Court File No.: 36776

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

BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

APPELLANT
(Appellant)

AND:

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

RESPONDENTS
(Respondents)

AND:

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

INTERVENERS

FACTUM OF THE INTERVENER, MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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INTRODUCTION

1. This appeal is the first opportunity for this Court to consider the Crown's duty to consult in the context of the unique pre-Confederation treaties and outstanding First Nation claims that span much of southern Ontario. It also provides the first opportunity for this Court to consider the confusion created by section 58 of the *National Energy Board Act* (the "*NEB Act*") in relation to the operation of the Crown's duty to consult in First Nation territories.

2. The Mississaugas of the New Credit First Nation ("MNCFN") intervenes in support of the Appellant in this appeal. It seeks a resolution of this important Crown consultation case that will ensure that reconciliation begins—finally—to penetrate its traditional home and territory, a territory crisscrossed by pre-existing pipelines, a territory that is now one of the most densely populated and industrialized regions in all of North America—Ontario's "golden horseshoe." The stakes in this appeal for MNCFN and the Appellant could not be higher. If allowed to stand, the majority below's decision would maintain the status quo and enable pipeline companies such as Enbridge to continue with "business as usual," disregarding the unique claims, interests, and ambitions of these First Nations. The promise of section 35 of the *Constitution Act, 1982* would largely be rendered meaningless to southern Ontario First Nations. This cannot be in the age of reconciliation.

PART I – STATEMENT OF FACTS

3. MNCFN adopts the Appellant's facts and adds that MNCFN is a Band under the *Indian Act* comprised of the descendants of the Mississauga people whose traditional territory extends across much of southern Ontario and encompasses present day Kitchener, Niagara Falls, Hamilton, and Toronto, including MNCFN's reserve lands near Hagersville.

4. MNCFN has a unique, ongoing, and incomplete treaty relationship with the Crown. Between 1781 and 1823, the ancestors of MNCFN entered into a number of different treaties with the Crown that variously reserved lands, waters, and fisheries for MNCFN's exclusive use.[1]

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[1] See Treaties No. 3, 3¾, 8, 13, 13a, 14, 22 & 23 in *Indian Treaties and Surrenders from 1680-1890 Vol. I* (Ottawa: S. E. Dawson, 1905) at pp. 5-9, 22-23, 32-40, 50-54, **MNCFN Book of Authorities [MBoA] Vol I, Tab 8**.

5. Enbridge's Line 9 pipeline is one of several pipelines that transect MNCFN's traditional territory. MNCFN was one of the four First Nations that were granted intervener status in the Line 9B hearing before the National Energy Board ("NEB"),[2] and filed evidence and final argument outlining, *inter alia*, concerns about the lack of Crown consultation on the project's adverse impacts on its Aboriginal rights and treaty rights.[3]

PART II – ISSUES ON APPEAL

6. MNCFN intervenes in support of the Appellant and makes submissions on the following:

    a. Reconciliation, the duty to consult, and the resolution of this appeal;

    b. Southern Ontario cannot be allowed to become a "Crown consultation free zone";

    c. The importance of a preliminary assessment in ensuring meaningful consultation;

    d. Consultation cannot be a guessing game, achieved by happenstance; and

    e. An *ex post facto* declaratory remedy is inadequate.

PART III – ARGUMENT

A. Reconciliation, the Duty to Consult, and the Resolution of this Appeal

7. This Court has held that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[4] Real reconciliation requires a renewed, difficult, and meaningful conversation about how these sometimes differing "claims, interests and ambitions" can be collectively advanced in the 21st Century and beyond.[5] The Crown's duty to consult is a key legal tool that helps initiate and guide this long overdue conversation. But in order for honourable consultation—and meaningful conversation—to be had, the Crown

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2 **Appellant's Record [AR] Vol I, Tab 1, p. 107**, NEB Reasons for Decision OH-002-2013 (Enbridge Pipelines Inc) (16 March 2014) (Docket Number OH-002-2013), p. 90.

3 **AR Vol I, Tab 1, pp. 72-73, 108-109 & 112,** NEB Reasons for Decision OH-002-2013 (Enbridge Pipelines Inc) (16 March 2014), pp. 55-56, 91-92 & 95.

