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
ATTORNEY GENERAL OF CANADA

RESPONDENTS
(Respondents)

FACTUM OF THE APPELLANT

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PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I: STATEMENT OF FACTS

A. Overview

1. This Court has previously held that the Crown's duty to consult and accommodate Aboriginal Peoples is a constitutional duty invoking the honour of the Crown and that, "it must be met."[1] No Crown actor, including a tribunal exercising delegated authority, can make a decision that ignores or is contrary to the Crown's constitutional obligations to Aboriginal Peoples.

2. Since this Court's decision in *Rio Tinto Alcan v. Carrier Sekani Tribal Council,*[2] legal scholars have commented on the need for this Court to address outstanding issues relating to an administrative tribunal's authority and proper role in regard to the Crown's constitutional duty to consult and accommodate Aboriginal Peoples.[3] These comments arise from the fact that this matter continues to play out in inconsistent ways in various administrative contexts across the country.[4] This appeal provides this Court with an opportunity to clarify the application and interpretation of its decision in *Carrier Sekani* to tribunals with final decision making authority over lands and resources potentially impacting constitutionally protected Aboriginal and Treaty rights.

3. Specifically, this appeal raises the question as to whether the National Energy Board (the "Board"), acting as the final decision-maker under s. 58 of the *National Energy Board Act* (the "*NEB Act*"),[5] is required to determine whether the Crown has met its constitutional duty to consult and accommodate prior to issuing a decision that has potentially adverse effects in relation to Aboriginal and treaty rights. This question 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.

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[1] *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 63, [2010] 2 SCR 650.
[2] *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, [*Carrier Sekani*].
[3] Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) 22:1 Const Forum Const 63; also, David Mullan, "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?" (2011) 24:3 Can J Admin L & Prac 233; also, 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; also, 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; also, Kirk N. Lambrecht Q.C., "Constitutional Law and the Alberta Energy Regulator" (2014) 23:2 Const Forum Const 33; and, 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.
[4] *Hamlet of Clyde River v TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179; and, *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379; and, *Cold Lake First Nations v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304.
[5] *National Energy Board Act*, RSC 1985, c N-7, s 58, [NEB Act].

4. The Board's decision in this case authorized Enbridge Pipelines Inc. ("Enbridge"), *inter alia*: to reverse the flow of a section of pipeline between North Westover, Ontario and Montreal, Quebec; and, to expand the annual capacity of Line 9 from Sarnia, Ontario to Montreal, Quebec; and, to allow heavy crude to be shipped on Line 9 ("the Proposed Project"). The Appellant Chippewas of the Thames First Nation ("the Chippewas First Nation" or "the Appellant") asserted Aboriginal, treaty and title rights in respect of lands and waterbeds potentially affected by the Proposed Project.

5. The Board failed to express an opinion as to whether the Crown had a duty to consult and accommodate in respect of the Proposed Project or, more importantly, whether the Crown had fulfilled its duty to consult. Neither the Crown nor the Board at any time engaged in meaningful consultation with the Chippewas First Nation regarding the nature of their asserted Aboriginal rights and interests or the potential impact of the Board's decision on those rights and interests. In fact, the Crown did not participate in the Board's proceeding, notwithstanding repeated requests by the Chippewas First Nation for the Crown to engage in consultation regarding the Proposed Project.

6. The majority ruling of the Federal Court of Appeal held that the Board was not required to assess the adequacy of Crown consultation prior to approving the application. This contradicts this Court's previous jurisprudence and effectively allows the Crown to avoid its constitutional duty simply by choosing not to participate in the Board's hearing process. Such a result creates a disincentive for Crown participation in the "process of fair dealing" and is fundamentally at odds with the honour of the Crown and the principle of reconciliation. It also leaves affected First Nations without an appropriate remedy in the context of proceedings under s. 58 of the *NEB Act* affecting Aboriginal and treaty rights.

B. Facts

7. The Chippewas First Nation is a signatory to a series of treaties with the British Crown signed between 1818 and 1822 that recognize and affirm the Chippewas First Nation's rights to their unceded lands.[6] In exchange for a limited surrender of their lands to the Crown the Chippewas First Nation was promised the continued protection of their seasonal relationship with the lands, waters and natural resources within their traditional territory.[7] The Crown's solemn promise was

[6] Appellant's Record, Vol II, Tab 9, pg 76, Chief Miskokomon Affidavit, pg 7 of 47 at para 23 referring to Exhibits in Affidavit "C", "D", "E", and "F", respectively, copies of notes taken of the oral treaty concluded in 1818, Treaty No. 21 (1819), Treaty No. 280 ½ (1820), and Treaty No. 25 (1822).
[7] Appellant's Record, Vol II, Tab 9, pg 77, Chief Miskokomon Affidavit, pg 8 of 47 at para 28.

to forever protect and uphold the Chippewas First Nation's rights to the continued use of their lands, waters and natural resources.[8]

8. The Chippewas First Nation continues to assert Aboriginal and treaty rights in the Thames River watershed, including Aboriginal title to the bed of the Thames River.[9]

9. 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 Chippewas First Nation and crosses the Thames River. There is no dispute amongst the parties in this appeal that the lands subject to the Proposed Project are also the lands over which the Appellant asserts Aboriginal rights, treaty rights and title.

10. In November of 2012, Enbridge filed an application under section 58 of the *NEB Act* 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 Chippewas First Nation.[10] Unlike other applications under the *NEB Act*, an application under s. 58 does not require further ministerial consideration or approval, thus, the Board is the final decision maker.[11]

11. 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.

i. Chippewas First Nation Use of Lands within the Project Area

12. The Chippewas First Nation current use of lands and resources in close proximity to Line 9 was set out in the following documents submitted to the Board: an affidavit of the Chippewas First Nation Chief, Joe Miskokomon; a Traditional Land Use Plan prepared by Eagle Sun Consulting; and, a research paper prepared by Professor Neal Ferris (the Lawson Chair of

[8] Appellant's Record, Vol II, Tab 9, pg 76, Chief Miskokomon Affidavit, pg 7 of 47 at paras 22-23.
[9] Appellant's Record, Vol II, Tab 9, pgs 71, 72-73 and 76, respectively, Chief Miskokomon Affidavit, pg 2 of 47 at para 6, and pgs 3-4 of 47 at para 10, and pg 7 of 47 at para 21.
[10] Appellant's Record, Vol I, Tab 1, pg 26, National Energy Board, Reasons for Decision, Enbridge Pipelines Inc., dated March 6, 2014 (Docket Number OH-002-2013) at pg 9: the application was to increase the annual capacity of the entire Line 9 from 240,000 bpd to approximately 300,000 bpd pursuant to section 58 (Part III) of the *National Energy Board Act*, RSC 1985, c N-7, [NEB Reasons for Decision].
[11] See for example s 52 of the *National Energy Board Act*, RSC 1985, c N-7, under which an application to the NEB is considered in a Board process but is ultimately referred to the Governor-in-Council for a final decision.

