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

– and –

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

Respondents

– and –

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1. The Mohawk Council of Kahnawà:ke ("MCK") adopts the facts as outlined in the Chippewas of the Thames First Nation's ("Appellant") Factum.

PART II: OVERVIEW AND POSITION ON APPELLANT'S QUESTIONS

2. The MCK agrees with the Attorney General of Canada ("AGC") and the Appellant that the duty to consult and accommodate was triggered by the National Energy Board's ("NEB") decision and with the Appellant that the duty was at the high end of the spectrum.[1]

3. Regarding the other questions in issue, the MCK submits that:

(A) the NEB had an obligation to assess whether the Crown fulfilled its duty to consult and accommodate prior to issuing an order under s. 58 of the *National Energy Board Act*[2] ("*NEB Act*");

(B) the NEB's process and Reasons for Decision ("NEB Reasons") did not and could not satisfy the requirements of s. 35(1) of the *Constitution Act, 1982*[3] ("s. 35(1)"); and

(C) this Court should direct the NEB to assess the fulfillment of the Crown's duty by applying the legal test that will be proposed herein.

PART III: ARGUMENT

A. The NEB had an obligation to assess whether the Crown fulfilled the duty to consult

4. The NEB's statutory grant of authority to determine questions of law includes the authority to assess whether consultation was required and had taken place but does not include the express or implicit authority to carry out the Crown's duty to consult and accommodate.[4]

5. The NEB was obligated to exercise the authority to assess consultation because it was the final

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[1] Factum of the Appellant at paras 46, 51, 54, 58, 62-64 [Appellant Factum]. See also Factum of the Attorney General of Canada at para 58 [AGC Factum].
[2] *National Energy Board Act*, RSC 1985, c N-7, [*NEB Act*], **ACG Factum, Part VII (Statutes), Tab 1, pp 1-35**.
[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[4] AGC Factum at para 69; Factum of the Respondent Enbridge at para 46 [Enbridge Factum]. *Chippewas of the Thames First Nation v Enbridge*, 2015 FCA 222, [2016] 3 FCR 96 at paras 106, 111-112 [*Chippewas*], **Appellant's Record [AR], Vol I, Tab 3, pp 194-196**; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] SCR 650 at para 57 [*Carrier Sekani*], **Appellant's Book of Authorities [ABA], Vol I, Tab 22, p 223**.

decision-maker for a project with adverse and potential adverse effects on Aboriginal rights; it is irrelevant whether the Crown was a party to the NEB hearings.[5]

6. In *Gitxaala*, the majority decided that the Governor in Council must consider whether Canada has fulfilled its duty to consult prior to rendering a final decision pursuant to s. 52 of the *NEB Act*. The NEB has the same legal obligation in exercising final decision-making authority pursuant to s. 58 of the *NEB Act*, since it has delegated authority from Parliament.[6]

7. In addition to the reasons identified by Justice Rennie,[7] there are many practical reasons why the NEB was most suited to determine whether the Crown had fulfilled the duty to consult and accommodate. The NEB had the remedial powers to complete a full, explicit and timely assessment of Crown consultation.[8]

8. The NEB could have also requested information from the parties and the Crown on whether there were any outstanding project related issues that were not addressed through the hearing process and on how the government would have proposed to deal with those issues:

> […] the Board may also rely on the fact that there are other processes to deal with the issue, and that those processes, and that any decisions resulting therefrom, must comply with any relevant laws, including constitutional obligations.
>
> Where the Board cannot act beyond its mandate established by legislation to regulate matters beyond its jurisdiction, it can take into consideration matters outside of its jurisdiction when making its public interest decision or recommendation.[9]

9. Had the NEB exercised this authority, all parties would have had the opportunity to submit evidence on Crown consultation early on, including preliminary issues such as the scope of the duty. The NEB could have ensured that the Crown consulted Indigenous interveners regarding any outstanding issues throughout the hearing process and prior to making a final decision. In assessing and then supervising consultation, the NEB could have been an effective body in ensuring the preservation of the Honour of the Crown. This integrated approach addresses concerns of