4 *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69 [*Mikisew Cree*], **MBoA Vol I, Tab 6** at para. 1.

5 *Mikisew Cree*, **MBoA Vol I, Tab 6** at para. 1; see also *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 [*Taku River*] **ABoA Vol I, Tab 26** at para 24.

must actually be aware of, appreciate, and engage with respect to, the claims, interests, and ambitions of an impacted First Nation prior to authorizing an industrial development. That did not happen in this case.

8. Reconciliation for these First Nations needs to occur in, and with an understanding of, the territories these nations now have. Their territories are among the most densely populated areas in North America, crisscrossed by multi-lane highways and pipelines. Their treaty harvesting rights and traditional practices in southwestern Ontario have long been impaired and constrained to make way for the influx of settlers, industrial developments, and rampant urbanization. For First Nations in southern Canada generally, and southern Ontario specifically, reconciliation will not be achieved by only measuring, quantifying, and potentially compensating for loss of site-specific traditional land use activities, as the NEB did here.[6]

9. True consultation—and reconciliation—requires a conversation about how these First Nations can continue to "use and be sustained"[7] by their territories, as they actually exist today. McLachlin J. (as she was then), recognized that treaties, including the pre-Confederation treaties engaged in this appeal, must be understood as arrangements that:

> …bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding—the *Grundnorm* of settlement in Canada—was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors **a replacement for the livelihood** that their lands, forests and streams had since ancestral times provided them.[8]

10. A regulatory "engagement" process that limits an assessment of Aboriginal "rights and interests" to those understood through the lens of traditional land use is entirely inadequate.

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6 *Chippewas of the Thames First Nation* v. *Enbridge Pipelines Inc.*, 2015 FCA 222 [*FCA Decision*], **AR Vol I, Tab 2** at para. 17.

7 *R.* v. *Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*], **MBoA Vol I, Tab 7** at para. 273 (McLachlin J. dissenting on other grounds).

8 *Van der Peet,* **MBoA Vol I, Tab 7** at para. 272 (McLachlin J. dissenting on other grounds) (emphasis added).

The NEB process at issue in this appeal utterly failed as a mechanism to appreciate and reconcile the "rights, interests and ambitions" of these First Nations whose traditional territories are no longer untouched and pristine wilderness. In particular, the NEB process precluded any discussion about "replacement for the livelihood" that have long been lost or are being eroded. First Nation requests to consult on the intent of their treaties and the achievement of their ambitions through economic participation fell on deaf ears.[9] The impacts from the stress of additional risk being placed on their territories were ignored. They continue to be seen as mere stakeholders in the territories, rather than stewards. In effect, these First Nations are left in the same position they were in when Line 9 was originally constructed in 1975—a time before section 35 of the *Constitution Act, 1982* and before this Court's judicial guidance on consultation and reconciliation. It is déjà vu all over again.

11. This context must inform the Court's resolution of this appeal. This is not simply a case about a legislative peculiarity created by section 58 of the *NEB Act*. It is a case about whether and how reconciliation will finally begin to penetrate southern Ontario.

B. Southern Ontario Cannot Be Allowed to Become a "Crown Consultation Free Zone" … Again

12. MNCFN's traditional territory—much like the Appellant's—is crisscrossed with pipelines, including not only Line 9, but also Enbridge's Lines 7, 8, 10, and 11, among others. The Respondents acknowledge that there was no consultation with First Nations during the 1970s when this extensive pipeline network was built in southern Ontario. Since 2011, Enbridge has filed no less than six applications for orders pursuant to section 58 related to various pipelines in MNCFN's territory.[10] And it does not stop with Enbridge. The NEB recently approved other pipeline projects in MNCFN's territory pursuant to section 58 and it is

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[9] **AR Vol VI, Tab 14, pp. 116-119**, National Energy Board, Exhibit, Aamjiwnaang First Nation and Chippewas of the Thames First Nation, Crown Letter dated 27 September 2013.

