab 1, pp 104-105.

77. This Aboriginal consultation and accommodation carried out by the Board under its statutory mandate, interpreted in light of the duties imposed by section 35 and by the honour of the Crown, is identical to what is required of the Crown itself. Only in circumstances where consultation and possible accommodation are outside the Board's jurisdiction does the Crown have to become actively involved to discharge its duty to consult. There was no need for additional Aboriginal consultation by the Crown in this case, as the relevant concerns raised by the appellant were all addressed in the Board process, on which the Crown could rely.

78. In this case, the appellant wrote to ministers of the Crown asserting that it was entitled to the following accommodation outside the Board's jurisdiction:

- a) protecting other parts of the appellant's land base to ensure that there continue to be areas in their traditional territories where they can exercise their traditional rights;
- b) addressing cumulative impacts caused by changes to other Enbridge pipelines (such as Lines 5 and 6B) and facilities (Sarnia Tank Terminal) that are required to enable Enbridge to ship 300,000 bpd of crude oil on Line 9;
- c) addressing cumulative impacts caused by changing the type of crude oil that will be used as feedstock by petrochemical and chemical refineries in Sarnia;
- d) providing economic accommodation for potential impacts to the appellant's rights;
- e) conducting the public hearing and make a decision under section 58 in a way which ensures that, if the Project is approved, accommodation provided to the appellant is commensurate with the potential adverse impacts on their rights and interests; and

- f) addressing historic and ongoing infringement of their rights caused by the construction and operation of Line 9.<sup>153</sup>

79. The Minister of Natural Resources confirmed that the Crown would be relying on the Aboriginal consultation of the Board, stating: "The National Energy Board's (NEB) regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate."<sup>154</sup>

80. Had the appellant sought judicial review of the Crown's refusal to provide additional accommodation (to that provided by the Board), the Crown's answer to the each of the issues raised with the Minister would have been as follows:

- a) the appellant's exercise of their traditional rights are adequately protected given that the Board concluded that there will be minimal impacts on their Aboriginal rights and that those impacts will be mitigated by the decision. The decision specifically sets out the requirements imposed by the Board to prevent spills, to provide prompt spill response in the unlikely event that a spill occurs, and adequate insurance to remediate any damage in the unlikely event of a spill. The Board therefore had, and exercised, the power to accommodate this concern;<sup>155</sup>
- b) while the appellant alleged that the Project would result in changes to other pipelines and refineries, there was no evidence at the hearing to

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<sup>153</sup> Letter from Aamjiwnaang First Nation and Chippewas of the Thames First Nation to the Prime Minister of Aboriginal Affairs and Northern Development and Minister of Natural Resources Canada dated September 27, 2013, **AR, Vol VI, Tab 14, p 118**.

<sup>154</sup> Letter from Minister of Natural Resources to Chippewas of the Thames First Nation and Aamjiwnaang First Nation, dated January 30, 2014, **AR, Vol VI, Tab 11, pp 47**.

<sup>155</sup> See for example Conditions 9, 10, 11, 12, 15, 16, 17, 19, 22, 27 and 28 (spill prevention), Conditions 3, 13, 14, 20 and 26 (emergency response), Conditions 6, 16, 18, 23 and 25 (environmental and health protection) and Conditions 24, 26 and 29 (ongoing engagement, spill response and water safety), Board Reasons, **AR, Vol I, Tab 1, pp 148-157**.

- support that speculation. Required changes to other pipelines would also have been subject to the Board's regulatory jurisdiction;
- c) the Board addressed the cumulative effects of the Project.<sup>156</sup> While the appellant speculates about other changes it predicts from the Project, the Crown's duty to consult regarding the project is limited to the Project itself, and the cumulative effects directly related to it.<sup>157</sup> The Board therefore had, and exercised, the power to accommodate this concern;
  - d) the Board's decision outlines the steps required of the proponent Enbridge to ensure its financial responsibility for any damages or impacts arising in the unlikely event of an impact on Aboriginal rights. The Board therefore had, and exercised, the power to accommodate this concern;<sup>158</sup>
  - e) the Board conducted a public hearing and its decision ensured that unlikely potential impacts would be compensated for by the proponent Enbridge. The Board therefore had, and exercised, the power to accommodate this concern;
  - f) the duty to consult does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976.<sup>159</sup> There is no ongoing infringement to the asserted rights of the appellant resulting from the Project, except the unlikely possibility of a spill affecting their traditional rights, and that potential impact has been accommodated by the Board's decision. The Board therefore had, and exercised, the power to accommodate this concern.