Canadian Archaeology, Department of Anthropology/Museum of Ontario Archaeology, University of Western Ontario).[12]

13. The Chippewas First Nation asserted the following rights within the Project Area:

i) Aboriginal harvesting rights within their traditional territory to hunt, fish, trap, gather or collect any or all species or types of animals, plants, minerals and oil, for any purpose, including for food, social and ceremonial purposes, trade, exchange for money, or sale (including commercial sale);

ii) the right to access, preserve, and conserve sacred sites for traditional, social, and ceremonial purposes;

iii) Aboriginal title to the bed of the Thames River, as well as the airspace over the Thames River and other lands throughout their traditional territory;

iv) an Aboriginal right to use the water and resources in the Thames River and the air space over the lands in their traditional territory; and

v) a solemnly negotiated treaty right promising members exclusive use and enjoyment of their reserve lands.[13]

ii. No Crown Consultation or Accommodation

14. 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.[14] The letter outlined the First Nations' assertions of Aboriginal, treaty and title rights within the impacted area and specifically raised the issue of the Crown's failure to consult and accommodate.[15]

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[12] For a map of the Chippewas of the Thames Land Use Study see Appellant's Record, Vol II, Tab 9, pg 83, Chief Miskokomon Affidavit, pg 14 of 47.
[13] Appellant's Record, Vol II, Tab 9, pg 72-73, Chief Miskokomon Affidavit, pgs 3-4 of 47 at para 10.
[14] Appellant's Record, Vol VI, Tab 14, pgs 117-118, National Energy Board, Exhibit, Letter from Aamjiwnaang First Nation & Chippewas of the Thames First Nation to the Right Honourable Stephen Harper, the Honourable Joe Oliver, and the Honourable Bernard Valcourt, dated September 27, 2013 at pg 2-3.
[15] Appellant's Record, Vol VI, Tab 14, pgs 117-118, National Energy Board, Exhibit, Letter from Aamjiwnaang First Nation & Chippewas of the Thames First Nation to the Right Honourable Stephen Harper, the Honourable Joe Oliver, and the Honourable Bernard Valcourt, dated September 27, 2013 at pg 2-3.

15. The letter also requested that the Crown inform the Board that no consultation had taken place, and that procedural steps involving the Crown and the First Nations would need to be taken.[16] The First Nations further stated that they did not believe that the Board had the jurisdiction to undertake consultation on behalf of the Crown, or to accommodate potential impacts arising from approval of the application before the Board.[17]

16. The Crown did not reply to these concerns prior to the Board hearing. At no time did the Crown provide any assessment of the Chippewas First Nation's asserted Aboriginal rights, treaty rights or title claims or engage in any consultation with the Appellant.

17. As part of the Board process the Chippewas First Nation submitted uncontradicted evidence of their members' use of lands and resources in close proximity to Line 9 and their continuing treaty right to harvest resources throughout their traditional territory, and evidence that established that the proposed changes to Line 9, including the rate of flow and the new composition of the oil, would increase the severity of harm associated with any spill within their traditional territory.[18] The Appellant's concerns regarding the lack of Crown consultation and accommodation were squarely placed before the Board and the Federal Government.

18. 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 Nations' letter, indicating that, "the Crown will meet its consultation obligations in an effective and meaningful manner."[19] The Minister further stated: "The Government relies on the NEB process to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate."[20]

C. The Board's Decision

19. In its reasons for decision approving the Proposed Project, the Board included a section entitled "Aboriginal Matters". The Board stated in the preamble to the section that it, "interprets its responsibilities, including those outlined in s. 58 of the *NEB Act*, in a manner consistent with

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[16] Appellant's Record, Vol I, Tab 3, pg 163, Federal Court of Appeal, Reasons for Judgment, 2015 FCA 222 at para 10, [FCA Reasons for Judgment].
[17] Appellant's Record, Vol I, Tab 3, pgs 163-164, FCA Reasons for Judgment at para 11.
[18] Appellant's Record, Vol II, Tab 9, pg 77, Chief Miskokomon Affidavit, pg 8 of 47 at para 28.
[19] Appellant's Record, Vol VI, Tab 11, pg 47, Affidavit of Sarah Snake, Exhibit "A", Letter from The Honourable Joe Oliver to Chief Joe Miskokomon, Chippewas of the Thames First Nation, and Chief Christopher Plain, Aamjiwnaang First Nation, dated January 30, 2014 at pg 2.
[20] Appellant's Record, Vol VI, Tab 11, pg 47, Affidavit of Sarah Snake, Exhibit "A", Letter from The Honourable Joe Oliver to Chief Joe Miskokomon, Chippewas of the Thames First Nation, and Chief Christopher Plain, Aamjiwnaang First Nation, dated January 30, 2014 at pg 2.

the *Constitution Act, 1982*, including s. 35"[21]; yet, it failed to assess the adequacy of Crown consultation.

20. The Board acknowledged that the Appellant and additional Aboriginal groups had expressed concerns about the lack of a consultation process. Specifically, the Board stated:

> Aboriginal Participants in this proceeding were critical of Enbridge's efforts to engage them concerning the Project and also expressed concerns regarding Crown consultation. Aboriginal Participants argued that because these efforts were insufficient the potential impacts of the Project on Aboriginal interests are not fully understood or addressed.[22]

21. In addition, the Board stated that increasing Line 9's capacity would result in an increase in assessed risk for Line 9 and recognized the potential for impacts on the Appellant's Traditional Land Use if there were a spill on Line 9.[23] The Board determined that these potential impacts "are likely to be minimal and will be appropriately mitigated [by the Proponent]".[24]

22. While it did not address the adequacy of Crown consultation the Board discussed at length Enbridge's efforts to provide information to the Appellant and other Aboriginal groups. The Board noted that these efforts, combined with the Board's hearing process, provided the Chippewas First Nation and other Aboriginal groups the opportunity to present their views as "part of the overall consultative process."[25]

23. Notwithstanding its reference to s. 35 of the *Constitution Act*, and despite lengthy and thorough written and oral submissions by the Appellant, the Board failed to:

- identify or discuss the Appellant's Aboriginal, treaty or title rights;
- provide any assessment of the strength of the Appellant's claims;
- comment on the concerns raised by the Appellant about the increase in the severity of the harm that could be experienced within its traditional territory if a spill was to occur;

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[21] Appellant's Record, Vol I, Tab 1, pg 104, NEB Reasons for Decision at pg 87.
[22] Appellant's Record, Vol I, Tab 1, pg 108, NEB Reasons for Decision at pg 91.
[23] Appellant's Record, Vol I, Tab 3, pgs 165-166, FCA Reasons for Judgment at para 17.
[24] Appellant's Record, Vol I, Tab 1, pgs 115-116, NEB Reasons for Decision at pgs 98-99.
[25] Appellant's Record, Vol I, Tab 1, pg 105, NEB Reasons for Decision at pg 88.