[10] NEB Letter Decision OH-005-2011 (Enbridge Pipelines Inc.) (27 July 2012) **Respondent Enbridge's Book of Authorities [EBoA] Vol II, Tab 27**; NEB Reasons for Decision OH-002-2013 (Enbridge Pipelines Inc) (16 March 2014), **AR Vol I, Tab 1**; NEB Letter Order XO-E101-023-2013 (Enbridge Pipelines Inc.) (29 October 2013), **MBoA Vol I, Tab 9**; NEB Letter Order XO-E101-018-2013 (Enbridge Pipeline Inc.) (25 July 2013), **MBoA Vol I, Tab 10**; NEB Letter Order XO-E101-016-2014 (Enbridge Pipeline Inc.) (21 August 2014), **MBoA Vol I, Tab 11**; Hearing Order (Draft Conditions) OH-001-2016 (Enbridge Pipeline Inc.) (14 October 2016), **MBoA Vol I, Tab 12**;

considering still more applications. And yet genuine Crown consultation on these projects (as can be seen in this appeal) remains all but non-existent.

13. The majority at the Court of Appeal was wrong when it concluded that the NEB can issue authorizations under section 58 even if it has been advised that Crown consultation has not occurred, as was the case here.[11] To do so contradicts this Court's express directions in *Haida Nation*, *Carrier Sekani*, and *Little Salmon/Carmacks* that the duty requires proactive and upstream Crown consultation *prior to* a decision being made.[12] The majority below's interpretation of section 58 could effectively allow the creation of a "Crown consultation-free zone" with respect to much of the significant pipeline redevelopment happening around the country, particularly in southern Ontario.

14. The majority below's reasoning would mean that, for First Nations such as MNCFN, the pipelines that were built in their territories in the mid 20th Century—without any consultation and without any accommodation of their rights, interests, and claims—can today be re-purposed, redeveloped, and expanded without any meaningful Crown consultation.[13] In effect, Crown consultation can be repeatedly evaded by discrete, proponent-driven applications under section 58. This approach allows the massive pipeline redevelopment that is ongoing in southwestern Ontario to avoid triggering any strategic level Crown consultation with First Nations.

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[11] *FCA Decision,* **AR Vol I, Tab 2** Ryer J. for the Majority at paras. 10 & 59.

[12] "*Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them." *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 [*Carrier Sekani*] **Appellant's Book of Authorities [ABoA] Vol I, Tab 22** at para. 35 (emphasis in original). "The Director was then required, as a matter of both compliance with the legal duty to consult based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate." *Beckman* v. *Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 [*Little Salmon/Carmacks*], **MBoA Vol I, Tab 2** at para. 73 (emphasis in original).

[13] See, *e.g.*, NEB Letter Decision OH-005-2011 (Enbridge Pipelines Inc.) (27 July 2012) **Respondent Enbridge's Book of Authorities [EBoA] Vol II, Tab 27**; NEB Reasons for Decision OH-002-2013 (Enbridge Pipelines Inc) (16 March 2014), **AR Vol I, Tab 1**; NEB Letter Order XO-E101-023-2013 (Enbridge Pipelines Inc.) (29 October 2013), **MBoA Vol I, Tab 9**; NEB Letter Order XO-E101-018-2013 (Enbridge Pipeline Inc.) (25 July 2013), **MBoA Vol I, Tab 10**; NEB Letter Order XO-E101-016-2014 (Enbridge Pipeline Inc.) (21 August 2014), **MBoA Vol I, Tab 11**; Hearing Order (Draft Conditions) OH-001-2016 (Enbridge Pipeline Inc.) (14 October 2016), **MBoA Vol I, Tab 12**; NEB Decision and Order GHW-001-2014 (TransCanada PipeLines Limited) (2 June 2015), **MBoA Vol I, Tab 13**; NEB Letter Order GH-001-2016 (TransCanada Pipelines Limited) (4 August 2016), **MBoA Vol I, Tab 14**.

15. Such an interpretation of section 58 essentially renders this Court's decisions in *Haida Nation* and *Mikisew Cree* without application to the massive pipeline redevelopment that is ongoing in MNCFN's traditional territory. As seen in this appeal, the much needed conversation about the claims, interests, and ambitions of these First Nations never happens. The promise of section 35 of the *Constitution Act, 1982* is denied and the lack of Crown consultation that plagued the past can be—and is— repeated.

