File No. _____

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)

APPLICATION FOR LEAVE TO APPEAL, VOLUME I

FILED BY THE APPLICANT
PURSUANT TO SECTION 40(1) OF THE *SUPREME COURT ACT*

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PART I: STATEMENT OF FACTS

A. Overview

1. This application arises from a split decision of the Federal Court of Appeal on an unsettled question relating to the role of the National Energy Board (the "Board") in assessing the adequacy of the Crown's duty to consult Aboriginal Peoples in circumstances where the Crown is itself absent from the decision-making process, but vests the Board, a quasi-judicial body with the final authority to review and approve projects. Can the Crown evade its constitutional duty by divesting itself of decision-making authority to approve projects that clearly have the potential to adversely affect to the rights of Aboriginal Peoples? Is this consistent with the honour of the Crown and the high purpose of section 35 of the *Constitution Act, 1982*, to advance reconciliation? In such circumstances, what is the Crown conduct that triggers the duty to consult? These are the central issues of national public importance upon which this leave application is focused.

2. In this case, Enbridge Pipelines Inc. ("Enbridge") filed an application pursuant to s. 58 of the *National Energy Board Act*[1] which allows for the Board to make orders exempting pipelines from certain regulatory provisions without the need for further Ministerial approval. The Crown was served with notice of the hearing, but did not participate in the proceedings. The Board found that the Aboriginal and treaty rights of the Chippewas of the Thames First Nation ("First Nation") could be adversely impacted and discussed other findings of fact relevant to the issue of the adequacy of the Crown's consultation. However, the Board ultimately did not make a determination as to whether the Crown's duty to consult had been met before making its final decision.

3. The Federal Court of Appeal was split on the proper interpretation of the law as set down by this Court in *Rio Tinto Alcan v. Carrier Sekani Tribal Council*[2] as it applies to the Board's jurisdiction in relation to the Crown's duty to consult and accommodate. Ryer J.A. for the majority, relying on his own Reasons in the Federal Court of Appeal's decision in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc*.,[3] held that the Board was not required to assess the adequacy of Crown consultation in considering the application.[4] Moreover, Ryer J.A., found that

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[1] *National Energy Board Act*,[1] R.S.C. 1985, c. N-7 [*NEB Act*].
[2] *Rio Tinto Alcan v. Carrier Sekani Tribal Council*,[2] [2010] 2 SCR 650, 2010 SCC 43 [*Carrier Sekani*].
[3] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc*., 2009 FCA 308 [*Standing Buffalo*].
[4] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. et. al*, 2015 FCA 222, [FCA Reasons] at para 59.

the Board had not been delegated any power to fulfill the Crown's duty to consult and accommodate Aboriginal Peoples in respect to the project proposed by Enbridge.[5]

4. In his dissent, Rennie J.A. concluded that *Carrier Sekani* required the Board, as a final decision maker, to ask whether the Crown's duty to consult has been triggered, and if so, whether the duty was met. He fundamentally disagreed with the majority regarding the interpretation and impact of *Carrier Sekani*:

> In my view, the foundation on which *Standing Buffalo* was predicated has been altered by *Carrier Sekani*, such that it no longer ought to be followed. At a minimum, the factual and legal contexts in this appeal are markedly different from those in *Standing Buffalo* so as to require re-consideration of that decision. Insofar as this appeal raises the question of the role of a tribunal in respect of the duty to consult in circumstances where the Crown is not a party to the proceedings and the tribunal is the final decision maker, we are in uncharted waters.[6]

5. If the majority ruling is allowed to stand, it will have significant and far-reaching consequences of both principle and practice. It would effectively allow the Crown to avoid its duty to consult by delegating final decision making authority to an administrative tribunal or by creating new regulatory bodies that are statutorily barred from making determinations relating to the existence or adequacy of Crown consultation.[7] Moreover, such a decision would allow the Crown to insulate itself from the application of the duty to consult and accommodate in part by choosing not to participate in a proceeding. Such a result creates a disincentive for Crown participation and is at odds with the honour of the Crown and the principle of reconciliation.

6. Given the diametrically opposing views in the court below regarding the interpretation of *Carrier Sekani* and its impact on cases like *Standing Buffalo*, the decision in the court below will also contribute to continued confusion in this area of the law, particularly as it relates to the Board's jurisdiction and mandate.