- assess the risk to the Appellant's traditional territory - instead the Board referred only to the increase in risk associated with the Proposed Project as a whole;
- assess what level of consultation was required with respect to the Appellant's constitutionally protected rights;
- discuss any possible accommodation of the Appellant's concerns; or
- address its role to ensure that the Crown's duty to consult was satisfied.

24. Without identifying or addressing the Chippewas First Nation's asserted Aboriginal and treaty rights or assessing whether the Crown had satisfied its constitutional duty to consult and accommodate on the potential impact of those asserted rights, the Board approved the application and concluded that it was "satisfied with the level of Aboriginal engagement Enbridge conducted for the Project given the nature and scope of its Application."[26]

D. Federal Court of Appeal's Reasons

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

- The Crown was notified of concerns regarding the potential impact of the NEB application on Aboriginal claims and rights and acknowledged the request by the Chippewas First Nation for Crown consultation and accommodation in the context of the NEB proceeding;[27]
- 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";[28]
- The *NEB Act* does not contain a provision delegating the Crown's duty to consult to the Board;[29] and
- The response letter from the Minister of Natural Resources to the Chippewas First Nation did not constitute a delegation of the Crown's duty to consult to the Board.[30]

[26] Appellant's Record, Vol I, Tab 1, pgs 115-116, NEB Reasons for Decision at pg. 99.
[27] Appellant's Record, Vol I, Tab 3, pgs 163-164 and 165, FCA Reasons for Judgment at paras 10, 11, 12 and 16.
[28] Appellant's Record, Vol I, Tab 3, pg 178, FCA Reasons for Judgment at paras 57-59.
[29] Appellant's Record, Vol I, Tab 3, pg 184, FCA Reasons for Judgment at para 79.
[30] Appellant's Record, Vol I, Tab 3, pg 184, FCA Reasons for Judgment at para 79.

26. While it agreed on the above facts, the Federal Court of Appeal in a 2-1 decision provided different interpretations of the law as set down by this Court in *Carrier Sekani* as it applies to the Board's jurisdiction in relation to the Crown's duty to consult and accommodate.

27. 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.*,[31] held that the Board was not required to assess the adequacy of Crown consultation prior to approving the application.[32] He further found that 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.[33] Ryer J.A. emphasized that the Board's obligation to consult with Aboriginal Groups is distinct from the Crown's duty to consult; but that, as a practical matter, "it should not matter whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process."[34]

28. In his dissent, Rennie J.A. noted that the Chippewas First Nation repeatedly requested to have the Minister attend the Board hearing in order to carry out consultation and accommodation. He went on to observe: "[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."[35]

29. Rennie J.A. disagreed with the majority regarding the application of *Standing Buffalo*, holding that it should no longer be followed given this Court's decision in *Carrier Sekani*.[36] Moreover, he expressed a clear "point of divergence"[37] with his colleagues with regard to the interpretation of the fundamental governing law as 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 triggered. 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

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[31] *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*., 2009 FCA 308, [*Standing Buffalo*].
[32] Appellant's Record, Vol I, Tab 3, pg 178, FCA Reasons for Judgment at para 59.
[33] Appellant's Record, Vol I, Tab 3, pg 184, FCA Reasons for Judgment at para 79.
[34] Appellant's Record, Vol I, Tab 3, pg 179, FCA Reasons for Judgment at para 63.
[35] Appellant's Record, Vol I, Tab 3, pg 188, FCA Reasons for Judgment at para 89.(emphasis added)
[36] Appellant's Record, Vol I, Tab 3, pg 186, FCA Reasons for Judgment at para 82.
[37] Appellant's Record, Vol I, Tab 3, pg 186, FCA Reasons for Judgment at para 81.

> that there was an outstanding unfulfilled duty to consult, it ought not to have rendered its approval.[38]

30. Rennie J.A. concluded that the appropriate remedy in this case would be to return the matter to the Board to consider the questions set out in *Carrier Sekani*.

PART II: QUESTIONS IN ISSUE

31. This Appeal raises the following issues for determination by this Court:

(1) Whether the Crown has a duty to consult and accommodate in this case;

(2) Whether the Board has the jurisdiction and the obligation to assess the adequacy of the Crown's duty to consult and accommodate prior to issuing a decision under s. 58 of the *NEB Act*; and

(3) Whether in the absence of Crown consultation or participation, the Board's hearing process can satisfy the requirements of s. 35(1) of the *Constitution Act, 1982*.

PART III: STATEMENT OF THE ARGUMENT

A. Standard of Review

32. This appeal deals with a review of the Board's jurisdiction and mandate under s. 58 of the *National Energy Board Act* to consider and discharge the Crown's duty to consult and accommodate the Appellant. The Federal Court of Appeal concluded that this question is reviewable on a standard of correctness.[39]

33. This Court has confirmed that questions concerning the jurisdiction of a tribunal to consider the Crown's duty to consult are to be determined on a standard of correctness.[40]

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[38] Appellant's Record, Vol I, Tab 3, pg 196, FCA Reasons for Judgment at para 112.
[39] Appellant's Record, Vol I, Tab 3, pg 167, FCA Reasons for Judgment at para 21.
[40] *Carrier Sekani*, 2010 SCC 43 at para 67.

B. Issue One: The Crown has a duty to consult and accommodate in this case

i. The duty to consult is a constitutional imperative grounded in the principles of reconciliation and the honour of the Crown

34. The special relationship between Aboriginal Peoples and the Crown is one that requires the Crown to deal honourably with Aboriginal Peoples.[41] This Court has recognized that this relationship is distinct from that which the Crown has with other Canadians.[42] As a result, the Crown has unique constitutional obligations with respect to the rights of Aboriginal Peoples.