C. The Importance of a Preliminary Assessment in Ensuring Meaningful Consultation

16. This appeal highlights the importance of this Court's direction in *Haida Nation* with respect to the need for some form of "preliminary assessment" by the Crown of the potentially impacted rights, interests, and claims of First Nations in order to properly determine the scope of consultations required.[14] This type of assessment is essential to the proper discharge of the duty because it frames the discussions and issues that must form part of a meaningful consultation process. This preliminary assessment ensures the parties understand each other's positions and a conversation can be had. Without this type of assessment, reconciliation can never begin.

17. Moreover, in the context of historic treaties (such as the ones at issue in this appeal), this Court has held that "[t]he determination of the content of the duty to consult will, as *Haida Nation* suggests, be governed by the context."[15] *Mikisew Cree* identified various factors that must be considered in determining the scope of the Crown's duty, including "[t]he history of dealings between the Crown and a particular First Nation."[16] In this appeal, the NEB's Reasons for Decision includes no appreciation of this history, the different treaties at issue in this appeal nor, the distinct First Nation rights and interests that flow from those agreements. The NEB had no knowledge of the state of the various filed, ongoing, or settled land claims that may be relevant to Line 9 (nor any means to obtain this information from the Crown). The NEB also failed to consider that First Nations in heavily urbanized and industrialized

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[14] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*], **ABoA Vol I, Tab 5** at paras. 36 & 68.

[15] *Mikisew Cree,* **MBoA Vol I, Tab 6** at para. 63.

[16] *Mikisew Cree,* **MBoA Vol I, Tab 6** at para. 63.

areas have been forced to develop adaptive and complex relationships to their territories, which often demand the use of private lands.[17]

18. The unique and unfinished history of treaty-making in southern Ontario, the dispossession of First Nations from their territories in what is now known as Ontario's "golden horseshoe," the lack of any consultation on past pipeline development, and the unique reconciliatory interests and ambitions of southern Ontario First Nations were all necessary "context" for understanding the scope of the Crown's duty in this appeal. Neither the NEB nor the Crown (as acknowledged in their submissions in this appeal) considered any of this context in assessing the scope or content of the duty. This constituted an error in law in the determinations under the first stage of the *Haida Nation* framework, which should not now be determined or assessed by this Court because all of the necessary evidence is not before it.

D. Consultation Cannot be a Guessing Game or Occur by Happenstance

19. In order for meaningful consultation to occur, First Nations cannot be left to simply guess with whom and where they should raise their claims, interests, and ambitions. Mass confusion over who is ultimately responsible and accountable for consultation does not uphold the honour of the Crown or advance reconciliation. But that is the result the myriad of approaches advanced by the majority below and the various Respondents would lead to.

20. It is telling that the Respondents cannot even agree among themselves—or with the Court of Appeal—whether the NEB was empowered to fulfill the duty to consult owed in this appeal, and if it was, to what extent. Enbridge is adamant that "Parliament has impliedly assigned to the Board the power to carry out consultation when it is exercising its jurisdiction under section 58 of the NEB Act."[18] Canada disagrees, asserting that although "[t]he Crown's duty to consult was triggered by the Board's consideration of whether to approve" Line 9, "the Crown [was] not delegating its duty" to the NEB.[19] The majority below shares Canada's view, holding "there 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

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[17] **AR Vol I, Tab 1, pp. 111, 114-115,** NEB Reasons for Decision OH-002-2013 (Enbridge Pipelines Inc) (16 March 2014), pp. 94, 97-98.

[18] Factum of the Respondent, Enbridge Pipelines Inc. [*Enbridge Factum*] at para. 47.

[19] Factum of the Respondent, Attorney General of Canada [*Canada Factum*] at paras. 1 & 2.

Crown in relation to the Project."[20] The NEB appears to take the position that the duty could be anywhere, and "it is essential to look at the substance of what has been done by *any actor* who has the power to meaningfully consult and provide relevant accommodation ..."[21]

21. While the Respondents and the majority below cannot agree where consultation lies, they are optimistic that it must lie somewhere. The Court of Appeal observes that "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."[22] Canada echoes the majority's optimism, explaining that the NEB "does not have the statutory power to discharge the Crown's duty to consult, although it is aware that the Crown may rely on the Board's section 35 Aboriginal consultation as discharging the Crown's duty to consult."[23] Canada hopes the NEB's engagement will be adequate but notes the Crown may "involve itself if there are issues of consultation and possible accommodation arising in a Board proceeding that are beyond jurisdiction to address."[24] When or how the Crown might elect to engage when consultation issues arise beyond the NEB's jurisdiction is left for First Nations to guess.