7. Since this Court's decision in *Carrier Sekani* a number of legal scholars have commented on the need for this Court to further address the outstanding issue of an administrative tribunal's authority and proper role in regard to the Crown's constitutional duty to consult and

[5] *Ibid* at para 79.
[6] *Ibid*. at para. 82 (emphasis added).
[7] For example, see *Responsible Energy Development Act*, SA 2012, c R-17.3 s 21. [*REDA*].

accommodate Aboriginal Peoples.[8] These comments arise from the fact that this issue continues to play out in inconsistent ways in various administrative contexts across the country.[9]

8. This proposed appeal engages important and outstanding legal questions concerning the role of the modern administrative framework in relation to the constitutional obligations of the Crown in its historic relationship with Aboriginal Peoples. It also provides this Court with an opportunity to clarify the application and interpretation of *Carrier Sekani* to the Board and to other tribunals with final decision making authority over lands and resources potentially impacting constitutionally protected Aboriginal and treaty rights.

B. Facts

9. The First Nation is a signatory to a series of treaties with the British Crown signed between 1818 and 1822 that recognize and affirm the First Nation's rights to their unceded lands. The First Nation continues to assert Aboriginal and treaty rights in the Thames River watershed, in addition to Aboriginal title to the bed of the Thames River.

10. In 1975, the Line 9 pipeline was constructed to transport crude oil from Sarnia, Ontario to Montréal, Québec. Line 9 pipeline passes directly through the traditional territory of the First Nation and crosses the Thames River.

11. In November of 2012, Enbridge filed an application to the Board seeking approval to modify a section of its existing Line 9 pipeline allowing it to move a larger volume of heavy crude oil passing directly through the territory of the First Nation. Unlike other applications under the *NEB Act*, this application does not require further ministerial approval, thus, the Board is the final decision maker.

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[8] Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) 22:1 Const Forum Const 63; David Mullan, "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?" (2011) 24 Can J Admin L & Prac 233; Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397; Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on Neskonlith Indian Band v. Salmon Arm (City)" (2014) 47:1 UBC L Rev 293; Kirk N. Lambrecht Q.C., "Constitutional Law and the Alberta Energy Regulator" (2014) 23:2 Const Forum Const 33; Sandy Carpenter, "Fixing the Energy Project Approval Process in Canada: An Early Assessment of Bill C-38 and Other Thoughts" (2012) 50:2 Alta L Rev 229.

[9] *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179 [*Hamlet of Clyde River*]; *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379 [*Neskonlith Indian Band*, BCCA]; *Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304 [*Cold Lake First Nations*].

12. Pursuant to the application, the Board issued Hearing Order OH-002-2013, dated February 19, 2013 ("Hearing Order"). The Hearing Order was served by the Board on a number of federal and provincial Crown representatives. The issue of consultation and accommodation with Aboriginal Peoples was properly raised and the views of all the parties involved were put before the Board through extensive written and oral submissions. The First Nation's concerns regarding the lack of Crown consultation and accommodation were squarely placed before the Board. Despite these concerns the Crown did not consult or accommodate the First Nation.

13. Prior to the Board's public hearing of Enbridge's application, the Chief of the Chippewas of the Thames First Nation, and the Chief of Aamjiwnaang First Nation sent a letter to the Prime Minister, the Minister of Aboriginal Affairs and Northern Development Canada, and the Minister of Natural Resources.[10] The letter outlined the First Nation's assertion of Aboriginal, treaty and title rights within the impacted area and specifically raised the issue of the Crown's failure to consult and accommodate.

14. After the Board's hearings were closed, but in advance of the Board's Final Order, the Minister of Natural Resources responded to the First Nation's letter indicating that while, "the federal Crown will meet its consultation obligations in an effective and meaningful manner… The Government relies on the NEB process to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate."[11]

15. In setting out the factual context of the Appeal, Rennie J.A. indicated that the First Nation repeated its request to have the Minister attend the Board hearing in order to carry out consultation and accommodation. He went on to note, however, "[T]he requests were not answered. Unlike *Standing Buffalo* where there had been many years of unproductive discussions between the First Nation and the Crown, here there have been none."[12]

C. The Board's Decision

16. The Board approved the application without addressing whether the Crown's duty to consult and accommodate was triggered in the circumstances of Enbridge's application, and without any findings regarding the adequacy of Crown consultation or accommodation. In its reasons, the Board discussed at length Enbridge's efforts to provide information to the First Nation and other Aboriginal groups. The Board also noted that those efforts combined with the Board's

[10] Letter from AFN & COTTFN to PM Harper & Minister Oliver dated September 27, 2013, at page 2-3.
[11] Letter from Minister Oliver to COTTFN & AFN dated January 30, 2014, at page 2.
[12] FCA Reasons at para 89.

hearing process which gave the First Nation and other Aboriginal groups the opportunity to present their views was "part of the overall consultative process."[13] Although it did not make a determination on the Crown's duty to consult and accommodate, the Board concluded that it was "satisfied with the level of Aboriginal engagement Enbridge conducted for the Project given the nature and scope of its Application."[14]