35. Subsection 35(1) of the *Constitution Act, 1982* provides that, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby affirmed and recognized".[43]

36. Treaty rights refer to historical and current Aboriginal practices that are recognized and guaranteed in agreements between Aboriginal groups and the Crown. The Chippewas First Nation negotiated a limited surrender of their lands to the Crown in exchange for the continued protection of their seasonal relationship with the lands, waters and natural resources within their traditional territory. The Crown's solemn promise was to forever protect and uphold the Chippewas' rights to the continued use of their lands, waters and natural resources.[44] This Court has held that a treaty is an agreement whose nature is sacred.[45]

37. The Crown's constitutional duty to consult and accommodate Aboriginal peoples is grounded in the principles of reconciliation and the honour of the Crown. 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*."[46] This Court has further held that, "[t]he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation,"[47] and that, "[t]he Crown's honour cannot be interpreted narrowly or technically,

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[41] 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); also, 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) at pgs 37-133; and, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16-25, [2004] 3 SCR 511, [*Haida Nation*].
[42] *R v Van der Peet*, [1996] 2 SCR 507 at para 30.
[43] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[44] Appellant's Record, Vol II, Tab 9, pgs 72-73, Chief Miskokomon Affidavit, pgs 3-4 of 47 at para 10.
[45] *R v Sioui*, [1990] 1 SCR 1025 at p 1063; *Simon v The Queen*, [1985] 2 SCR 387 at p 401.
[46] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103, [Little Salmon].
[47] *Haida Nation*, 2004 SCC 73 at para 45.

but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."[48]

38. The Crown's duty to consult and accommodate was summarized most recently by McLachlin C.J. in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44:

> 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.[49]

39. The duty to consult requires the Crown to undertake meaningful consultation in good faith with Aboriginal people when a government decision may adversely affect their rights and to accommodate those interests in the spirit of reconciliation.[50] 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.[51]

40. Indeed, the concepts of reconciliation and the honour of the Crown are intricately connected.[52] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)* this Court ruled that the doctrine of the honour of the Crown is both substantive and inclusive for the Crown's dealings with Aboriginal Peoples.[53] The Court in that case 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."[54] The duty to consult and accommodate Aboriginal Peoples plays a "supporting role" but cannot be separated from the purpose of reconciliation or the honour of the Crown.[55] The honour of the Crown is always at stake in its dealings with Aboriginal peoples.[56]

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[48] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550, [Taku River].
[49] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 78, [2014] 2 SCR 257. (emphasis added)
[50] *Carrier Sekani*, 2010 SCC 43 at paras 31, 40 and 41; also, *Haida Nation*, 2004 SCC 73 at para 35.
[51] *Little Salmon*, 2010 SCC 53 at para 44.
[52] *Carrier Sekani*, 2010 SCC 43 at para 34.
[53] *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at paras 70 & 94, [2013] 1 SCR 623, [Manitoba Métis].
[54] *Manitoba Métis*, 2013 SCC 14 at para 67.
[55] *Little Salmon*, 2010 SCC 53 at para 44.
[56] *Haida Nation*, 2004 SCC 73 at para 25; *Taku River*, 2004 SCC 74 at para 24; *R v Badger*, [1996] 1 SCR 771 at para 41; *R v Marshall*, [1999] 3 SCR 456 at para 49.

ii. The Crown's duty to consult and accommodate was triggered

41. This Court in *Haida Nation* and more recently in *Carrier Sekani*, held that three elements must be present in order to trigger the Crown's duty to consult: 1) the Crown must have actual or constructive knowledge of a 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.[57] All three elements of the test are met in this case.

a) The Crown had knowledge of the Aboriginal claim or right

42. With respect to the first element of the test, the Crown in this case had both constructive and actual knowledge that the Chippewas First Nation asserted Aboriginal and treaty rights in addition to Aboriginal title in their traditional territory affected by the application before the Board. As Justice Binnie stated in *Mikisew*, "[i]n the case of a treaty the Crown, as a party, will always have notice of its contents".[58]

43. Moreover, the Chippewas First Nation and the Aamjiwnaang First Nation in their letter of September 27, 2013 clearly set out their assertions of Aboriginal, treaty and title rights within the impacted area and specifically raised the issue of the Crown's duty to consult and accommodate prior to the Board issuing a decision on the application. The Government acknowledged receipt of this letter and indicated its commitment to meeting its duty to consult. The Board was also notified repeatedly of the Appellant's assertion of Aboriginal, treaty and title rights and of the need for Crown consultation.[59]

b) The Board's decision constituted contemplated Crown conduct

44. The second element of the duty to consult is contemplated Crown conduct or a government decision that may adversely affect Aboriginal or treaty rights.

45. Ryer J.A., for the majority in the Court below, focused on the question of whether the enactment of the Board's enabling legislation could amount to government conduct potentially

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[57] *Carrier Sekani*, 2010 SCC 43 at para 31.
[58] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34, [2005] 3 SCR 388, [*Mikisew*].
[59] Appellant's Record, Vol VI, Tab 10, pgs 2-42, National Energy Board, OH-002-2013 Hearing Transcript Vol. 5, dated October 16, 2013 at Lines 3204-3205, Lines 3209-3212, Lines 3234-3238, Lines 3249-3252, Line 3307, Line 3313, Lines 3317-3318, Lines 3328-3337, Lines 3352-3361.

triggering a *Haida* duty. Although he noted that this question was not dealt with by the Board, he nevertheless made 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.[60]

46. The Chippewas First Nation submits that the majority erred by focusing on the wrong question in respect of assessing whether there was contemplated government conduct in this case. It was the Board's exercise of final decision-making authority under s. 58 of the *NEB Act* - not the enactment of the enabling statute itself - which engaged the duty to consult.

47. In this regard it is helpful to review the legislative scheme that governs the Board. The Board is a federal agency established by the Parliament of Canada to regulate international and interprovincial aspects of the oil, gas and electric utility industries. It reports to Parliament through the Minister of Natural Resources. Under Part III of the *NEB Act*, Parliament has delegated to the Board the authority to make certain decisions regarding pipelines, including the authority to decide applications on a final basis under s. 58 of the *NEB Act.*[61] The Board's decisions are binding on the Crown under s. 2.1 of the *NEB Act*.[62]

48. The specific legislative context is relevant to the issue raised by this appeal. It is important to understand the distinction between s. 52 and s. 58 of the *NEB Act*. The *NEB Act* requires that a new certificate be obtained when there is a modification to an existing pipeline. In order to obtain a new certificate, a project proponent must first apply to the Board, which then makes a recommendation to the Government in Council under s. 52 of the *NEB Act*. [63] On receiving the Board's report, under s. 54 of the *NEB Act* the Governor in Council may, by order, direct the Board to either issue a certificate or dismiss the application.[64] It is thus the Governor in Council that makes the final decision to approve a pipeline project that has been considered by the Board under s. 52 of the *NEB Act*.