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[5] Appellant Factum at paras 75, 79-86; *Chippewas*, *supra* note 4 at paras 104-106, 111-112, **AR, Vol I, Tab 3, pp 193-196**.
[6] *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 168 and 237 [*Gitxaala*], **Intervenor Mohawk Council of Kahnawà:ke's Book of Authorities [IMBA], Tab 4**.
[7] See Justice Rennie's dissent in *Chippewas*, *supra* note 4 at paras 114-119, **AR, Vol I, Tab 3, pp 196-198**.
[8] *NEB Act*, *supra* note 2 at s 12(2), **ACG Factum, Part VII (Statutes), Tab 1, pp 1-35**; *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208 at s 18, **ACG Factum, Part VII (Statutes), Tab 4, p 146**; See also Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65 UTLJ 382 at 399, 432-433 [Graben & Sinclair], **IMBA, Tab 16**.
[9] Factum of the Respondent National Energy Board at paras 64-65 [NEB Factum].

proponents and government pertaining to efficiency, duplication and confusion.

10. What the MCK is proposing is not radical. For the Georgia Strait project, the NEB stated that it was required to assess and supervise Crown consultation throughout the hearing process; this resulted in the conclusion of satisfactory agreements with affected Indigenous Nations.[10]

11. However, due to the NEB's failure to assess and supervise consultation during the hearing process, the Appellant's concerns were not addressed and the only recourse was to pursue expensive and time-consuming litigation with the courts, resulting in uncertainty for all parties.

12. The question of whether the NEB had the obligation to assess if the Crown had a duty to consult and whether it was fulfilled is reviewable on the standard of correctness.[11]

B. The NEB's process did not and could not satisfy the requirements of s. 35(1)

i) Scope of the project

13. The assertion that Enbridge's project is minor is specious. The application involved a major repurposing of an old pipeline to authorize the transportation of 300,000 barrels of heavy crude oil per day. The number and scope of issues covered by the hearing order, the hearing duration and the number of interveners demonstrate that this was a very large and complex project, assessed in consideration of the national interest.[12]

14. Secondly, the scope of the project is not relevant to determining whether the NEB should have assessed Crown consultation. The determination of scope would be relevant to the NEB's appreciation of the content of the duty to consult, but under no circumstances would it negate the legal obligation for the NEB to assess Crown consultation.

ii) Reconciliation and the importance of Crown engagement in the context of large projects

15. The overarching goal of s. 35(1) is reconciliation.[13] Included in this framework is the duty to

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[10] *GSX Canada Limited Partnership (Re)*, 2003 LNCNEB 13 (November 2003) at pp 38-41, **IMBA, Tab 5**.
[11] *Chippewas*, *supra* note 4 at para 21, **AR, Vol I, Tab 3, p 167**; *Carrier Sekani*, *supra* note 4 at paras 64-67, **ABA, Vol I, Tab 22, pp 225-226**; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR at para 48, **Respondent National Energy Board's Book of Authorities, Tab 3, p 12 [RNBA]**.
[12] See National Energy Board, Reasons for Decision, Enbridge Pipelines Inc., dated March 6, 2014 (Docket Number OH-002-2013) at ss 2.1.2, 2.2 and 2.3 at 8-14 [NEB Reasons], **AR, Vol I, Tab 1, pp 25-31**.
[13] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 at para 118, **IMBA, Tab 9**; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 32 [*Haida*], **ABA, Vol I, Tab 5, p 37**.

consult and accommodate Indigenous Nations.

16. This duty is rooted in the recognition that Indigenous Nations were here before Europeans and were never conquered; it ensures that the Honour of the Crown is preserved pending the determination of Aboriginal rights and the conclusion of nation-to-nation treaties.[14] For the MCK, the goal is to move toward a renewed relationship that is "rooted in the two-row wampum tradition of autonomy, mutual respect and friendship".[15]

17. As this Court has explained, consultation "is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy and compromise".[16]

18. The courts have not fully considered how Indigenous governance rights inform the duty to consult.[17] However, international law recognizes that achieving reconciliation encompasses the recognition of the jurisdictional rights of Indigenous Nations.[18] This is especially true for decisions pertaining to large or complex projects where policy and national public interest decisions are at issue, as was the case with the NEB's decision.[19]