D. Federal Court of Appeal's Reasons

17. In a 2-1 decision, Ryer J.A. for the majority of the Federal Court of Appeal upheld the Board's decision and concluded that the Board was not required to determine whether the Crown's constitutional obligations were triggered or fulfilled before considering the application.[15] Further, Ryer J.A. also concluded that the Board had not been delegated any power to fulfill the Crown's constitutional duty to consult and accommodate Aboriginal Peoples in respect to the project proposed by Enbridge.[16] Nevertheless, Ryer J.A. suggested that the Board's process could rectify any failure by the Crown to consult and accommodate.

18. The Federal Court of Appeal confirmed the following facts relevant to this appeal:

- The Crown did not consult or accommodate the First Nation;[17]
- The Crown did not participate in the application process before the Board, and "no comprehensive explanation was put forward for the Crown's decision to not participate."[18]
- The NEB Act does not contain a provision delegating the duty to consult to the Board;[19] and
- The response letter from the Minister of Natural Resources to the First Nation does not constitute a delegation of the Crown's duty to consult to the Board.[20]

19. In his dissenting opinion, Rennie J.A. expressed a clear "point of divergence"[21] with his colleagues in regards to the interpretation of the fundamental governing law on this issue as

[13] NEB Reasons OH-002-2013 at 88.
[14] *Ibid* at 99. (emphasis added).
[15] FCA Reasons at para 59.
[16] *Ibid* at para 79.
[17] *Ibid* at para 57 and 89.
[18] *Ibid* at paras 57-59.
[19] *Ibid* at para 79.
[20] *Ibid*.
[21] *Ibid* at para 81.

articulated by this Court in *Carrier Sekani*. In applying his understanding of the law, Rennie J.A. concluded:

> As a final decision maker, *Carrier Sekani* requires the Board to ask, in light of its understanding of the project and aboriginal title and treaty interests, whether the duty to consult was trigged. If so, it was required to ask whether the consultations had taken place. The answers to those two questions, on the facts of this case were respectively affirmative and negative. Given its understanding that there was an outstanding unfulfilled duty to consult, it ought not to have rendered its approval.[22]

PART II: QUESTIONS IN ISSUE

20. This leave application raises the following issues of public and national importance:

(1) What is the role and jurisdiction of an administrative tribunal, where it is the final decision maker, to ensure that the Crown's duty to consult is fulfilled?

(2) The question of whether the administrative exercise of final decision-making authority amounts to "government conduct" triggering the Crown's duty to consult and accommodate is one of public and national importance?

(3) Whether an administrative tribunal's regulatory process can rectify the absence or inadequacy of Crown consultation is a matter of public importance?

PART III: STATEMENT OF THE ARGUMENT

A. Issue One: What is the role and jurisdiction of an administrative tribunal, where it is the final decision maker, to ensure that the Crown's duty to consult is fulfilled?

21. This application provides the Court with an opportunity to address and clarify the outstanding legal question of whether an administrative tribunal, acting as the final decision-maker, is required to ensure that the Crown's duty to consult has been met prior to issuing a decision that has the potential to adversely affect Aboriginal and treaty rights. This is particularly important in circumstances where, as in the case below, the Crown is not a party to the proceedings and in fact purports to rely on the tribunal to address all Aboriginal impacts resulting from the decision.

[22] *Ibid* at para 112.

i) The duty to consult and accommodate: the honour of the Crown cannot be delegated

22. This Court has recognized that the Crown has a constitutional obligation to consult and accommodate Aboriginal peoples before taking action that might adversely affect Aboriginal rights. The duty to consult, which is grounded in the principle of the honour of the Crown, was summarized most recently by McLachlin C.J. in *Tsilhqot'in Nation v. British Columbia*:

> Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.[23]

23. As this Court explained in *Haida Nation*, governments may set up regulatory schemes to address the procedural aspects of consultation,[24] but the Crown has the ultimate legal responsibility for consultation and accommodation: "[t]he honour of the Crown cannot be delegated". [25]

24. In *Carrier Sekani* this Court revisited *Haida Nation* and set out in more detail the framework by which the duty to consult and accommodate is triggered,[26] as well as how governments can properly delegate aspects of this duty to administrative tribunals,[27] but emphasized that, "[t]he goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*."[28]

25. Applying a long line of jurisprudence dealing with the powers of administrative tribunals in the context of constitutional issues including s. 35 of the *Constitution Act*,[29] this Court in *Carrier Sekani* set down a number of guiding principles relating to the role of an administrative tribunal as it relates to the Crown's duty to consult:

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[23] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 78 (emphasis added).
[24] *Haida Nation* at para 51.
[25] *Ibid* at para 53.
[26] *Carrier Sekani* at paras 31-54.
[27] *Ibid* at paras 55-61.
[28] *Ibid* at para 61.
[29] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 SCR 854. at para 70; *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at paras 29 & 45; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 at paras 38-39; *R. v. Conway*, 2010 SCC 22 at paras 21-22, [*Conway*].