22. If, after a project approval, the proponent, Canada in right of the Crown, the NEB, and the Court of Appeal cannot even agree about where the duty to consult lies and what it requires, how can a First Nation have comfort meaningful consultation actually occurred? The divergent perspectives of the respondents demonstrates that additional guidance from this Court is required. Lack of clarity on this issue frustrates the day-to-day operation of the duty. A First Nation cannot be left guessing where, and by whom, their rights and interests will be addressed.[25] While they may not ultimately agree with the outcome, MNCFN submits that First Nations are at least owed clarity on who is accountable. The current situation is tantamount to a game of consultation "three-card Monte," forcing First Nations to constantly

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20 *FCA Decision*, **AR Vol I, Tab 2** at para. 79.

21 Factum of the Respondent, National Energy Board [NEB Factum] at para. 73 (emphasis in original).

22 *FCA Decision*, **AR Vol I, Tab 2** at para. 63.

23 *Canada Factum* at para. 69.

24 *Canada Factum* at para. 71.

25 "The Crown's duty is to carry on a process that is as transparent as possible." *Ke-Kin-Is-Uqs* v. *British Columbia (Minister of Forests)*, [2008] BCJ No. 2089, 2008 BCSC 1505, **MBoA Vol I, Tab 5** at para. 147.

guess where the consultation card is hidden today. This is not simply an issue of form over substance. With limited capacity and tight timelines in project approval processes, First Nations must know where consultation is actually going to be dealt with so they can focus their efforts there. If First Nations do not even know where to go to consult, the difficult work of reconciliation cannot ever be started, let alone be advanced.

E. An Ex Post Facto Declaratory Remedy is Inadequate

23. For the duty to consult and accommodate to be effective and meaningful, adequate remedies must be afforded to Aboriginal peoples when the duty is breached or ignored, and to discourage breaches from occurring in the first place. The approach proposed by the Court of Appeal fails to do that. The majority below holds that if a First Nation is denied adequate consultation or accommodation by the Crown in respect of a development being reviewed by the NEB under section 58, the authorization should issue, the development should proceed, and the Aboriginal people should simply seek recourse to the courts, by way of judicial review against the Crown. Relying on such an "after-the-fact" approach to remediating a breach of the duty to consult is grossly inadequate, impoverishes the scope and meaning of the duty, and renders First Nations unable to avail themselves of the sort of substantive accommodations and reconciliation that Crown consultation is intended to facilitate. It may also leave Aboriginal groups with no meaningful judicial remedy at all.

24. The majority below states that a First Nation denied Crown consultation should bring "an application for judicial review…with respect to that refusal" and through that judicial review avail itself of "the panoply of potential available judicial remedies [that] was described by the Supreme Court at paragraph 37 of *Carrier Sekani*."[26] But the "panoply" of remedies described in *Carrier Sekani* would not be available in such a judicial review. In the case at

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[26] *FCA Decision*, **AR Vol I, Tab 2** Ryer J.'s Majority Reasons paras. 72-73. The referenced paragraph from *Carrier Sekani* states "[t]he Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct." *Carrier Sekani*, **ABoA Vol I, Tab 22** at para. 37 (citing *Haida Nation,* **ABoA Vol I, Tab 5** at paras. 13-14).

bar, most of those remedies would only have been available if the First Nation filed an action—not if the breach of the Crown's duty was pursued by judicial review.[27]

25. As Rennie J. explained in dissent, "[t]he Minister does not propose to do anything and has no power in respect of the decision. There is nothing to be enjoined, quashed or compelled … [s]ubstantively, any consultation or accommodation which might flow from a judicial review would be too late."[28] Even an award of damages would be denied, since "[i]t is trite to say that damages cannot be awarded on application for judicial review."[29] A First Nation could obtain, at best, a pyrrhic victory through a judicial review of the Crown's failure to consult with respect to a section 58 application.

