

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

BETWEEN:

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

Appellants

and

**PETROLEUM GEO-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 TUNNGAVIK INCORPORATED, MAKIVIK
CORPORATION, THE NUNAVUT WILDLIFE MANAGEMENT BOARD,
INUVALUIT REGIONAL CORPORATION,
and THE CHIEFS OF ONTARIO**

Interveners

AND BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

Appellant

and

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

Respondents

and

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MISSISSAUGAS OF THE NEW CREDIT FIRST NATION and THE CHIEFS OF
ONTARIO**

Interveners

**FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA,
IN REPLY TO THE INTERVENERS (Rule 59 and SCC Order of 13 September 2016)**

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Respondent Attorney General of Canada's Argument in Reply to Interveners

A. THE ROLE OF TRIBUNAL PROCESSES

1. Several interveners argue that the Board had an obligation to assess the adequacy of Crown consultation and accommodation.¹ Some say that the Board was unable to conduct a proper assessment.² Others argue that the Board's processes can never satisfy the Crown's duty to consult.³

2. The duty to consult is the Crown's obligation, but the Crown can rely on tribunal processes to satisfy that duty, whether or not a tribunal was asked to evaluate the sufficiency of consultation, or was in a position to do so. In these cases, the Crown was aware of the Board's comprehensive and robust approach to consultation and the Crown explicitly informed the parties that it would rely on that process.⁴

3. In the approach advocated by the interveners, the Crown would be obliged to carry out and conclude a parallel consultation process that could then be evaluated by a regulatory tribunal such as the Board. As stated in the *Chippewas* factum, such a parallel process would risk creating delay, duplication and procedural gridlock, and would risk missing opportunities for reconciliation that can be provided through a tribunal's early involvement in project development and review.⁵ In the Crown's present approach, it can intervene if issues of consultation and accommodation arise that are outside a tribunal's jurisdiction, but otherwise the Crown's honour is maintained through its reliance on the consultation carried out by the

¹ Factum of the Intervener Nunavut Tunngavik Incorporated, paras 14-24; Factum of the Intervener Mohawk Council of Kahnawà:ke, paras 4-12.

² Factum of the Intervener Makivik Corporation, paras 30-41.

³ Factum of the Intervener Mississaugas of the New Credit First Nation, para 13; Factum of the Intervener Mohawk Council of Kahnawà:ke, paras 23-24.

⁴ Letter from Minister of Aboriginal Affairs and Northern Development Canada to Qikitani Inuit Association and Nunavut Tunngavik Incorporated dated 10 June 2014, **Appellants' Record (Clyde), Vol IV, Tab 63, p 966**; letter from Minister of Natural Resources to Chippewas of the Thames First Nation and Aamjiwnaang First Nation dated 30 January 2014, **Appellants' Record (Chippewas), Vol VI, Tab 11, p 47**.

⁵ Factum of the Respondent, the Attorney General of Canada in *Chippewas of the Thames*, para 81.

Board, and the judicial supervision that is available to ensure that constitutionally-protected right

4. In cases where there are adverse project-related impacts that a tribunal cannot address, the tribunal may consider a range of remedies, including deferral or refusal of approval in appropriate cases. The extent to which a tribunal may appropriately provide guidance on what is required to address or accommodate such impacts will depend on the particular legislative scheme that applies. A determination of this issue should await a case where such impacts arise.

All of which is respectfully submitted.

DATED at Toronto this 17th day of November, 2016.

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TABLE OF AUTHORITIES

None

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