- The role of a tribunal in relation to the duty to consult and accommodate depends on the powers the legislature has conferred on it;[30]

- There are four possible roles an administrative tribunal can play: to engage in consultation with Aboriginal Peoples, to determine whether adequate consultation has taken place, both roles, or no role at all;[31]

- The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power,[32]

- The distinct role of engaging in consultation cannot be inferred from the mere power to consider questions of law;[33]

- Consultation is not a question of law, but "a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.";[34]

- "A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers".[35]

26. It is the conflicting interpretation and application of these principles in the context of the Board's power to make final decisions in the absence of Crown participation that are at issue in this application, and which require the guidance of this Court.

ii) ***It is a matter of broad public importance whether the Crown can be permitted to avoid its duty to consult***

27. Given the importance of the duty of consultation and accommodation in supporting the objectives of reconciliation and upholding the honour of the Crown, this Court expressed concerns in *Carrier Sekani* that the detailed framework for consultation and accommodation set out in that decision could be effectively sidestepped by the Crown through the use of the government's legislative powers:

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[30] *Carrier Sekani* at para 55.
[31] *Ibid* at para 58.
[32] *Ibid* at para 69.
[33] *Ibid* at para 60.
[34] *Ibid*. (emphasis added).
[35] *Ibid* at para 61.

> The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent anyone from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.[36]

28. The First Nation submits that the "fear" expressed by this Court in *Carrier Sekani* has been realized in the way the majority of the Federal Court of Appeal interpreted and applied the law in the present case. Notwithstanding the fact that the *NEB Act* gives the Board the power to decide questions of law and does not specifically remove from it the power to decide constitutional questions like the adequacy of consultation, the Federal Court of Appeal found that the Board was not bound to determine the adequacy of Crown consultation in this case. The Court of Appeal based its decision on the specific legislative scheme set out under s. 58 of the *NEB Act*, whereby the Crown effectively removed itself from the Board's regulatory decision making process. Further, the Crown did not participate in the proceedings. When the Board proceeded to make a final decision in the absence of a determination of whether the Crown had fulfilled its duty to consult those Aboriginal Peoples whose rights stood to be impacted by the project, the Board allowed the Crown to effectively avoid its constitutional duty to consult and accommodate.

29. The *NEB Act* must be interpreted and applied in a manner that complies with the Constitution, including upholding the honour of the Crown through the promotion of reconciliation and the protection of Aboriginal and treaty rights. The duty to consult and accommodate plays a supporting role in achieving this. The *NEB Act* confers on the Board, "full jurisdiction to hear and determine all matters, whether of law or of fact,"[37] in respect of any decision taken under the Act. An interpretation of the *NEB Act* that fails to ensure that the Crown has fulfilled its duty to consult before a final decision is made is inconsistent with these fundamental principles, as explained by Rennie J.A. in his dissenting opinion:

> The Board must have, and exercise, the power to assess whether the duty to consult has been fulfilled, and to refuse to grant an approval if there is an unfulfilled duty to consult; otherwise the section 58 regime allows for the approval of projects which may adversely affect Aboriginal rights without the Crown ever consulting with the Aboriginal group in question. A project proponent can apply, go through the NEB's hearing process, and receive approval. The Crown can remain silent, on the sidelines.[38]

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[36] *Ibid* at para 62. (emphasis added).
[37] *NEB Act* s. 12(2).
[38] FCA Reasons at para. 106 (emphasis added).

30. The concern expressed in *Carrier Sekani* and by Rennie J.A. is not one that has arisen in this case alone. There are other cases where the Crown's duty to consult and accommodate was avoided through the delegation of final decision making authority to tribunals and other creatures of statute.