26. Enbridge argues in support of an after the fact judicial remedy, asserting that "a declaration would be a meaningful remedy to affirm the rule of law and provide a useful guidepost for government actors and Aboriginal groups going forward."[30] But an *ex post* declaration, after a project has gone forward and after the damage has been done, is cold comfort to an impacted Aboriginal people. Concern with the duty to consult cannot simply be pushed downstream and made the subject of an after-the-fact judicial review of Crown action after the industrial development has already been approved. To do so is the antithesis of reconciliation. Given the inadequacy of *ex post* remedies in the section 58 context, Rennie J. was correct that the proper course of action is that the NEB "refuse to grant an approval if there is an unfulfilled duty to consult."[31]

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[27] Denying consultation in advance, and then requiring a First Nation to file an action in an attempt to have its rights recognized or vindicated, is the exact problem that *Haida Nation* was seeking to forestall. A principal reason for *Haida Nation's* requirement of prior Crown consultation is because "Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts . . . [w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests." *Haida Nation,* **ABoA Vol I, Tab 5** at para. 14.

[28] *FCA Decision*, **AR Vol I, Tab 2** Rennie J.'s Dissenting Reasons at paras. 123-24.

[29] *Hinton* v. *Canada (Minister of Citizenship and Immigration)*, [2009] 1 FCR 476, 2008 FCA 215, **MBoA Vol I, Tab 4** at para. 45 (citing *Al-Mhamad* v. *Canada (Radio-Television and Telecommunications Commissions)*, [2003] FCJ No 145 (QL), 2003 FCA 45, **MBoA Vol I, Tab 1**). See also *Canada* v. *Tremblay*, [2004] 4 FCR 165, 2004 FCA 172, **MBoA Vol I, Tab 3** at para. 34 ("monetary compensation… cannot be the subject of an application for judicial review.").

[30] *Enbridge Factum* at para. 127.

[31] *FCA Decision*, **AR Vol I, Tab 2** Rennie J.'s Dissenting Reasons at para. 106.

PART IV – SUBMISSION ON COSTS

27. MNCFN does not seek and ask that no costs be awarded against it in this appeal.

PART V – ORDER REQUESTED

28. MNCFN asks that this Court grant it time to make oral representations at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2016.

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PART VI -- TABLE OF AUTHORITIES

Cases	**Cited at Paragraph(s)**
Al-Mhamad v. *Canada (Radio-Television and Telecommunications Commissions)*, [2003] FCJ No 145 (QL), 2003 FCA 45	25
Beckman v. *Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53	13
Canada v. *Tremblay*, [2004] 4 FCR 165, 2004 FCA 172	25
Haida Nation v. *British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511	13, 15, 16, 17, 18
Hinton v. *Canada (Minister of Citizenship and Immigration)*, [2009] 1 FCR 476, 2008 FCA 215	25
Ke-Kin-Is-Uqs v. *British Columbia (Minister of Forests)*, [2008] BCJ No. 2089, 2008 BCSC 1505	22
Mikisew Cree First Nation v. *Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 2005 SCC 69	7, 15, 17
Rio Tinto Alcan Inc. v. *Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43	13, 24
R. v. *Van der Peet*, [1996] 2 SCR 507	9
Taku River Tlingit First Nation v. *British Columbia (Project Assessment Director)*, [2004] 3 SCR 550	7

Other Authorities	**Cited at Paragraph(s)**
Indian Treaties and Surrenders from 1680-1890 Vol. I (Ottawa: S. E. Dawson, 1905)	4
NEB Letter Decision OH-005-2011 (Enbridge Pipelines Inc.) (27 July 2012)	12, 14
NEB Letter Order XO-E101-023-2013 (Enbridge Pipelines Inc.) (29 October 2013)	12, 14
NEB Letter Order XO-E101-018-2013 (Enbridge Pipeline Inc.) (25 July 2013)	12, 14
NEB Letter Order XO-E101-016-2014 (Enbridge Pipeline Inc.) (21 August 2014)	12, 14
Hearing Order (Draft Conditions) OH-001-2016 (Enbridge Pipeline Inc.) (14 October 2016)	12, 14
NEB Decision and Order GHW-001-2014 (TransCanada PipeLines Limited) (2 June 2015)	12, 14
NEB Letter Order GH-001-2016 (TransCanada Pipelines Limited) (4 August 2016)	12, 14

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. **(96)**

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. **(97)**

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(96) Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

(97) Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

CANADA

CONSOLIDATION

CODIFICATION

National Energy Board Act

Loi sur l'Office national de l'énergie

R.S.C., 1985, c. N-7

L.R.C. (1985), ch. N-7

Current to October 11, 2016

Last amended on June 19, 2016

À jour au 11 octobre 2016

Dernière modification le 19 juin 2016

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or suspend a certificate if any term or condition thereof has not been complied with or has been contravened.

