File No. 36776

# IN THE SUPREME COURT OF CANADA

**(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**CHIPPEWAS OF THE THAMES FIRST NATION**

**APPLICANT**
(Appellant)

-and-

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

**RESPONDENTS**
(Respondents)

---

## APPLICANT'S REPLY

PURSUANT TO RULE 28 OF THE *RULES OF THE SUPREME COURT OF CANADA*

---


**Counsel for the Applicant,**
**Chippewas of the Thames First Nation:**

DAVID NAHWEGAHBOW & SCOTT ROBERTSON
NAHWEGAHBOW, CORBIERE
109-5884 Rama Rd.
Rama, ON L3V 6H6
Tel: (705) 325-0520
Fax: (705) 325-7204
Email: dndaystar@nncfirm.ca
Email: srobertson@nncfirm.ca

**Agent for Counsel for the Applicant,**
**Chippewas of the Thames First Nation:**

MOIRA S. DILLON
SUPREME LAW GROUP
900 - 275 Slater Street
Ottawa, ON K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

**Counsel for the Respondent,**
**Enbridge Pipelines Inc:**

DOUGLAS CROWTHER AND JOSHUA JANTZI
DENTONS CANADA LLP
15th Floor, Bankers Court
850-2nd Street SW
Calgary, AB T2P 0R8
Tel: (403) 268-7000
Fax: (403) 268 3100
Email: douglas.crowther@dentons.com
Email: josh.jantzi@dentons.com

**Agent for Counsel for the Respondent,**
**Enbridge Pipelines Inc:**

SCOTT MCLEAN AND COREY VILLENEUVE
DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, Ontario K1P 1H4
T: (613) 783-9665/783-9699
F: (613) 783-9690
Email: scott.mclean@dentons.com
Email: corey.villenueve@dentons.com

**Counsel for the Respondent,**
**The National Energy Board:**

**C. REBECCA BROWN AND PARVEZ KHAN**
**NATIONAL ENERGY BOARD**
444 Seventh Avenue S.W.
Calgary, Alberta T2P 0X8
Tel: 1-800-899-1265
Fax: (403) 292-5503
Email: Rebecca.Brown@ neb-one.gc.ca
Parvez.Khan@neb-one.gc.ca
Andrew.Hudson@neb-one.gc.ca
Caroline.Moore@neb-one.gc.ca

**Counsel for the Respondent,**
**Attorney General of Canada:**

**PETER SOUTHEY**
**DEPARTMENT OF JUSTICE CANADA**
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario M5X 1K6
Tel: (416) 973-0942
Fax: (416) 973-0890
Email: Peter.Southey@justice.gc.ca

**DAYNA S. ANDERSON**
**DEPARTMENT OF JUSTICE CANADA**
310 Broadway Suite 301
Winnipeg, Manitoba R3C 0S6
Tel: (204) 983-2391
Fax: (204) 984-6488
Email: Dayna.Anderson@justice.gc.ca

**SARAH BIRD**
**DEPARTMENT OF JUSTICE CANADA**
10th Floor, 123 2nd Ave. South
Saskatoon, Saskatchewan S7K 7E6
Tel: (306) 975-4756
Fax: (306) 975-4030
Email: Sarah.Bird@justice.gc.ca

**Agent for the Respondent,**
**Attorney General of Canada:**

Christopher Rupar
Office of the Attorney General of Canada
50 O'Connor Street
Suite 500, Room 557
Ottawa, ON K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

# TABLE OF CONTENTS

# APPLICANT'S REPLY MEMORANDUM OF ARGUMENT

## A. Issue of National Importance

1. The central issue arising on this appeal relates to the scope and mandate of an administrative tribunal to assess the adequacy of Crown consultation on projects that may adversely impact Aboriginal rights or title, in those cases where the tribunal is the final decision-maker. Under the approach adopted by the majority in the court below, projects can be approved by a final decision of the National Energy Board (NEB) and implemented by the project proponent without the Crown participating in the proceeding and without the NEB assessing the existence or adequacy of the duty to consult.

2. This means that Aboriginal, treaty and title rights can be potentially impacted without Aboriginal Peoples having had any recourse to a decision on the adequacy of consultation by the NEB or the Crown. Given the national scope of decisions made by the NEB, the impact of those decisions on asserted Aboriginal rights and title, and the relevance of this question for all other tribunals who exercise similar powers, this is clearly an issue of national and public importance.