31. In *Neskonlith Indian Band*, the City of Salmon Arm was delegated final decision making authority and exercised that authority in approving a development plan for a shopping district. On appeal to the Supreme Court of British Columbia, Leask J. held that the City of Salmon Arm did not owe a duty to consult on the basis that the Honour of the Crown could not be delegated and that the enacting legislation neither expressly nor implicitly conferred the duty to consult on the City of Salmon Arm.[39] As a result, Leask J. did not find it necessary to consider whether the decision would adversely impact the Reserve and the Aboriginal title and rights of the Neskonlith Indian Band. The Court of Appeal for British Columbia upheld the decision and made the following comment:

> And while it is true that First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one, it is also true that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments.[40]

32. In *Cold Lake First Nations*, the Energy Resources and Conservation Board ("ECRB") concluded that it had the jurisdiction to answer some constitutional questions, but not whether the Crown's duty to consult had been met, stating, "It would create an absurd result if the ERCB had jurisdiction under the [*Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3], or otherwise, to consider constitutional question outside its mandate and thus outside its area of intended expertise."[41] Cold Lake First Nations' application to seek leave to appeal to the Alberta Court of Appeal was rejected on the basis that the project had since been approved and the issue was now moot.[42] Shortly after this, the government of Alberta enacted the *Responsible Energy Development Act*, replacing the old agency with a new one called the Alberta Energy Regulator whose mandate explicitly excluded the jurisdiction to assess the adequacy of Crown consultation.[43]

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[39] *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCSC 499 at para 54.
[40] *Neskonlith Indian Band*, BCCA at para 70.
[41] Energy Resources and Conservation Board Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law, Application No. 1636580 at page 6.
[42] *Cold Lake First Nations* at para 8.
[43] *REDA* s. 21 reads: The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982.*

33. These two cases are cited merely as examples of instances in which the duty to consult and accommodate has been effectively avoided by the Crown. They speak to the growing need for this Court to clarify the law and provide guidance to policy-makers and lower courts on the Crown's constitutional duty to consult and accommodate in situations where the decision-making authority of the Crown has been delegated to boards, tribunals or other delegated bodies.

34. In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)* the Federal Court considered the adequacy of Crown consultation involving a proposed energy project under the *Canada Oil and Gas Operations Act*, R.S.C., 1985, c. O-7 (the "COGOA"). The Court held that, "[i]t is not enough to rely on the process provided for in the Act.[44] The Crown's duty to consult must not be "boxed in by legislation". While the Crown may in some circumstances rely on a tribunal's statutory process to discharge the duty to consult, total reliance on the tribunal process in Ka'a'Gee Tu First Nation "was inconsistent with the honour of the Crown."[45]

35. When considering the significant national importance that this Court has placed on the process of reconciliation and the essential supporting role that the duty to consult and accommodate is required to play in advancing that goal, it is submitted that clarification is needed to address the potential for the Crown to effectively avoid its duty to consult and accommodate.

iii) This Court's guidance is required on the question of whether *Standing Buffalo* has been overruled by *Carrier Sekani*

36. A fundamental point of disagreement in the court below related to the application and interpretation of *Standing Buffalo*, a 2009 decision of the Federal Court of Appeal which pre-dated *Carrier Sekani*. In *Standing Buffalo*, the Federal Court of Appeal held that the Board was a "quasi-judicial" body and therefore not itself under a *Haida* duty, and that the Board was not required to assess the existence or adequacy of Crown consultation before rendering a decision.[46]

37. The majority of the Federal Court of Appeal in the present case relied on its earlier ruling in *Standing Buffalo* to find that the Board was not required to determine whether the Crown's constitutional duty had been met before making a final decision. Ryer J.A. for the majority, summarized his interpretation as follows:

> [I]t is my view that *Carrier Sekani* has not overruled *Standing Buffalo* because the Supreme Court did not address the issue of whether a tribunal is obligated to make the *Haida* determinations in a proceeding before it in which the Crown does not participate as a

[44] *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 at para 121
[45] *Ibid*.
[46] *Standing Buffalo* at para 43.

> party. Accordingly, in my view, the principle established in *Standing Buffalo* continues to apply.[47]

38. In contrast to the majority opinion, Rennie J.A. expressed a dissenting and opposite opinion on the applicability of *Standing Buffalo*:

> In my view, the foundation on which *Standing Buffalo* was predicated has been altered by *Carrier Sekani*, such that it no longer ought to be followed. At a minimum, the factual and legal contexts in this appeal are markedly different from those in *Standing Buffalo* so as to require re-consideration of that decision.[48]

39. The fact that the Federal Court of Appeal itself cannot agree on whether one of its earlier decisions has been overruled by a subsequent Supreme Court of Canada decision suggests that this is a question of public importance requiring guidance and clarification from this Court, particularly given that constitutional rights and interests of Aboriginal Peoples are at the heart of the discussion.

iv) Inconsistency with other Federal Court of Appeal decisions: *Hamlet of Clyde River*

40. In addition to evident disagreement among Federal Court judges about the continued application of *Standing Buffalo*, recent case law suggests that there is also inconsistency in recent Federal Court of Appeal decisions regarding the scope of the Board's jurisdiction to discharge the Crown's duty to consult and accommodate the rights and interests of Aboriginal peoples.