19. The nation-to-nation relationship involves the reconciliation of sovereignties and worldviews, including fundamentally different philosophical and cultural systems:[20]

> The reconciliation is of sovereignties, with its ultimate expression being in developing shared and collaborative patterns of how sovereigns will interact with each other with respect to governing and making decisions. Reconciliation of this nature and scope is not a mere adjustment to processes of Crown decision-making, or a mechanistic and formulaic

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[14] *Haida*, *supra* note 13 at paras 20, 25, **ABA, Vol I, Tab 5, p 33-34**.
[15] Jennifer Dalton, "Constitutional Reconciliation and Land Negotiations: Improving Relationship between Aboriginal Peoples and the Government of Ontario" (2009) 3 Journal of Parliamentary and Political Law 277 at 1, online: Thomson Reuters <http://www.specific-claims-law.com/images/stories/specific_claims_docs/06-academic_literature/Dalton_2009_secure.pdf>, **IMBA, Tab 13**.
[16] *Carrier Sekani*, *supra* note 4 at para 60, **ABA, Vol I, Tab 22, p 224**.
[17] Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" (2008) National Centre for First Nations Governance Research Paper at 64-65, online: <http://fngovernance.org/resources_docs/Crown_Duty_to_Consult__Accommodate.pdf>, **IMBA, Tab 14**.
[18] The *United Nations Declaration on the Rights of Indigenous Peoples* recognizes jurisdictional rights as integral to state consultation obligations; See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, A/RES/61/295, (2007) at arts 18, 19, 32, **IMBA, Tab 18**. This should be reflected in this Court's interpretation of the duty as per *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 174 DLR (4th) 193 at paras 70-71, 74, **IMBA, Tab 1**.
[19] See NEB Reasons, *supra* note 12 at p 4, **AR, Vol I, Tab 1, p 21**.
[20] Roshan Danesh & Jessica Dickson, "Alternative Dispute Resolution and Aboriginal-Crown Reconciliation in Canada" in Humberto Dalla Bernardina de Pinho & Juliana Loss de Andrade, eds, *Contemporary Tendencies in Mediation* (Madrid: Editorial Dykinson, 2005) 67 at 77, 81, **IMBA, Tab 15**.

exchange of information. It is much broader, extensive and complex than this.[21]

20. In recent cases, the courts have implied that the Crown has discretion to develop the consultation processes in which Indigenous Nations must participate.[22] The MCK submits that this is not established law and that there are compelling arguments challenging this view.[23] Regardless, when the Crown does unilaterally establish a process, it is important that there be "[…] an openness to challenges from those who see exclusions and limitations in the design of a given dispute resolution process, and mechanisms to adjust procedures in an ongoing way".[24]

21. These fundamental aspects of reconciliation were completely ignored in the present case. The Crown's unilateral determination that the NEB process was sufficient, its non-existent engagement within the context of the hearing,[25] combined with the categorical refusal to discuss outstanding concerns pertaining to the process and project are incompatible with the MCK's view on reconciliation. This creates a "disconnect between Aboriginal peoples and the Crown"[26] and is contrary to the requirements and purpose of the duty. The Crown ran roughshod over the Honour of the Crown, perpetuating the practice condemned by Kahane:

> It is tempting for members of dominant cultures to try to escape these dilemmas by appealing to neutralist models of adjudication or by using general templates for interpreting cultures and incorporating them into deliberative processes […] both neutralist models and "one size fits all" accounts of intercultural decision making tend to privilege dominant worldviews, at the expense of the perspectives and interests of marginalized groups.[27]