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[60] Appellant's Record, Vol I, Tab 3, pgs 181-182, FCA Reasons for Judgment at para 69.
[61] *NEB Act* at s 58.
[62] *NEB Act* at s 2.1.
[63] *NEB Act* at s 52.
[64] *NEB Act* at s 54.

49. It is well accepted that where approval of an application under s. 52 may adversely affect Aboriginal or treaty rights, the Governor in Council cannot direct the issuance of a certificate unless Canada has first fulfilled its duty to consult and accommodate Aboriginal peoples.[65]

50. Section 58 of the *NEB Act* enables the Board to exempt proposed additions or modifications to a pipeline from the requirement to obtain a new certificate, if the proposal involves 40 kilometers or less of existing pipeline. Unlike an application under s. 52, the decision of the Board to approve the proposed changes is the only approval required.

51. As the final decision maker, the Board's approval of an application under s. 58 amounts to government conduct for the purposes of determining whether the Crown's duty to consult has been triggered. Rennie J.A., in dissent, agreed with this assessment:

> [I]n *Carrier Sekani*, the Supreme Court of Canada "left for another day" the question as to whether a legislative action itself triggers the duty to consult or offends section 35 of the *Constitution Act*. In the particular circumstances of this case, the requirement of Crown conduct is satisfied by the regulatory regime which makes the Board the final decision maker. 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.[66]

52. On the facts of this case, Rennie J.A. concluded that the Crown's *Haida* duty had been triggered.[67]

53. This Court has held that administrative tribunals are created "for the purpose of implementing government policy."[68] In this case, the Board was created to implement government policy relating to energy and pipelines through the exercise of delegated decision-making authority as set out in the *NEB Act*. If Cabinet directly approved the application for changes to a pipeline under s. 58, it would undoubtedly constitute government conduct for the purpose of the test set out in *Haida Nation* and *Carrier Sekani*. There is no reason why the same decision made by a federal

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[65] *Gitxaala Nation v Canada*, 2016 FCA 187 at para 7, [*Gitxaala Nation*].
[66] Appellant's Record, Vol I, Tab 3, pg 193, FCA Reasons for Judgment at para 105. (emphasis added)
[67] Appellant's Record, Vol I, Tab 3, pg 196, FCA Reasons for Judgment at para 112.
[68] *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para 24, [2001] 2 SCR 781.

tribunal discharging its statutory mandate as delegated by Parliament should not also attract the same result.

54. In determining what government action triggers the duty to consult, it is necessary to take a "generous, purposive approach".[69] Without the approval of the Board, the Proposed Project could not proceed. The Chippewas First Nation therefore submits that the contemplated exercise by the Board of its delegated authority to approve an application under s. 58 of the *NEB Act* on a final basis constituted government conduct that engaged the Crown's duty to consult.

c) The Board's decision had the potential to adversely impact Aboriginal and treaty rights

55. While Aboriginal claimants are required to demonstrate a potential for adverse impacts in order to trigger the duty to consult, conclusive proof of actual impacts is not required.[70] Moreover, government action engaging the duty to consult is not confined to decisions or conduct which have an immediate impact on lands and resources: "A potential for adverse impact suffices".[71]

56. In the case at hand, the Chippewas First Nation asserted established treaty and Aboriginal rights that are not in dispute. The Chippewas First Nation also asserted Aboriginal title to the lakes, rivers, lakebeds and river beds on their traditional territory. According to Chief Miskokomon, the Chippewas First Nation never surrendered control and ownership over these areas.[72]

57. The potential adverse impacts to these Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill.[73] Clearly, the Board's approval of the application in this case has the potential to cause adverse impacts on the Chippewa First Nation's Aboriginal and treaty rights.

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[69] *Carrier Sekani*, 2010 SCC 43 at para 43.
[70] *Carrier Sekani*, 2010 SCC 43 at para 45.
[71] *Carrier Sekani*, 2010 SCC 43 at para 44.
[72] Appellant's Record, Vol II, Tab 9, pg 79, Chief Miskokomon Affidavit, pg 10 of 47, para 30.
[73] Specifically Chief Miskokomon indicated in his affidavit that "spills, leaks, and discharges from Line 9 in the operational phase of the Project have the potential to cause new adverse impacts on our use of land and resources for traditional purposes, which are protected by our Aboriginal and treaty rights, cause direct health impacts to COTTFN members, and destroy or severely and irreparably damage our traditional territory." Appellant's Record, Vol II, Tab 9, pg 107, Chief Miskokomon Affidavit, pg 38 of 47, para 78.

58. The Board acknowledged that increasing Line 9's capacity would result in an increase in assessed risk for Line 9.[74] While the Board made a general finding that impacts of the Project on traditional land uses were "minimal" and could be "mitigated", it made those findings without any meaningful engagement with the Appellant, and without making any reference to the specific concerns raised by the Appellant about the severity of potential impacts on their traditional territories.

59. The evidence before the Board, the Board's own findings, and the findings of Rennie J.A. in the Court below, support the conclusion that the Crown's duty to consult and accommodate the Chippewas First Nation was triggered in the circumstances of this case.

iii. Potential adverse impacts required extensive Crown Consultation

60. The scope of the Crown's duty to consult falls on a spectrum and is determined by an examination of the strength of the claims being asserted by the affected Aboriginal group and of the seriousness of the potentially adverse impact on the right or title being claimed.[75]

61. The Board in its decision did not identify or assess the strength of the claims asserted by the Chippewas First Nation. However, the Chippewas First Nation provided extensive evidence supporting these claims and no contradictory evidence was tendered by any party.

62. With respect to the seriousness of any potentially adverse impact on the rights and title claimed by the Chippewas First Nation, the modifications to Enbridge's pipeline will result in a larger volume of heavy crude oil passing directly through the traditional territory of the Chippewas First Nation. Any impacts associated with the Proposed Project therefore constitute new impacts giving rise to a duty to consult. [76] The Proposed Project will reverse the direction of flow for the 639km long section of Line 9 between Westover, Ontario and Montreal, Quebec, and substantially increase the annual capacity of the entire Line 9 from Sarnia to Montreal, from the current 240,000 barrels of diluted bitumen per day to 300,000 barrels of heavy crude per day.[77]

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[74] Appellant's Record, Vol I, Tab 1, pgs 26-27 and 116, NEB Reasons for Decision at pgs 9 to 10 and pg 99.
[75] *Haida Nation*, 2004 SCC 73 at para 68.
[76] Specifically Chief Miskokomon indicated in his affidavit that "spills, leaks, and discharges from Line 9 in the operational phase of the Project have the potential to cause new adverse impacts on our use of land and resources for traditional purposes, which are protected by our Aboriginal and treaty rights, cause direct health impacts to COTTFN members, and destroy or severely and irreparably damage our traditional territory." Appellant's Record, Vol II, Tab 9, pg 107, Chief Miskokomon Affidavit, pg 38 of 47 at para 78.
[77] Appellant's Record, Vol I, Tab 3, pg 162, FCA Reasons for Judgment at para 6.