41. In *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS),*[49] the Federal Court of Appeal was asked to determine the Board's jurisdiction as it relates to the Crown's constitutional duty to consult in the context of an application for a Geophysical Operations Authorization under section 5(1)(b) of the COGOA. During the appeal hearing, Hamlet of Clyde River asserted that the Crown had done "virtually nothing" to discharge its duty.[50] In response, the Crown argued that, "in fulfilling its duty to consult, Canada relied on the consultative efforts of the proponents and their agents, and on the administrative process of the Board."[51]

42. It its decision, the Federal Court of Appeal noted that the Board had the jurisdiction under both the *NEB Act* and the *COGOA* to deal with all matters before it, including questions of fact and law. Accordingly, the Court concluded that that the Board had been empowered by the

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[47] FCA Reasons at para 49 (emphasis added).
[48] *Ibid* at para 82 (emphasis added).
[49] *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179 [*Hamlet of Clyde River*].
[50] *Ibid* at para 30.
[51] *Ibid* at para 31.

legislature to undertake a consultation process, and that the Crown could rely on the Board's process, at least in part, to satisfy its duty to consult.[52]

43. The Court in *Hamlet of Clyde River* was dealing with a different statute. Nevertheless, given the fact that it was the same quasi-judicial tribunal in both cases, the Court's conclusion in *Hamlet of Clyde River* is at odds with that reached by the Court of Appeal in the case below, in which both the majority and the minority agreed that the Board had not been delegated the power to discharge the Crown's duty to consult. As Rennie J.A. explained:

> For even further clarity, none of this is to say that the Board had the duty or power to actually perform the consultation. It is a point of agreement between myself and the majority, and indeed between the parties, that the Board is incapable of actually fulfilling the duty to consult. To the extent that the Minister purported to rely on the Board to fulfill the duty to consult, he did so in error. The Board's duty, instead, was simply to ensure that when consultation had not occurred, it did not discharge its mandate.[53]

44. The decision in *Hamlet of Clyde River* was released shortly before the decision in the present case. Given that the same Court of Appeal, applying the same framework set down by this Court in *Carrier Sekani* to interpret the jurisdiction of the same tribunal was able to reach contradictory conclusions regarding the Board's authority to discharge the Crown's duty to consult, it is submitted that this potential division in the case law is a strong indicator that the law requires clarification by this Court.

45. An application for leave to appeal the *Hamlet of Clyde River* decision was recently filed with this Court. The First Nation requests that to the extent this Court considers it appropriate to grant leave in *Hamlet of Clyde River* that it grant leave in both cases so that the matters can be heard and considered together.

B. Issue Two: The question of whether an administrative tribunal exercising final decision-making authority amounts to "government conduct" triggering the Crown's duty to consult and accommodate is one of public and national importance?

46. The second issue of public importance raised in this application is the question of whether an administrative tribunal acting as the final decision maker under enabling legislation is engaged in conduct that triggers the Crown's constitutional duty to consult and accommodate. The First Nation submits that the conflicting interpretations in the Court below, as well as the impact

[52] *Ibid* at para 65.
[53] FCA Reasons at para 120.

of the majority decision on the reconciliation process, indicate a pressing need for this Court to address and clarify the matter.

47. This Court in *Carrier Sekani* held that three elements must be present in order to trigger the Crown's duty to consult: 1) the Crown must know about the potential Aboriginal claim or right; 2) there must be contemplated Crown conduct or a Crown decision; and 3) the contemplated conduct or decision must have the potential to adversely affect the claim or right in question.[54] It is the interpretation and application of the second criteria that is in dispute in this case, and on which the Federal Court of Appeal expressed contradictory opinions.

48. Ryer J.A., for the majority, focused on the question of whether the enactment of the Board's enabling legislation could potentially trigger a *Haida* duty. He noted that the question was not dealt with by the Board, but went on to make the following observation:

> If the enactment of the *NEB Act* constitutes the impugned Crown conduct and that conduct occurred over 60 years before the Project application, one is presented with the logical impossibility that the *Haida* consultations in respect of the Project were required to have taken place prior to the enactment of that legislation.[55]

49. The First Nation submits that Rennie J.A. properly concluded that "the requirement of Crown conduct is satisfied by the regulatory regime which makes the Board the final decision maker".[56] In other words, it is the exercise of final decision-making authority under the legislation, as opposed to the enactment of the legislation, which triggers the duty to consult. He explained the legal and policy foundation underpinning this view as follows:

> The duty to consult is rooted in section 35 of the *Constitution Act*, and it cannot be avoided by the Crown refusing to engage until it is too late in the decision making process or by delegating the final decision making to a tribunal. The duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet.[57]

50. The Federal Court of Appeal's opposing views on whether or not the Crown's duty to consult is triggered by making a specific decision under the legislation is a question of public importance which requires guidance and clarification from this Court.