22. Moreover, the Crown could not use the NEB process as grounds to refuse to engage with

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[21] The First Nations Leadership Council, "Advancing Indigenous Framework for Consultation and Accommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group" (2013) at 11, online: <http://www.fns.bc.ca/pdf/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf>, **IMBA, Tab 17**.
[22] *Gitxaala*, *supra* note 6 at para 203, **IMBA, Tab 4**; *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 AR 259 at para 39, **IMBA, Tab 3**.
[23] The MCK supports the view that the mechanisms of consultation must be developed in consultation; See Chiefs of Ontario Notice of Motion at para 14(b)(ii).
[24] David Kahane, "Dispute Resolution and the Politics of Cultural Generalization" (2003) 19 Negotiation Journal 5 at 21 [Kahane], **IMBA, Tab 12**.
[25] While Environment Canada responded that it would "consider the concerns of First Nations related to our department's mandate", no "consideration" or engagement occurred in any way during or after the hearing process, AGC Factum at footnote 59 citing Environment Canada Response dated 12 September 2013 to IR No 1 of Jesse McCormick (Exhs C36-5-1, C36-5-2 and C36-6-1), response 1.8, **Joint Record of the Respondents, Vol 3, Tab 22, pp 563 and 620-621**.
[26] 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 UBC L Rev 397 at 414-415 [Ritchie], **ABA, Vol II, Tab 31, pp 72-73**.
[27] Kahane, *supra* note 24 at 23, **IMBA, Tab 12**.

the Appellant; such refusals are routinely considered breaches of the Crown's duty.[28]

iii) The NEB was not delegated the duty to consult and accommodate

23. Enbridge argues that the NEB was implicitly empowered to carry out the Crown's duty to consult and accommodate. This is false. The NEB was responsible for assessing the biophysical impacts of the project on Aboriginal rights and for measuring these impacts against the public interest.[29] While there may be some overlap between the NEB's role and the Crown's duty, there is no equivalency between the NEB's role and the Crown's duty, and therefore there can be no implicit empowerment:

> […] the difficulty with the NEB reasoning is that the meaning of 'adverse effect' in *Haida* and the meaning of 'harm' or 'impact' used by the NEB represent very different standards when considering whether the duty has been triggered and whether it has been accommodated.
>
> […] the meaning of 'adverse effect' as articulated in *Haida* is much broader than that of 'impact' and 'harm' used by the NEB. Unlike 'impact' or 'harm' tests, the 'adverse effects' test does not need to have an immediate or tangible impact on lands and resources. It can flow from abstract Crown conduct, such as high-level managerial, organizational or policy changes […][30]

24. Secondly, there is no reason why the Crown's choice to rely on an administrative body's Aboriginal consultation should amount to implicit delegation to carry out the Crown's duty.

iv) The NEB Reasons do not constitute accommodation or fulfill the s. 35(1) duty

25. Canada's interpretation of the NEB Reasons, including the conditions imposed for approval of the project, as full accommodation of all of the Appellant's issues is wrong.

26. Any tribunal that purports to consult and accommodate by itself must possess the necessary remedial powers.[31] In this case, the NEB had the remedial powers to assess and supervise consultation but it did not have the powers necessary to discharge the duty itself. As will be

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[28] See *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34 at para 209, **IMBA, Tab 2**; *Sambaa K'e Dene Band v Duncan*, 2012 FC 204, [2012] FCJ No 216 at para 161, **IMBA, Tab 8**; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, [2007] FCJ No 1006 at para 121, **IMBA, Tab 6**.
[29] See NEB Reasons, *supra* note 12 at s 7 at pp 87-88, **AR, Vol I, Tab 1, pp 104-105**.
[30] Graben & Sinclair, *supra* note 8 at 417-418, **IMBA, Tab 16**.
[31] *Carrier Sekani* at para 60, **ABA, Vol I, Tab 22, p 224**.

demonstrated, the situation described below by the NEB applies to this case:

> […] there may be certain instances where an issue raised or identified by an Aboriginal group during consultation on a project cannot be remedied through the proponent's actions or through the imposition of conditions by the Board.[32]

27. The AGC also acknowledged the limitations of the NEB's powers in indicating that tribunals can accommodate Aboriginal concerns only "to the extent possible".[33]

28. In an attempt to justify any shortcomings, Enbridge mistakenly relies on administrative law to support the assertion that the NEB Reasons do not have to be perfect or comprehensive.[34] As determined in *Gitxaala*, providing reasons under administrative law does not mean that the separate constitutional duty to consult and accommodate has been fulfilled.[35]

29. The NEB's assertion that interveners had the opportunity to express all concerns related to the project is false. Interveners, including the Appellant and the MCK, were limited by the NEB's exclusive List of Issues. For example, concerns related to energy policy, the upstream or downstream GHG emissions related to the project[36] and cumulative impacts[37] could not be raised. Similar to *Gitxaala*, the List of Issues only covered some subjects on which consultation was required and was narrower than the Crown's duty.[38]

