Court File No.: 36692

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, INUVIALUIT REGIONAL CORPORATION, and THE CHIEFS OF ONTARIO

Interveners

Court File No.: 36776

AND BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

Appellant

and

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

Respondents

and

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

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PART I
OVERVIEW AND FACTS

1. The Attorney General for Saskatchewan ("Attorney General") was granted leave to intervene in these appeals by Order of Gascon J. dated September 13, 2016.

2. The Attorney General adopts the facts set out in the factums of the various Respondents.

3. In this factum the Attorney General will identify and discuss three interrelated concepts that are central to the Crown's duty to consult Aboriginal peoples: practicality, flexibility and substance.

4. The duty to consult and accommodate is, at its core, a practical doctrine. Courts have consistently understood and applied the duty in ways that promote effective and meaningful paths to reconciliation without introducing unnecessary steps into the process. Practicality should guide the Court's determination of these appeals. Administrative tribunals can have the authority, processes and technical expertise to make them best situated to satisfy the duty. Where a tribunal has effectively assessed and complied with the duty, there should be no residual need for any other part of executive government to oversee this process or to conduct parallel consultations.

5. Courts have built various points of flexibility into how the duty can be satisfied. This same sensitivity to flexibility should allow governments wide latitude to rely on administrative bodies to comply with the duty. The Attorney General asks this Court to not unnecessarily restrict the availability to the Crown of effective means of reconciliation.

6. The duty should be a triumph of substance over form. Where substance and meaning can be found, the form in which they have been delivered should not matter. Consultative or remedial measures provided by government, whether through a Crown ministry or indirectly through an administrative body, should count toward satisfying the duty in whole or in part.

PART II
STATEMENT OF ISSUES

7. The Attorney General will address issues surrounding the role of administrative tribunals in satisfying the duty to consult Aboriginal peoples. In particular, the Attorney General will consider whether the executive branch of government has any residual role to play where an administrative body has the authority and expertise to effectively satisfy the duty.

PART III
ARGUMENT

A. Saskatchewan's Interest

8. Saskatchewan relies primarily on line ministries, not administrative tribunals, to comply with its consultative obligations, and it has no particular interest here in the National Energy Board's jurisdiction. However, Saskatchewan is generally interested in ensuring that governments are given wide latitude in how they satisfy the duty to consult. The duty should map on to administrative tribunals in ways that are practical, flexible and substantive.

9. The Attorney General also has a specific concern that the outcome of these appeals may inadvertently undermine Saskatchewan's approach to municipalities in the consultation process. By policy (not legislation) it relies on its municipalities to consult where they independently make decisions that may negatively impact the exercise of rights.[1] No provincial executive oversight is required. The rationale is that municipalities may be in the best position to address concerns of Aboriginal peoples for ground level decisions. Moreover, reconciliation is fostered when local governments form direct relationships with neighbouring Aboriginal communities.

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[1] This policy formed part of Saskatchewan's application for leave to intervene. The Attorney General is aware that of the British Columbia Court of Appeal's decision in *Neskonlith Indian Band v Salmon Arm*, 2012 BCCA 379, in which that Court held that municipalities do not hold the duty. The Attorney General respectfully disagrees with that decision and leaves the issue to be argued before this Court for another day.

B. The Duty to Consult is a Practical Doctrine

10. The Attorney General urges this Court to adopt the recent statement of the Saskatchewan Court of Appeal in *Buffalo River Dene Nation* that "the duty to consult is, at core, a practical doctrine."[2]

11. The conception of the duty as a practical doctrine simply encapsulates how it has been consistently understood and applied by the courts. The doctrine's overall intent is to move the discussion away from protracted litigation and towards cooperative solutions. As this Court stated in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, "Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests."[3]

12. In *Rio Tinto* the Court also affirmed that "mere speculative impacts [...] will not suffice" to trigger the duty, and that "there must be an appreciable adverse effect on the First Nation's ability to exercise their aboriginal right."[4] As demonstrated in *Buffalo River Dene Nation, supra*, consultations are impractical when potential impacts on rights are premature, hypothetical or speculative. The Saskatchewan Court of Appeal held that no duty was triggered in relation to mineral licences that permitted no land access, and where it was highly uncertain whether land access would ever be sought by the proponent. The Court held that "it would be a great waste of time, effort and public resources to require the Crown to [...] consult about something that is, at this time, so terribly contingent and unquantifiable."[5]

13. Practicality also governed this Court's finding in *Rio Tinto* that the duty arises only in relation to current decisions and new impacts.[6] The Court held that consultations would become "impossible" if they digressed into compensation negotiations over historical impacts and decisions long past.[7]

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[2] *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31 at para 91.
[3] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 33 & 34, [2010] 2 SCR 650 (Canada's BOA, Tab 2, in the Chippewas of the Thames appeal)
[4] At para 46.
[5] *Buffalo River Dene* Nation, *supra*, at para 99. See also, for example, *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472 at para 146.
[6] At para 53. See also, for example, *Peter Ballantyne Cree Nation v Canada*, 2016 SKCA 124 at paras 67-75.
[7] At para 83.