63. Enbridge acknowledged, in response to an information request, that a release of crude oil from Line 9 during the operational phase of the Project may cause adverse environmental effects and correspondingly impair First Nations' ability to exercise their Aboriginal and treaty rights.[78]

64. Together, these factors suggest a need for extensive consultation and accommodation with the Appellant on the part of the Crown. As emphasized by Rennie J.A, in dissent, "[r]esponsiveness is key and the Crown…is required to engage directly with the affected First Nation."[79] Based on the facts of this case the Crown had a duty but failed to comply with its obligation to consult honourably with the Chippewas First Nation.

C. Issue Two: The Board was required to assess the adequacy of Crown consultation and accommodation before issuing a final decision under s. 58 of the *NEB Act*

65. Having established that the Crown had a duty to consult, the question arises as to the role of the Board in ensuring that this duty was fulfilled.

66. In *Carrier Sekani*, this Court held there are four possible roles the Board may carry out with respect to Crown consultation, including: to consult with Aboriginal peoples; to assess whether adequate consultation has taken place; both roles; or no role at all. Determining which of the possible roles an administrative tribunal can play is dependent on the contours of the tribunal's enabling legislation. [80]

67. Specifically, the Court stated:

> The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision‑making process with respect to a resource.
>
> Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has

[78] Appellant's Record, Vol VI, Tab 16, pgs 139-140, National Energy Board, Exhibit, Response to Jesse McCormick Information Request No. 2, Filed July 23, 2013 at pgs 2-3 of 21.
[79] Appellant's Record, Vol I, Tab 3, pg 162, FCA Reasons for Judgment at para 117.
[80] *Carrier Sekani*, 2010 SCC 43 at paras 55-58.

> discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted to it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction. As such they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.[81]

68. The majority of the Federal Court of Appeal relied on the decision in *Standing Buffalo* to find that the Board, as a quasi-judicial body, had no duty to consult or to consider consultation before rendering a decision.

69. The Appellant submits that the majority in the Court below erred in applying *Standing Buffalo*. As held by Justice Rennie in his dissent, this Court's decision in *Carrier Sekani* means that *Standing Buffalo* should no longer be followed.[82]

70. In *Standing Buffalo*, Ryer J.A. rejected arguments that the Board was required to determine whether the Crown had fulfilled its duty to consult with First Nations with respect to an approval under s. 52 of the *NEB Act*. [83] Instead, Ryer J.A. held that the obligations under s. 35 of the *Constitution Act* required only that the Board be satisfied with the level of consultation engaged in by the *proponent* of the Project. Ryer J.A. relied on the fact that the *NEB Act* did not contain a provision that explicitly required the Board to consider the Crown's duty to consult and held that it could therefore not be obligated to do so. Ryer J.A. suggested that it was only the courts that could assess and provide a remedy with respect to the Crown's duty to consult.[84]

71. This Court's decision in *Carrier Sekani* was released in October 2010, after the decision in *Standing Buffalo* was issued and very shortly before leave to appeal *Standing Buffalo* was denied. In *Carrier Sekani*, this Court confirmed that, in determining whether a tribunal has the power to determine the adequacy of Crown consultation, the mandate confirmed by the legislation is essential. However, it is not necessary to find an explicit provision granting that authority. Rather, "[t]he power to decide questions of law implies a power to decide constitutional issues that are

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[81] *Carrier Sekani*, 2010 SCC 43 at paras 56-58.
[82] Appellant's Record, Vol I, Tab 3, pg 186, FCA Reasons for Judgment at para 82.
[83] Appellant's Record, Vol I, Tab 3, pg 178, FCA Reasons for Judgment at para 59.
[84] Appellant's Record, Vol I, Tab 3, pg 183, FCA Reasons for Judgment at para 74.

properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power".[85]

72. Section 12(2) of the *NEB Act* expressly grants the Board jurisdiction to decide questions of law:

> 12(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.[86]

73. Moreover, there is nothing in the *NEB Act* that indicates a clear intention of Parliament to exclude from the Board's jurisdiction the duty to consider whether the Crown has adequately discharged its constitutional duty to consult.[87]

74. In the decision below, Ryer J.A. held that *Standing Buffalo* was "indistinguishable" from the factual context of this case and ought to be followed:

> [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 party. Accordingly, in my view, the principle established in *Standing Buffalo* continues to apply.[88]

75. The only basis for Ryer J.A.'s holding that *Carrier Sekani* did not apply was that the Crown did not participate as party in the hearing before the Board. This fundamentally misapprehends the nature of the duty to consult and the reason a tribunal must consider whether it has been discharged. The requirement that the Crown must consult and accommodate s. 35 rights holders prior to authorizing development that might adversely affect them arises because the failure to do violates the honour of the Crown. This is not a matter of the Board ruling on the conduct of one of the parties before it. Rather, it is a critical component of the Board ensuring that its own decision does not derogate from the honour of the Crown.

76. In this context, it is important to recognize that this question is not merely a matter of administrative law, but is intricately tied to fundamental constitutional guarantees. As previously set out by this Court in *Conway*, the *Constitution* is enforceable at the tribunal level:

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[85] *Carrier Sekani*, 2010 SCC 43 at para 69; also, *R v Conway*, 2010 SCC 22 at para 81, [2010] 1 SCR 765, [*Conway*]. (emphasis added)
[86] *NEB Act* at s 12(2).
[87] *Carrier Sekani*, 2010 SCC 43 at para 72.
[88] Appellant's Record, Vol I, Tab 3, pg 175, FCA Reasons for Judgment at para 49.