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[54] *Carrier Sekani* at para 31.
[55] FCA Reasons at para 69.
[56] *Ibid*.
[57] *Ibid* at para 105.

C. Issue Three: Whether an administrative tribunal's regulatory process can rectify the absence or inadequacy of Crown consultation is a matter of public importance?

51. The third and final issue on which leave is sought is whether the Board's regulatory proceedings can be a substitute for Crown consultation or can rectify the absence of Crown consultation. The majority's decision below suggests that it can, a result that is problematic from a legal, policy and practical perspective.

i) The duty to consult is inseparable from the concepts of reconciliation and the honour of the Crown

52. This Court has made it clear that the duty to consult and accommodate is not to be viewed independently from its purpose which is reconciliation and upholding the honour of the Crown.[58] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)* this Court further ruled that the doctrine of honour of the Crown is both substantive and inclusive for the Crown's dealings with Aboriginal Peoples.[59]

53. The role of the duty to consult as it exists within the broad framework of reconciliation is well established. Most recently in *Beckman v. Little Salmon/Carmacks First Nation* this Court affirmed that, "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*." [60] This Court also confirmed that the honour of the Crown is central to this relationship as a constitutional principle,[61] and that, "[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose."[62]

ii) No legal basis for majority view that the Board's process can be a substitute for Crown consultation and accommodation

54. The First Nation submits that Ryer J.A., failed to appropriately consider, apply and connect the honour of the Crown principle to the process of consultation in this case. The resulting analysis lacks coherence and principled underpinnings.

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[58] *Little Salmon* at para 44.
[59] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at paras 70 & 94.
[60] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [*Little Salmon*].
[61] *Ibid* at para 42.
[62] *Ibid* at para 44.

55. On the one hand, Ryer J.A. acknowledges that the Board has an obligation "to carry out its mandate in a manner that respects the provisions of subsection 35(1) of the *Constitution Act*."[63] On the other hand, he holds "that the Board's duty to ensure that appropriate levels of consultation with Aboriginal groups is not the same as the Crown's *Haida* duty."[64] He then goes on to find, "as a practical matter" that "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."[65] Ultimately, Ryer J.A. determines that, "it should not matter whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process."[66]

56. This holding applies a reasoning similar to that was advanced in argument in *Carrier Sekani* which this Court summarized as:

> The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation. [67]

57. This line of reasoning was firmly rejected by this Court applying the established propositions set down in *Conway*.[68]

58. It is submitted that the ruling from the majority of the Federal Court of Appeal adds significant confusion to the role of the Board in matters of Aboriginal consultation. The honour of the Crown requires the Crown to meaningfully engage in consultation and accommodation with Aboriginal Peoples. The Board cannot rectify the Crown's lack of consultation by engaging in consultation itself or by finding that the proponent's consultations are an adequate practical substitute for Crown consultation. The Federal Court of Appeal's reasoning contradicts established law, subverts the fundamental principle of the honour of the Crown and elevates the Board's authority to effectively rectify the Crown's vice.

59. The Crown in this case actively chose not to participate in the process but rather relied on the Board and its regulatory process to satisfy its duty. Rennie J.A. pointed to, "a gap in the

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[63] FCA Reasons at para 61.
[64] *Ibid* at para 63.
[65] *Ibid*. (emphasis added).
[66] *Ibid* at paras 61-63.
[67] *Carrier Sekani* at para 59.
[68] *Ibid* at para 60.

regulatory scheme and the Section 58 approvals process which allows the duty to consult, by design or otherwise, to fall through the cracks."[69]

60. This Court in *R. v. Adams* warned of a regulatory scheme that subjects the exercise of Aboriginal rights to a pure act of Ministerial discretion, and sets out no criteria regarding how that discretion is to be exercised. The Court in *Adams* found that such a regulatory scheme would impose undue hardship and interfere with the preferred means of exercising Aboriginal rights. The Court provided the following reasoning:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance.[70]

61. The Federal Court of Appeal's decision severely limits the scope of the honour of the Crown without any grounding in legal principle or precedent. This will ultimately result in administrative regimes where decisions are routinely made without any Crown participation or oversight on issues of consultation or accommodation with potentially impacted Aboriginal and treaty rights. This decision is not in keeping with what Brian Slattery describes as the "generative constitutional order" which mandates the Crown to negotiate with Aboriginal Peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society.[71]

62. The Federal Court of Appeal's holding that the Board's "consultation process" can as "a practical matter" substitute for the Crown's consultation, while at the same time holding that the Board was not delegated the duty to consult, is inconsistent with all of the above discussed principles set down by this Court and leads to a result, as Rennie J.A. explains, that "creates a disincentive to timely, good faith and pragmatic consultations, and undermines the overarching objective of reconciliation".[72] It is this result that requires the review and consideration of this Court.