Notice and hearing

(2) No order shall be made under subsection (1) unless notice of the alleged non-compliance or contravention has been given to the holder of the certificate and the Board has afforded the holder an opportunity of being heard.

Revocation or suspension on application, etc., of holder

(3) Notwithstanding subsections (1) and (2), the Board may, by order, revoke or suspend a certificate on the application or with the consent of the holder thereof.

R.S., c. N-6, s. 47; R.S., c. 27(1st Supp.), s. 13.

Conditions to Certificate

Compliance

57 Every certificate is subject to the condition that the provisions of this Act and the regulations in force at the date of issue of the certificate and as subsequently enacted, made or amended, as well as every order made under the authority of this Act, will be complied with.

R.S., 1985, c. N-7, s. 57; 1990, c. 7, s. 21(F).

Exemptions

Exempting orders respecting pipelines, etc.

58 (1) The Board may make orders exempting

(a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length, and

(b) any tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property, or immovable and movable, and works connected to them, that the Board considers proper,

from any or all of the provisions of sections 29 to 33 and 47.

(2) [Repealed, 1990, c. 7, s. 22]

Terms

(3) In any order made under this section the Board may impose such terms and conditions as it considers proper.

conseil, annuler ou suspendre un certificat en cas de contravention à l'une ou l'autre des conditions dont celui-ci est assorti.

Avis et audition

(2) L'Office ne peut rendre d'ordonnance aux termes du paragraphe (1) que s'il a avisé le titulaire du certificat de l'infraction reprochée et donné à celui-ci la possibilité de se faire entendre.

Annulation ou suspension sur demande

(3) Malgré les paragraphes (1) et (2), l'Office peut, par ordonnance, annuler ou suspendre un certificat sur demande du titulaire de celui-ci, ou avec son consentement.

S.R., ch. N-6, art. 47; S.R., ch. 27(1er suppl.), art. 13.

Conditions du certificat

Observation

57 Constitue une condition du certificat l'observation des dispositions de la présente loi et de ses règlements en vigueur à la date de délivrance et par la suite, ainsi que des ordonnances prises ou rendues sous le régime de la présente loi.

L.R. (1985), ch. N-7, art. 57; 1990, ch. 7, art. 21(F).

Exemptions

Pipelines

58 (1) L'Office peut, par ordonnance, soustraire totalement ou partiellement à l'application des articles 29 à 33 et 47 :

a) les pipelines, ou embranchements ou extensions de ceux-ci, ne dépassant pas quarante kilomètres de long;

b) les citernes, réservoirs, installations de stockage et de chargement, pompes, rampes de chargement, compresseurs, systèmes de communication entre stations par téléphone, télégraphe ou radio, ainsi que les ouvrages ou autres immeubles ou meubles, ou biens réels ou personnels, connexes qu'il estime indiqués.

(2) [Abrogé, 1990, ch. 7, art. 22]

Conditions

(3) L'Office peut assortir toute ordonnance qu'il rend aux termes du présent article des conditions qu'il estime indiquées.

Time limit

(4) If an application for an order under subsection (1) is made, the Board shall, within the time limit specified by the Chairperson, either make an order under that subsection or dismiss the application.

Maximum time limit and obligation to make it public

(5) The time limit specified by the Chairperson must be no longer than 15 months after the day on which the applicant has, in the opinion of the Board, provided a complete application. The Board shall make the time limit public.

Environmental assessment

(6) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the Board shall also, within the time limit,

(a) prepare a report, as required by paragraph 22(b) of that Act, with respect to its environmental assessment of the designated project; and

(b) comply with subsections 27(1) and 54(1) of that Act with respect to that assessment.

Excluded period — applicant

(7) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline or anything referred to in paragraph (1)(b) to which the application relates and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

Public notice of excluded period

(8) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (7) as soon as each of them is known.