> …[T]he Charter belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decision of these tribunals.[89]

77. In contrast to the majority, Rennie J.A. expressed a dissenting and opposite opinion on the applicability of *Standing Buffalo* holding that "it no longer ought to be followed" in light of the subsequent decision of this Court in *Carrier Sekani* and the "markedly different factual and legal contexts in this appeal".[90] Rennie J.A. stated:

> In my view, *Carrier Sekani* changes the question from being whether the Crown is seeking relief or permission from the Board (as was BC Hydro), to one that focuses on the legislative mandate given the Board by Parliament. Whether or not the Crown shows up at regulatory proceedings cannot alter the responsibilities of the Board with respect to the Crown's duty of consultation (see Promislow, J., *Irreconcilable? The Duty to Consult and Administrative Decision Makers* Constitutional Forum Volume 22, Number 1, 2013). The Board's jurisdiction to assess consultation does not vary according to project proponent. This conclusion makes sense because at a practical level, the section 58 process culminates with a final decision, and any Aboriginal or treaty rights that might be affected by the proposed project are affected in the same way, regardless of the project proponent.[91]

78. The Chippewas First Nation submits that Rennie J.A. is correct in his conclusion that *Standing Buffalo* is no longer good law in light of this Court's decision in *Carrier Sekani*.[92]

79. The issue of the adequacy of the Crown's duty to consult and accommodate was properly before the Board. The Chippewas First Nation therefore submits that the Board had both the jurisdiction and the obligation to assess the adequacy of Crown consultation and accommodation in the circumstances, and failed to do so. The Board failed to satisfy itself that the Crown had properly discharged its duty to consult and accommodate the Chippewas First Nation prior to granting the exemptions and authorizations being sought.

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[89] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, McLachlin J. dissenting.
[90] Appellant's Record, Vol I, Tab 3, pg 186, FCA Reasons for Judgment at para 82. (emphasis added)
[91] Appellant's Record, Vol I, Tab 3, pg 186, FCA Reasons for Judgment at para 104. (emphasis added)
[92] *Standing Buffalo* was denied leave by the Supreme Court on December 2, 2010 – neither of the Supreme Court decisions since then dealing with the duty to consult (*Carrier Sekani* or *Little Salmon*) reference *Standing Buffalo.*

80. If a tribunal having the jurisdiction to consider the adequacy of Crown consultation is not satisfied that the Crown's duty has been fully discharged, it must refrain from issuing any decision that might impact Aboriginal or treaty rights until such consultation and accommodation has taken place.[93] This Court confirmed in *Little Salmon* that: "[a] decision maker who proceeds on the basis of inadequate consultation errs in law".[94]

81. Given the importance of the duty to consult and accommodate 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:

> 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.[95]

82. The Chippewas First Nation agrees with Rennie J.A. in his dissenting reasons that the "fear" expressed by this Court in *Carrier Sekani* has been realized in the way the majority in the Court below interpreted and applied the law. In concluding that the Board had no authority or duty to consider the existence or adequacy of Crown consultation, the Court below effectively allowed the Crown to avoid its constitutional duty to consult and accommodate.

83. The *NEB Act* must be interpreted and applied in a manner that complies with the principles underpinning s. 35(1) of the *Constitution Act*, 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 constitutional imperative.

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[93] Zena Charowsky, "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals" (2011) 74 Sask L Rev 213-230 at para 60.
[94] *Little Salmon*, 2010 SCC 53 at para 42.
[95] *Carrier Sekani*, 2010 SCC 43 at para 62. (emphasis added)

84. 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. Indeed, the Chippewas First Nation submits that any interpretation of s. 58 that would oust the Crown's constitutional duty to consult prior to the Board issuing a decision adversely impacting Aboriginal and treaty rights would ostensibly render the section *ultra vires*.[96] Under established principles of statutory interpretation, there is a presumption of constitutionality; where possible, legislative provisions should be interpreted in a manner that preserves their constitutional validity.[97]

85. As explained by Rennie J.A. in his dissenting opinion, the Board must consider whether the duty to consult has been fulfilled by the Crown prior to approving an application under s. 58. To conclude otherwise leads to an unacceptable, and arguably unconstitutional, result:

> 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.[98]

86. The Chippewas First Nation submits that, based on a review of the law and of the Board's enabling legislation, the Board must have both the jurisdiction and the obligation to assess the adequacy of Crown consultation and accommodation. Because the Board issued its decision in this case without first satisfying its legal obligations in this regard, the Chippewas First Nation submits that the Board erred in jurisdiction and its decision should be set aside.

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[96] *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 at para 37.
[97] *R v Rodgers*, 2006 SCC 15 at para 18, [2006] 1 SCR 554; *R v Clarke*, 2014 SCC 28 at paras 14-15, [2014] 1 SCR 612.
[98] Appellant's Record, Vol I, Tab 3, pg 194, FCA Reasons for Judgment at para 106.

D. Issue Three: In the absence of Crown consultation or participation, the Board's hearing process cannot satisfy the requirements of s. 35(1) of the *Constitution Act, 1982*

i. The Board does not have delegated authority to conduct Crown consultation

87. Although the Government has indicated that it relies on the Board processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate,[99] the Court below unanimously agreed that the Board itself does not have the jurisdiction or authority to carry out Crown consultation. As Rennie J.A. explained:

> 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.[100]

88. Whether a tribunal has the authority itself to engage in consultation and accommodation depends on its enabling legislation. As this Court has confirmed, 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.[101]

89. A review of the Board's enabling legislation indicates no express or implicit legislative intent to provide the Board with the authority to discharge or displace the Crown's duty to consult and accommodate Aboriginal rights and interests. Nor does the Board have the remedial jurisdiction to accommodate the adverse impacts on the Appellant's Aboriginal and treaty rights and interests raised by the application before the Board in this case.

90. Accordingly, the Court below correctly concluded that the Board does not have the jurisdiction to engage in consultation on behalf of the Crown.

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[99] Appellant's Record, Vol VI, Tab 11, Affidavit of Sarah Snake, Exhibit "A", Letter from The Honourable Joe Oliver to Chief Joe Miskokomon, Chippewas of the Thames First Nation, and Chief Christopher Plain, Aamjiwnaang First Nation, dated January 30, 2014; also, Government of Canada, Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Minister of Dept. of Aboriginal Affairs and Northern Development Canada, March 2011) at Part B "Getting Ready for Consultation and Accommodation", Section II "Developing a Departmental or Agency Approach to Consultation and Accommodation, at pgs 20 to 28.

[100] Appellant's Record, Vol I, Tab 3, pg 198, FCA Reasons for Judgment at para 120.

[101] *Conway*, 2010 SCC 22; *Carrier Sekani*, 2010 SCC 43 at paras 55-58.

ii. The Board's hearing process under s.58 of the NEB Act is not an adequate substitute for Crown Consultation

91. While the majority in the court below agreed that the Board did not have the authority to discharge the Crown's duty to consult, the reasons of Ryer J.A. suggest that the Board's hearing process, even in the absence of Crown consultation or participation, nevertheless satisfied the constitutional requirements of s. 35(1) of the *Constitution Act*. The Chippewas First Nation submits that in reaching this conclusion the majority erred in law.