14. Courts have accepted the utility of consultations occurring at different stages of the process. In *Taku River* this Court accepted that certain Aboriginal concerns would be more effectively considered at a later stage.[8] In the other direction, this Court found that it is ineffective to consult too late in the process, as for example when strategic land use decisions have already been made.[9]

15. This Court in *Haida Nation* imposed "reciprocal duties" on Aboriginal claimants as a practical solution to the practical problem of how to consult in relation to unproven rights, each with varying degrees of strength and definition. The Court's answer was to require claimants to outline their claims with focus and certainty, and to not frustrate the process by taking unreasonable positions.[10]

16. In *Haida Nation* the Court held that the Crown may delegate procedural aspects of consultation to project proponents,[11] tacitly accepting the utility of including third parties in the process. Proponents are best situated to inform Aboriginal peoples of their proposed projects and to know what mitigation measures may fit best within the overall plan on the ground level.

17. Practical considerations should also factor into the role administrative bodies have in satisfying the duty to consult. The National Energy Board's powers, technical expertise and expansive remedial authority are thoroughly reviewed in the Board's factum in the Chippewas of the Thames First Nation appeal. The Attorney General notes that the Board delegates procedural aspects of consultation to project proponents (as the Crown most certainly would) commensurate with the scope of the project and the potential for adverse impacts.[12] It monitors and oversees proponents' consultative efforts. It may require proponents to conduct further consultations if needed,[13] which is what occurred in the Hamlet of Clyde River matter.[14] It makes no functional difference whether proponent delegation is overseen by an administrative body or directly by a Crown ministry.

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[8] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 45 and 46, [2004] 3 SCR 550 [Enbridge's BOA, Vol I, Tab 2, Chippewas of the Thames First Nation appeal]. See also, for example, *Buffalo River Dene Nation, supra,* at para 100.

[9] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 76, [2004] 3 SCR 511 [Canada's BOA at Tab 1, Chippewas of the Thames appeal]

[10] At paras 36 & 41.

[11] At para 53.

[12] Factum of the Respondent, The National Energy Board, at para 53.

[13] At para 56.

[14] Factum of the Appellant, the Hamlet of Clyde River, at para 32.

18. The Board is also a court of record with powers to compel witnesses; order the production and inspection of documents; and issue and enforce orders. It has jurisdiction to hear and determine questions of law, and fact and law. It creates its own rules of practice and procedure. It considers representations from experts and affected persons and Aboriginal groups. It may grant or deny applications; impose measures to mitigate potential negative impacts on rights; and vary, rescind, revoke or suspend its orders and decisions, as the case may be, during project implementation. It is unclear what residual role the Crown might have in consulting or accommodating Aboriginal concerns that cannot be effectively achieved through the Board's robust process.[15]

19. Moreover, there is no *a priori* reason to believe that the Board is not *better* able to address Aboriginal concerns than consultations conducted directly by a Crown ministry. The Board is a specialized body standing in the best position to understand the proposed project and its potential impacts, and to impose appropriate mitigation measures directly or through the proponent.

20. In his dissenting opinion in the *Chippewas of the Thames First Nation* matter, Justice Rennie held that the Board was obligated to assess the adequacy of the Crown's consultations.[16] However, while it is true that the Board has jurisdiction to determine questions of law, it would be pointless for it to conduct an analysis of whether *the Crown* satisfied the duty. In neither appeal was the Crown the proponent or the decision maker. There was no Crown conduct for the Board to consider, and the Board had no remedial power over the Crown in any event.