Excluded period — Governor in Council

(9) If the Board has referred a matter to the Governor in Council under subsection 52(2) of the *Canadian Environmental Assessment Act, 2012*, the period that begins on the day on which the reference is made and ends on the day on which the Governor in Council makes a decision in relation to the matter is not included in the calculation of the time limit.

Extension

(10) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council

Délais

(4) Si une demande d'ordonnance au titre du paragraphe (1) est présentée, l'Office est tenu, dans le délai fixé par le président, soit de rendre une ordonnance en vertu de ce paragraphe soit de rejeter la demande.

Restriction et publicité

(5) Le délai fixé par le président ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

Évaluation environnementale

(6) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale (2012)*, l'Office est aussi tenu, dans le même délai :

a) d'une part, d'établir le rapport d'évaluation environnementale relatif au projet exigé par l'alinéa 22b) de cette loi;

b) d'autre part, de se conformer, s'ils s'appliquent, aux paragraphes 27(1) et 54(1) de cette loi à l'égard de cette évaluation.

Période exclue du délai — demandeur

(7) Si l'Office exige du demandeur, relativement au pipeline ou à tout élément visé à l'alinéa (1)b) faisant l'objet de la demande, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

Avis publics – période exclue

(8) L'Office rend publiques, sans délai, la date où commence la période visée au paragraphe (7) et celle où elle se termine.

Période exclue du délai — gouverneur en conseil

(9) Si l'Office renvoie au gouverneur en conseil une question en application du paragraphe 52(2) de la *Loi canadienne sur l'évaluation environnementale (2012)*, la période commençant le jour du renvoi et se terminant le jour où le gouverneur en conseil prend une décision sur la question n'est pas comprise dans le calcul du délai.

Prorogations

(10) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil

may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

Continuation of jurisdiction and obligation

(11) A failure by the Board to comply with subsection (4) within the required time limit does not affect its jurisdiction to deal with the application or its obligation to make the order or to dismiss the application, and anything done by it in relation to the application remains valid.

R.S., 1985, c. N-7, s. 58; 1990, c. 7, s. 22; 2004, c. 25, s. 151; 2012, c. 19, s. 84.

peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

Maintien de l'obligation et de la compétence

(11) Le défaut de l'Office de se conformer au paragraphe (4) dans le délai fixé ne porte atteinte ni à sa compétence à l'égard de la demande en cause ni à son obligation de rendre l'ordonnance ou de rejeter la demande ni à la validité des actes posés à l'égard de la demande en cause.

L.R. (1985), ch. N-7, art. 58; 1990, ch. 7, art. 22; 2004, ch. 25, art. 151; 2012, ch. 19, art. 84.

PART III.1

Construction and Operation of Power Lines

International Power Lines

Prohibition

58.1 No person shall construct or operate a section or part of an international power line except under and in accordance with a permit issued under section 58.11 or a certificate issued under section 58.16.

1990, c. 7, s. 23.

Permits

Issuance

58.11 (1) Except in the case of an international power line designated by order of the Governor in Council under section 58.15 or in respect of which an election is made under section 58.23, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the construction and operation of an international power line.

Information

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

1990, c. 7, s. 23.

Publication

58.12 (1) The applicant shall publish a notice of the application in the *Canada Gazette* and such other publications as the Board considers appropriate.

PARTIE III.1

Construction et exploitation de lignes de transport d'électricité

Lignes internationales

Interdiction

58.1 Il est interdit de construire ou d'exploiter une ligne internationale sans un permis ou un certificat, respectivement délivré en application des articles 58.11 ou 58.16, ou en contravention avec l'un ou l'autre de ces titres.

1990, ch. 7, art. 23.

Permis

Délivrance

58.11 (1) Sauf si un décret ou une décision ont été pris au titre des articles 58.15 ou 58.23, l'Office délivre, sur demande et sans audience publique, les permis autorisant la construction et l'exploitation des lignes internationales.

Renseignements

(2) Sont annexés à la demande les renseignements prévus par règlement et liés à celle-ci.

1990, ch. 7, art. 23.

Publication

58.12 (1) Le demandeur fait publier un avis de la demande dans la *Gazette du Canada* et toutes autres publications que l'Office estime indiquées.