## B. This Court's guidance is required to provide a full response to the issues raised in the application

3. The Respondent asserts that *Carrier Sekani* provides a "complete answer"[1] to the question of the role of administrative tribunals with respect to the duty to consult and that the Applicant cannot demonstrate any inconsistency in the application of the principles from *Carrier Sekani*. This argument fails to recognize, however, that the application of *Carrier Sekani* is the very basis on which Rennie JA dissented.[2] In response to para. 33 of the Leave Response, the Applicant does not rely on the mere fact that Rennie JA dissented, but on the fact that he dissented on a question of national importance involving the application of a decision of this Court. Decisions from lower Courts in different jurisdictions and recent analyses by academic scholars further indicate that the directions of this Court are being inconsistently interpreted and require clarification by this Court.[3]

---

[1] Leave Response at para. 30.
[2] FCA Reasons at para 81.
[3] Leave Application at para 7; see also Sari Graben and Abbey Sinclair, "Tribunal administration and the duty to consult: A study of the National Energy Board," (2015), University of Toronto Law Journal, Volume 65, Number 4, at 382-433.

4. The Respondent incorrectly argues that *Carrier Sekani* "put to rest"[4] the very concern that this Court expressed in *Carrier Sekani* that, "governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate."[5]

5. A review of the essential facts as established by both the findings of the NEB and the Court below strongly indicates that this concern is being realized. The repurposing of the pipeline (the Project) is on lands used by Aboriginal Peoples for "traditional purposes"[6] and there is potential for adverse impacts resulting from the Project.[7] All of the consultations with Aboriginal Peoples in relation to the potential impacts of the Project were carried out by the Project proponent,[8] and any additional consultation required through the Project was expected to be fulfilled by the Project proponent.[9] The Crown did not participate in the hearing,[10] nor did the Crown reply to requests for consultation sent by Aboriginal participants prior to the conclusion of the hearing.[11] When the Crown did reply to the Aboriginal participants requests for consultation, it expressly stated that, "the Government relies on Board processes to address potential impacts to Aboriginal and treaty rights stemming from projects under the Board's mandate."[12]

6. The NEB has the power to make a final decision and there is no statutory basis for the Crown to intervene. However, under the majority's approach in the Court below, the NEB has not been delegated a mandate to discharge the Crown's duty to consult. As a result, the Crown in this case has effectively avoided its duty to consult by virtue of a legislative framework that allows for a final decision to be made and implemented in the absence of any consultation. This is especially troubling given the NEB's statutory requirements to consider, "the current use of lands and resources for traditional purposes by Aboriginal Peoples."[13]

7. The Respondent also argues that the question of whether administrative decision-making constitutes Crown conduct sufficient to trigger the duty to consult is not "live"[14] in this case. The Respondent does not say that this is not a question of public and national importance.

---

[4] Leave Response at para 5.
[5] *Carrier Sekani* at para 62.
[6] NEB Decision, OH-002-2013 at 98.
[7] *Ibid* at 99.
[8] *Ibid* at 97.
[9] *Ibid* at 98.
[10] FCA Reasons at para 13.
[11] *Ibid* at para 12.
[12] *Ibid* at para 16.
[13] *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52, s 5(1).
[14] Leave Response at para. 44.

Instead, the Respondent says the issue was addressed by the Court below only in *obiter*. However, the determination that there was no Crown conduct to trigger the duty to consult in this case clearly underpins the whole of the majority's decision.

### C. *Standing Buffalo* is inconsistent with *Carrier Sekani* and must be overruled to avoid inconsistent results in the jurisprudence

8. The Respondent at para. 30 of the Leave Response advances the Federal Court of Appeal's decision in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[15] to bolster its argument that *Carrier Sekani* "provides a complete answer" and further, that the dissent in the Court below does not raise issues of national importance.

9. To be clear, the "point of divergence"[16] in the Court below focused on a fundamentally different interpretation of *Carrier Sekani* and *Haida Nation* and the impact of those cases on the authority of *Standing Buffalo*.[17] *Standing Buffalo* relied on this Court's 1994 decision in *Quebec (Attorney General) v. Canada (National Energy Board)*[18] in holding that the NEB itself, in its adjudicative capacity, "is not under a *Haida* duty".[19] In pointing out this delineation, Rennie J.A. makes it clear that *Haida Nation* and *Carrier Sekani* are sufficient to mandate, "re-visiting the conclusion reached in *Standing Buffalo*."[20]