21. The difference between these appeals and *Rio Tinto* is therefore relevant. Where the Crown is the proponent, as in *Rio Tinto*, the tribunal may have jurisdiction to assess the Crown's consultations and to assert authority over the Crown *as the proponent*. It would be strange to characterize the Crown in that circumstance as having been "delegated" procedural aspects of the duty, as would be the case for a non-Crown proponent. But this distinction may be meaningless. Again, in the *Hamlet of Clyde River* matter the Board assessed the proponent's consultation efforts and ordered it to make further efforts. It is not clear what difference it would have made if the proponent was a Crown

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[15] Factum of The National Energy Board: see paras 33 – 36, 58 & 61.
[16] *Chippewas of the Thames First Nation v Enbridge Pipelines*, 2015 FCA 222 at para 106.

actor. The proponent does not trigger the duty. Rather, the decision of whether or not to grant an approval triggers the duty, which in both of these appeals was the Board's to make.

22. Thus to the extent that the Board must conduct a *Haida* analysis, it should be focused on whether its processes and mitigation measures are sufficient to satisfy its section 35 obligations. This will include an assessment of the proponent's consultations and accommodations (whether the proponent is a private or Crown entity), opportunities for Aboriginal concerns to be heard directly by the Board, and measures taken by the Board to accommodate those concerns in its decision. Functionally, such a tribunal acts no differently than a Crown ministry in doing so.

23. Where a tribunal takes the view that Aboriginal concerns cannot be adequately addressed within its process, then it should withhold its approval accordingly. A Board must always be open to a "no" answer, as must the Crown.

24. In *Chippewas of the Thames First Nation*, Justice Ryer questioned whether the Board, as a quasi-judicial body, could both discharge the duty and assess the adequacy of its consultations.[17] The Attorney General does not share his concern. Officials in Saskatchewan's line ministries both conduct consultations and assess their adequacy without any concern that the Crown is somehow conflicted. Requiring two separate arms of government to conduct and assess the adequacy of consultations would introduce unnecessary complexity into the process.

25. Nor should there be any concern that a quasi-judicial tribunal is somehow conflicted in this regard. Administrative bodies must routinely take measures to comply with the requirements of procedural fairness and assess the adequacy of those measures.

26. In *Hamlet of Clyde River* the Federal Court of Appeal held that, while the Crown may rely on the Board's processes as satisfying the duty, the Crown must always independently assess whether additional consultations and accommodations are necessary.[18] This requirement appears to introduce another unnecessary and duplicative step into the process.

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[17] At para 66.

[18] *Hamlet of Clyde River v TGS-NOPEC Geophysical Co. ASA (TGS)*, 2015 FCA 179 at para 65.

27. The Board has the authority to determine whether its processes, including those taken by proponents, comply with section 35. It is unclear what other arm of government has authority to make these determinations or is qualified to second-guess those of the Board. As this Court held in *Rio Tinto*, whether a tribunal is incapable of addressing the potential adverse impacts of its decision is a question appropriately answered by the Courts.[19] There is no need for an intermediate stage of executive government review over the Board's decision. Moreover, the Crown's assessment of the Board's decision may *itself* invite a duty. It also gives rise to the possibility of both the Board's decision, and the Crown's assessment of that decision, being subject to judicial review.

28. Justice Rennie found that the honour of the Crown required direct Crown consultations in a "parallel process" to that of the Board.[20] With respect, the honour of the Crown should not demand unnecessary duplication of efforts. Where tribunals have the authority to conduct and assess consultations, there should be no need for additional executive oversight. Introducing unnecessary steps into the process is precisely the type of inefficiency admonished against by the Saskatchewan Court of Appeal in *Buffalo River Dene Nation, supra,* and is inconsistent with the duty to consult as a practical doctrine. In these circumstances, the notion that there must be parallel processes or additional layers of government review should be given swift application of Occam's razor, the principle of logic which holds that "entities are not to be multiplied without necessity."[21]

C. **Flexibility and the Duty**

29. This Court has recognized more than once that "the business of government is a practical one" and that governments must have "room to manoeuver" in complying with their constitutional obligations.[22] It should not be surprising then that this Court has built various points of flexibility into how the duty to consult can be satisfied.

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[19] At para 63.
[20] *Chippewas of the Thames First Nation* at para 119.
[21] Bertrand Russell, *The History of Western Philosophy* (New York: Simon and Schuster, 1945) at p. 472.
[22] *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at 794-795. See also, for example: *R v Schwartz*, [1988] 2 SCR 443 at 488; *Reference Re Prov. Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 181.

30. The doctrine is generally devoid of hard rules. Rather, it is infused with purposeful concepts such as "give and take", "balance" and "compromise". This Court has given governments room to manoeuver by holding that "flexibility lies in the variable content of the duty once triggered"[23] and by invoking the forgiving concept of a "spectrum".[24] The duty does not demand perfection but instead requires that government decisions fall "within the range of reasonable outcomes."[25] The Crown is also given the flexibility to delegate operational aspects of the duty to proponents and to satisfy its obligations on a continuing basis at different stages of the process.