30. On several occasions, the AGC and Enbridge significantly overstate the extent to which the NEB Reasons address the Appellant's concerns. For example, in response to concerns pertaining to "providing economic accommodation for potential impacts to the Appellant's rights", the AGC answers that: "the Board's decision outlines the steps required of the proponent Enbridge to ensure its financial responsibility for any damages or impacts arising in the unlikely event of an impact on Aboriginal rights."[39] The NEB Reasons cited by the AGC do not address the Appellant's concerns in any way, as they do not mention the Appellant's Aboriginal rights or the manner in which Enbridge addresses financial responsibility for impacts to these rights. This type of vague

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[32] NEB Factum at para 63 (emphasis added). Similar to *Conway*, the NEB was not statutorily empowered with the "free remedial rein" required to take over all aspects of the duty to consult from the Crown, see *R v Conway*, [2010] 1 SCR 765, 2010 SCC 22 at paras 82 and 97, **IMBA, Tab 7**; See also AGC Factum in Clyde River at para 64.
[33] AGC Factum at para 64.
[34] Enbridge Factum at paras 111-112.
[35] *Gitxaala*, *supra* note 6 at paras 156-158, **IMBA, Tab 4**.
[36] NEB Reasons, *supra* note 12 at p 2, **AR, Vol I, Tab 1, p 19**.
[37] Graben & Sinclair, *supra* note 8 at 405-407, **IMBA, Tab 16**.
[38] *Gitxaala*, *supra* note 6 at para 240, **IMBA, Tab 4**.
[39] AGC Factum at para 36.

"addressing of concerns" was condemned in *Gitxaala.*[40]

31. In fact, the NEB solely assessed the biophysical impacts of the project on Aboriginal rights and measured these against the public interest. The additional recommendations and outstanding concerns raised by the Appellant and other Indigenous interveners were never assessed by the NEB or the Crown with respect to the duty to consult. The NEB never measured the project's potential adverse impacts on the Appellant with respect to "any known legal standard nor treated constitutional obligations to consult as relevant to approval".[41]

32. Further, the NEB lacked the power to order many types of accommodation measures that could apply to large projects such as pipelines. For example, the NEB could not order the creation of intergovernmental monitoring bodies that include Indigenous governments, whereas the Crown, acting through a government department, can negotiate the creation of such bodies.[42]

33. In addition, the use of administrative tribunals to carry out Crown accommodation for large projects is not desirable from a policy standpoint. Courts have been reticent to impose accommodation, and have preferred a supervisory role in ordering the parties to negotiate in good faith.[43] This allows for effective and substantive negotiations, the preferred means to achieving reconciliation. It is time for this Court to direct tribunals to play a similar role.

34. Since the NEB did not assess whether the duty was fulfilled, or whether there were any outstanding concerns that required consideration, it would be inappropriate for this Court to conduct its own "after the fact" assessment of the sufficiency of the NEB's process:

> Judicial review requires the court to rely on the accuracy and completeness of the expert tribunal's findings. [...] If the tribunal's record is incomplete and/or silent on whether the duty has been triggered and fulfilled, the court's assessment of the adequacy of Crown consultation may be equally lacking.[44]

35. The AGC's assertion that participation in the NEB's process meant that deep consultation occurred is unfounded. The MCK agrees with the Appellant that, in spite of participation in the NEB's process, many of the Appellant's concerns were not addressed or were not substantially addressed.[45] To the extent that the Crown relied on the NEB process to address these outstanding

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[40] *Gitxaala*, *supra* note 6 at paras 286-287, **IMBA, Tab 4**.
[41] Graben & Sinclair, *supra* note 8 at 432, **IMBA, Tab 16**.
[42] Ritchie, s*upra* note 26 at 416, 436, **ABA, Vol II, Tab 31, pp 74 and 94**.
[43] See for example, *Wii'litswx v HMTQ*, 2008 BCSC 1620, [2009] 1 CNLR 359 at paras 22-23, **IMBA, Tab 11**.
[44] Graben & Sinclair, *supra* note 8 at 429, **IMBA, Tab 16**.
[45] Appellant Factum at para 23.

concerns for the fulfillment of the constitutional duty to consult, it did so in error.[46]

C. The NEB should assess adequacy by determining whether the duty was fully met

36. If this Court grants the appeal, quashes the order and sends the application back to the NEB for a final decision, this Court should provide guidance to the NEB on the applicable legal test for assessing whether the Crown met the duty to consult and accommodate.