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<sup>156</sup> Board Reasons, pp 82-84, **AR, Vol I, Tab 1, pp 99-101.**

<sup>157</sup> *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani*], **RBA, Tab 2**, paras 35 and 53-54

<sup>158</sup> Board Reasons, pp 63-71, **AR, Vol I, Tab 1, pp 80-88.**

<sup>159</sup> *Carrier Sekani*, **RBA, Tab 2**, at paras 45, 48-49.

81. The expert process of the Board provides for the early pragmatic influence of Aboriginal concerns on proposed projects. If every smaller licensing process required a separate Crown consultation process in addition to the Aboriginal consultation carried out by the regulatory tribunal, the regulatory process would be continually impeded by duplicative discussions with Crown officials, frustrating the entire purpose of the statutory scheme. A dual process of consultation does not provide early intervention promoting reconciliation as is suggested by the dissenting judgment below.<sup>160</sup> Instead, it invites delay, duplication, and procedural gridlock.

82. The appellant claims that the Board weighed polycentric and conflicting interests and preferred jobs and money to adverse impacts on Aboriginal rights. But in reality, the Board's expert opinion was this:

In conclusion, the Board is of the view that given the nature and scope of the Project, and with the implementation of Enbridge's commitments and fulfillment of regulatory requirements such as its EPP and EMP, as well as those mitigation measures committed to by Enbridge and discussed in these Reasons, particularly Chapters 4 to 6, and the conditions imposed by the Board for the Project in the Order, any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated.<sup>161</sup> [Emphasis added]

83. The conclusion of the Board is that there will be no significant impact on the appellant's asserted rights that will result from the change of the direction of flow, the return to the originally approved capacity of the pipeline, and a return to the approval of the pipeline carrying heavy crude. This conclusion does not imply any preference between a serious impact on Aboriginal rights and other public interests.

84. The appellant relies on the recent Federal Court of Appeal decision in *Gitxalaa Nation v Canada* as supporting its argument that a second Crown consultation process is required in addition to the statutory process of the Board. This argument fails to acknowledge the enormous difference between the two cases. In this case, the regulatory

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<sup>160</sup> *Chippewas*, para 119, AR, Vol I, Tab 3, p 198.

<sup>161</sup> Board Reasons, p 99, AR, Vol I, Tab 1, p 116.

approval involved switching the direction and volume of product in an existing and operating pipeline; in *Gitxalaa* it involved the construction and operation of two new pipelines and their associated facilities, including a new marine terminal and tank terminals, crossing lands potentially subject to Aboriginal title. In the latter case, Parliament requires that the Governor in Council is the final decision-maker in the Certificate required under section 52 of *NEBA*.

#### **D. CONCLUSION**

85. The Board carried out an extensive and ample process of Aboriginal consultation. It gave the appellant and every other interested Aboriginal group the opportunity to be heard, it carefully considered the concerns that were expressed and it imposed conditions on the proponent to mitigate the concerns that were identified. The process and decision of the Board were entirely adequate to be relied upon by the Crown in discharging its duty to consult. The result maintains the honour of the Crown and advances the reconciliatory purpose of section 35.

**PART IV – SUBMISSIONS AS TO COSTS**

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

**PART V – NATURE OF THE ORDER SOUGHT**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 13<sup>th</sup> day of September, 2016.

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Peter Southey

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Mark Kindrachuk, Q.C.  
Counsel for the Attorney General of  
Canada

**PART VI – TABLE OF AUTHORITIES**

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**APPENDIX "A" – STATUTES RELIED ON**

*National Energy Board Act*, RS 1970, Chap N-6 (See separate Part VII Book)

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

National Energy Board Onshore Pipeline Regulations SOR/99-294 (See separate Part VII Book)

*National Energy Board Rules of Practice and Procedure*, 1995, SOR/95-208 (See separate Part VII Book)