31. Flexibility works in other directions. Aboriginal peoples are also afforded flexibility, for example, in their ability to delegate authority to individuals or organizations to represent them in consultations.[26] Being flexible is also part of the Crown's duty: it must be willing to modify its consultations and accommodations as new information comes to light during the process.[27]

32. Flexibility also has limits. The Crown cannot simply adopt "unstructured discretionary administrative regimes" to satisfy the duty.[28] Subject to this limit, however, courts should generally allow governments wide latitude, recognizing that the various jurisdictions in Canada may take differing approaches to satisfying the duty, now and in the future. The outcome of these appeals should not unnecessarily restrict the availability of any effective means of reconciliation.

D. Substance Over Form

33. The duty to consult should be a triumph of substance over form. As this Court stated in *Haida Nation*, the honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices."[29] This Court would not allow form to trump substance in *Mikisew Cree First Nation*. Recall that the Crown had argued that, while it should consult about potential

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[23] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34, [2005] 3 SCR 388.
[24] *Haida Nation, supra*, at para 43.
[25] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48, [2010] 3 SCR 103 [Enbridge's BOA, Vol I, Tab 5, Chippewas of the Thames First Nation appeal]
[26] *Behn v Moulton Contracting Ltd.*, 2013 SCC 26 at para 30, [2013] 2 SCR 227.
[27] *Haida Nation* at para 45.
[28] *Haida Nation* at para 51.
[29] *Haida Nation* at para 16.

impacts on rights, it was under no corresponding duty to accommodate Aboriginal interests because the Treaty itself was the formal accommodation. The Court rejected this argument as follows:

> This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.[30]

34. By the same token, where substance and meaning are found, the form in which they have been delivered should not matter. The Attorney General agrees with Justice Ryer's observation in the Court below that:

> [...] as a practical matter, consultations with Aboriginal groups that arise in the Board's section 58 application process may very well deal with, and hopefully remediate if necessary, the same Aboriginal concerns that arise when the Crown engages in *Haida* duty consultations. In other words, it should not matter whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process.[31]

35. Substance matters. The British Columbia Court of Appeal preferred substance over form where it held that "the quality of the consultation must prevail" regardless of whether a formal strength of claim assessment had been completed.[32] Elsewhere that Court found that a municipality's process satisfied the duty even where the municipality took the view that it was under no duty.[33] As for the role of administrative bodies, this Court in *Beckman* affirmed that "forums created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided."[34]

36. The Attorney General submits that consultative or remedial measures taken by government, whether through a Crown ministry or any other arm of government (including municipalities), must be counted towards satisfying the duty in whole or in part. The distinction between "the Crown" and

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[30] *Mikisew Cree First Nation, supra*, at para 54.
[31] *Chippewas of the Thames First Nation, supra*, at para 63.
[32] *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472 at para 118.
[33] *Neskonlith Indian Band v Salmon Arm*, 2012 BCCA 379 at para 88 [Enbridge's BOA, Vol I, Tab 18]
[34] *Beckman, supra*, at para 39.

administrative bodies, or questions of whether the duty has been formally delegated, should not be reasons for placing form over substance.

37. The Court has already recognized that existing administrative bodies may have varying roles to play in satisfying the duty, depending on such factors as the tribunal's remedial powers and ability to decide questions of law. The Attorney General submits that these questions should also be guided by the principles of practicality, flexibility and substance that inform the duty. The Attorney General has no intention here of attempting to modify the duty. His point is simply that, as a practical matter, where a tribunal has in substance or effect satisfied the duty, there should be no requirement for additional executive oversight or consultative measures.

PART IV
COSTS

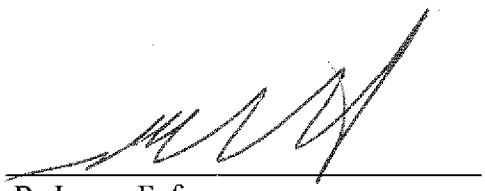
38. The Attorney General does not seek costs and asks that no costs be awarded against him.

PART V
NATURE OF THE ORDER SOUGHT

39. The Attorney General requests the Court's leave to make oral argument of no more than ten minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 3rd day of November, 2016.



FOR R. James Fyfe
Counsel for the Intervener
The Attorney General for Saskatchewan

PART VI
LIST OF AUTHORITIES

CASES	PARAGRAPH
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