37. At the FCA, Justice Rennie argues, building on *Carrier Sekani*, that if the NEB was the final decision-maker it "[…] was required to ask whether the consultation had taken place"[47] as a first step in its assessment of whether the duty was met.

38. Subsequently, in *Gitxaala*, the majority proposed a "reasonable satisfaction" standard for determining whether the duty to consult has been fulfilled, in order "not to hold Canada to anything approaching the standard of perfection".[48] This standard must be rejected; given the constitutional nature of the duty to consult, the duty must be fully met.[49]

39. The majority in *Gitxaala* confused the process and outcome of consultation and accommodation (neither of which must result in perfect satisfaction, as per *Haida*[50]) with the applicable standard for reviewing whether the duty has been fulfilled.

40. While the MCK agrees with the majority in *Gitxaala* that final decision-makers must ensure that the specific concerns raised by Indigenous Nations are "specifically addressed", we disagree that deep consultation must lead to the demonstration of serious "consideration of accommodation". The Crown must demonstrate more than consideration of accommodation (which is procedural), it must also demonstrate that it has specifically and substantially addressed and accommodated each concern raised by Indigenous Nations, as appropriate.[51]

41. To determine the appropriate level of consultation, the NEB should have first determined where this project was on the spectrum of the duty to consult (based on the *Haida* factors[52]). Following this assessment, the MCK submits that the NEB should have applied this test:

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[46] Appellant Factum at para 18.
[47] *Chippewas*, *supra* note 4 at para 112 (emphasis added), **AR, Vol I, Tab 3, p 196**.
[48] *Gitxaala*, *supra* note 6 at paras 183-185, **IMBA, Tab 4**.
[49] *Carrier Sekani*, *supra* note 4 at para 63, **ABA, Vol I, Tab 22, p 225**.
[50] *Haida*, *supra* note 13 at para 62, **ABA, Vol I, Tab 5, pp 50-51**.
[51] *Haida*, *supra* note 13 at para 42, **ABA, Vol I, Tab 5, p 41**; *White River First Nation v Yukon Government*, 2013 YKSC 66, [2013] YJ No 74 at para 108, **IMBA, Tab 10**.
[52] *Haida*, *supra* note 13 at paras 43-44, **ABA, Vol I, Tab 5, pp 41-42**.

> Has Canada met the duty to consult by 1) ensuring the completion of a process that fulfills the procedural requirements of the duty; and by 2) ensuring that the concerns raised about the adverse and potentially adverse effects of the project on the Aboriginal rights of Indigenous Nations have been substantially addressed through meaningful consultation and accommodation, as appropriate.

42. The MCK submits that this test reflects the appropriate balance between the procedural and substantive components of the duty to consult and accommodate.

D. Conclusion

43. The duty to consult and accommodate must be applied in a manner that acknowledges the complex interaction of facts, law, policy and compromise inherent in the approval process of large projects, such as pipelines. This involves the nation-to-nation relationship that is required to achieve reconciliation. The Crown's categorical refusal to engage is inexcusable.

44. In this case, the NEB was legally required to assess the fulfillment of the Crown's duty to consult, and had the remedial powers to supervise ongoing dialogue between the Crown and Indigenous interveners. The NEB failed to carry out this legal obligation. The NEB Reasons could not and did not remedy this breach and the requirements of s. 35(1) were not met.

PART IV: COSTS

45. The MCK does not seek costs and seeks that no costs be awarded against the MCK.

PART V: ORAL ARGUMENT

46. The MCK requests permission to present oral argument of up to ten minutes in length.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the Mohawk Territory of Kahnawà:ke, Quebec, this 3rd day of November, 2016.

Francis Walsh
Counsel for the Intervener
Mohawk Council of Kahnawà:ke

PART VI – TABLE OF AUTHORITIES

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