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[69] FCA Reasons at para 126. (emphasis added).
[70] *R. v. Adams*, [1996] 3 SCR 101 at para 54.
[71] Brian Slattery, "Aboriginal Rights and the Honour of the Crown," (2005), 29 SCLR (2d) 433 at 436-437. See also: *Haida Nation* at para 25.
[72] FCA Reasons at para 119.

D. Conclusion: Reconciliation and the honour of the Crown are at stake where the duty to consult and accommodate Aboriginal Peoples remains unclear

63. The national public importance of the issues raised in this application are more fully appreciated in the context of Canada's current and historic relationship with Aboriginal Peoples. The relationship between Aboriginal Peoples and the Crown is one that predates the written record in Canada, yet one upon which much has been written about by this Court, Commissioners, and scholars alike.[73] This Court has recognized that this relationship is distinct from the one the Crown has with other Canadians[74] and as a result the Crown has unique constitutional obligations with respect to the rights of Aboriginal Peoples.

64. This Court has previously affirmed that reconciliation and the honour of the Crown are intricately connected,[75] most definitively in *Manitoba Metis Federation* when it was stated that, "[t]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."[76] Further, this Court has held that, "[t]he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation,"[77] and that, "[t]he Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."[78]

65. Reconciliation, as held by this Court, is the "grand purpose" of the law on Aboriginal and treaty rights and that the duty to consult plays a "supporting role" but cannot be separated from this purpose or the honour of the Crown.[79]

66. The Federal Court of Appeal fails to treat the Crown's duty to consult with the same level of constitutional significance as the ultimate and grand purposes for which it is meant to support and safeguard. Such a result undermines the basis of the historic relationship between the

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[73] For a detailed explanation of the historical development of the relationship see: *Report of the Royal Commission on Aboriginal Peoples in Looking Forward, Looking Back*, Volume 1, Part One: The Relationship in Historical Perspective (Ottawa: Supply and Services Canada, 1996); Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015); and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].
[74] *R. v. Van der Peet*, [1996] 2 SCR 507 at para 30.
[75] *Carrier Sekani* at para 34.
[76] *Manitoba Metis Federation* at para 67.
[77] *Haida Nation* at para 45;
[78] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24.
[79] *Little Salmon* at para 44.

Crown and Aboriginal Peoples and the principle of constitutionalism. The law needs to be clarified so that governments can be confident in their legislative instructions to tribunals, tribunals can in turn be confident in properly exercising their legislative authority, and Aboriginal Peoples can be confident in knowing that the modern administrative framework is capable of achieving the goal of reconciliation.

67. Chief Perry Bellegarde, the National Chief of the Assembly of First Nations, representing 633 First Nations from across Canada has expressed the following concern: "the Federal Court of Appeal's decision threatens to roll back, perhaps irreparably, the gradual progress that has been achieved in forging better relations between the Crown and First Nations through consultation and accommodation processes and significantly alters the balance of power between First Nations and the Crown. Moreover, I am worried this judgement will undermine the exercise of Aboriginal and treaty rights of our First Nations across Canada."[80]

68. The factual record of this case and the split decision in the Federal Court of Appeal, provide this Court with an opportunity to address and clarify unsettled questions of law regarding the jurisdiction and mandate of an administrative tribunal to ensure that the constitutional duty of the Crown to consult and accommodate Aboriginal Peoples is fulfilled. The First Nation submits that these are issues of national public importance which merit consideration and resolution by this Court.

PART IV: SUBMISSIONS AS TO COSTS

69. The First Nation seeks costs of this application.

PART V: NATURE OF THE ORDER SOUGHT

70. The First Nation seeks leave to appeal the decision of the Federal Court of Appeal and requests an order that leave be granted with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
DATED at Rama First Nation, in the Province of Ontario, 18th day of December, 2015.

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David Nahwegahbow and Scott Robertson
Counsel for the Applicant

[80] Affidavit of National Chief Perry Bellegarde dated December 15, 2015, at page 2.