10. Since *Quebec v NEB,* it has become clear that the honour of the Crown infuses relationships between the Crown and Aboriginal Peoples even in circumstances where a fiduciary duty might not be found to exist. This fundamental re-characterization of the Crown's relationship with Aboriginal Peoples has significantly altered how Aboriginal rights and corresponding Crown duties are conceptualized.[21] Moreover, as subsequent jurisprudence has made clear, the Crown's constitutional duty to consult gives rise to two separate questions with respect to the role of a tribunal such as the NEB: first, does such a tribunal have a duty to engage in consultation as result of the Crown delegating to it the procedural aspects of consultation; and second, does the tribunal have an obligation to assess the sufficiency of the Crown's own discharge of its duty to consult?[22]

---

[15] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 [*Standing Buffalo*].
[16] FCA Reasons at para 81.
[17] *Ibid* at 99-103.
[18] *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 [*Quebec v NEB*].
[19] *Standing Buffalo* at para 34.
[20] FCA Reasons at para 100.
[21] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 105.
[22] *Haida Nation, Carrier Sekani.*

11. The Respondent's assertion that *Carrier Sekani* "provides a complete answer" is also at odds with observations made by Graben and Sinclair in a recent empirical study suggesting that the NEB's current practice of considering Aboriginal consultation as part of its process does not comply with this Court's judicial directives regarding the proper evaluation of the adequacy of the Crown's constitutional duty to consult.[23] Whether and how the NEB is required to comply with these directives is an issue of national importance that only this Court can resolve.

12. The NEB's legislative authority with respect to evaluating the sufficiency of Crown consultation has not been addressed by this Court and by definition remains a live issue. Only this Court can resolve whether the NEB can rely on *Standing Buffalo* as authority for continuing its practice of not assessing the sufficiency of Crown consultation before making a final decision.

**D. Inconsistency with *Clyde River***

13. The Respondent argues that the decision on appeal in this case is not inconsistent with the recent decision of the same Court in *Clyde River (Hamlet) v TGS-NOPEC Geophysical Co.* ASA.[24] The Respondent's argument rests on the assertion at para. 35 of the Leave Response that the Federal Court of Appeal in both cases did not find that the Crown's duty had been delegated. The Respondent deliberately confuses the issue of delegation as the Court in *Clyde River* concluded that the NEB, "has a mandate to engage in a consultation process such that the Crown may rely on that process to meet, at least in part, its duty to consult with Aboriginal Peoples."[25]

14. This finding is a contradiction of the conclusion reached by the Court below that, "[T]here has been no delegation by the Crown to the Board, under the *NEB Act* or otherwise, of the power to undertake the fulfillment of any applicable *Haida* duty of the Crown in relation to the Project."[26]

15. The Respondent argues at para. 34 that there is no inconsistency between these two conclusions because the Court in *Clyde River* was interpreting "a different statutory mandate." With respect, in both cases the NEB was authorized to make a final decision which mandated a consideration of "environmental effects" with respect to lands used by Aboriginal Peoples for traditional purposes. Where the NEB's statutory mandate in *Clyde River* is different is in the

---

[23] See: Graben and Sinclair at 415. (The authors state, "In short, the NEB has adopted an approach that is fundamentally at odds with a culture of legality promoted by the Courts in the last thirty years of jurisprudence.")
[24] *Clyde River (Hamlet) v TGS-NOPEC Geophysical Co.* ASA, 2015 FCA 179 [*Clyde River*].
[25] *Ibid* at para 65.
[26] FCA Reasons at para 79.

subject matter (geophysical operations assessment under the *Canada Oil and Gas Operations Act*[27]), the application of the now repealed *Canadian Environmental Assessment Act, 1992*, and in the fact that the Minister retains a very narrow scope of authority to approve of, or waive the requirement for, a benefits plan prior to approval under s. 5(2) of the *COGOA*.

16. While these legislative distinctions exist, of greater significance is the fact that in both cases the final decision on the main application rests with the NEB and the Crown has no statutory basis for interfering with it. The authority of the NEB to undertake consultation itself highlights the existing confusion about the proper application of *Carrier Sekani* to the role of the NEB as a final decision maker. All of this emphasizes the point that the law in this area needs to be clarified.

**E. Conclusion**

17. Contrary to the Respondent's assertions, this Application raises significant and unresolved issues of national importance relating to the scope of the NEB's authority to assess the sufficiency of Crown consultation. Addressing these issues will provide much needed clarity to Aboriginal Peoples, Crown representatives and industry proponents. It will also resolve a number of outstanding legal questions, including whether the NEB, as part of its regulatory approval process, is required to determine whether the duty to consult has been discharged.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Rama First Nation, in the Province of Ontario, 15th day of February, 2016.

agent for

David Nahwegahbow and Scott Robertson
Counsel for the Applicant

[27] *Canada Oil and Gas Operations Act*, RSC 1985, c O-7 [*COGOA*].