92. Ryer J.A. stated that while the Board is not subject to a *Haida* duty, it nevertheless has an obligation "to carry out its mandate in a manner that respects the provisions of subsection 35(1) of the *Constitution Act*."[102] The scope and meaning of this obligation is unclear on the face of the decision, but Ryer J.A. emphasized that, "the Board's duty to ensure appropriate levels of consultation with Aboriginal groups is not the same as the Crown's *Haida* duty."[103]

93. He went on to explain that in his view:

> [A]s a practical matter, consultations with Aboriginal groups that arise in the Board's section 58 application process may very well deal with, and hopefully remediate if necessary, the same Aboriginal concerns that arise when the Crown engages in *Haida* duty consultations. In other words, it should not matter whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process.[104]

94. Under Ryer J.A.'s interpretation is neither constitutionally sound nor consistent with established case law.

95. In this context, *it matters very much* whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process. One process is grounded in established constitutional principles and guarantees, while the other is an administrative process focused on balancing multiple interests in which these principles may or may not be acknowledged or fulfilled. The Crown's duty to consult, grounded in the honour of the Crown, entails a process that provides meaningful consultation and, where appropriate, accommodation, in the spirit of reconciliation. The Board's application process under s. 58, according to Ryer J.A., gives rise to a forum that "may very well deal with" (but might not) and "hopefully remediate" (but might not)

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[102] Appellant's Record, Vol I, Tab 3, pg 179, FCA Reasons for Judgment at para 61.
[103] Appellant's Record, Vol I, Tab 3, pg 179, FCA Reasons for Judgment at para 63.
[104] Appellant's Record, Vol I, Tab 3, pg 179, FCA Reasons for Judgment at para 63. (emphasis added)

the same concerns raised in Crown consultation. Such a process can hardly be described as meaningful consultation as required under s. 35 of the *Constitution Act*.

96. The Board provided the following summary of its own mandate in its decision:

> In fulfilling its mandate the Board estimates the overall public good a project may create, estimates its potential negative aspects, weighs its various impacts, and makes a decision which it determines to be in the public interest. Under Part III of the *NEB Act*, in making a decision of whether a project is in the public interest, the Board considers the integration of economic, environmental and social interests within the context of the project.[105]

97. As per the Board's mandate the potential impacts of a project on Aboriginal and treaty rights are not specifically assessed.

98. In *Haida Nation*, this Court held that while the Crown may delegate "procedural" elements of its duty to consult, "the ultimate legal responsibility for consultation and accommodation rests with the Crown and the Crown alone."[106] There is no jurisprudence to support the notion that the Crown can rely entirely on a tribunal or other third party to undertake consultation in the absence of any Crown involvement[107] and without the express legislative intent to do so. The honour of the Crown cannot be delegated.[108]

99. 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" and that the Crown's duty to consult must not be "boxed in by legislation".[109] 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".[110]

100. Similarly in this case, while the Board had the power and the duty under its enabling statute to consider the question of the adequacy of Crown consultation, total reliance by the Crown on the

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[105] Appellant's Record, Vol I, Tab 1, pg 20, NEB Reasons for Decision at pg 3.
[106] *Haida Nation*, 2004 SCC 73 at para 53.
[107] Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49-77 at para 44.
[108] *Haida Nation*, 2004 SCC 73 at para 53.
[109] *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at para 121, [*Ka'a'Gee Tu First Nation*].
[110] *Ka'a'Gee Tu First Nation*, 2007 FC 763 at para 121.

Board's process to discharge its duty to consult was inconsistent with the Crown's constitutional obligations.

101. Indeed, the Appellant submits that the Board's legislative mandate to consider matters relevant to the public interest are not sufficient and may be at odds with the protection and accommodation of Aboriginal and treaty rights under s. 35(1) that are the core elements of the Crown's duty to consult.

102. For example, the Board has stated that in assessing the potential impacts of a project it, "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors, before determining whether the project is in the public interest,"[111] and that in carrying out its mandate, "the Board's objective is to reconcile Aboriginal concerns with other public interest considerations".[112]

103. As Freedman and Hansen explain, there is an inherent conflict raised when a tribunal determines section 35 rights in the context of a public interest mandate:

> It is difficult to see how a public interest-based approach to determining section 35 rights can satisfy the important purposes behind granting those rights constitutional protection in the first place. How is the important objective of reconciliation to be achieved if projects can simply be approved because of the money they will bring in or the jobs they will create? How in such a framework will the aboriginal perspective of their rights and the need for the land, environment, and ecosystem to remain in a certain state be properly taken into account? In our view, the rights and interests of First Nations are ignored or downplayed in these public interest-based tribunals.[113]

104. The Chippewas First Nation submits that the scenario described above is precisely what has occurred in the case at hand. The Appellant's Aboriginal and treaty rights were weighed by the Board against a number of economic and public interest factors, resulting in an approval of the Proposed Project that failed to fully recognize or accommodate the impact on the rights asserted.

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[111] Appellant's Record, Vol I, Tab 1, pg 105, NEB Reasons for Decision at pg 88.
[112] National Energy Board, *Reasons for Decision* GH-004-2011, Nova Gas Transmission Ltd., July 2012 at pg 40. (emphasis added)
[113] Robert Freedman & Sarah Hansen, "Aboriginal Rights vs. The Public Interest" prepared for Pacific Business Law Institute conference, Vancouver, BC (February 26, 2009) at pg 18. (emphasis added)

iii. Consultation must be meaningful

105. Whether the consultation process involves a tribunal hearing or some other process, the honour of the Crown requires the Crown to meaningfully engage in consultation and accommodation with Aboriginal Peoples where government decisions have the potential to adversely impact Aboriginal rights and title.

106. 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. This led 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".[114]

107. 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.[115]

108. The Federal Court of Appeal's recent decision in *Gitxaala Nation v. Canada* reviewed the Crown's exercise of discretionary authority in setting up a regulatory process to review a pipeline application. The Court found that in doing so, the Crown must provide a means by which it can be satisfied that Aboriginal concerns have been heard, and where appropriate, accommodated. Specifically, Dawson and Stratas JJ.A, writing for the majority, held that the consultation and accommodation process must involve, "someone from Canada's side" who is empowered to respond in a meaningful way:

> Based on our view of the totality of the evidence, we are satisfied that Canada failed in Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised.

[114] Appellant's Record, Vol I, Tab 3, pg 198, FCA Reasons for Judgment at para 119.
[115] *R v Adams*, [1996] 3 SCR 101 at para 54.

> Missing was a real and sustained effort to pursue meaningful two-way dialogue. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.[116]

109. As in *Gitxaala Nation*, the Board's regulatory process in this case failed to provide "a real and sustained effort to pursue meaningful two-way dialogue" between the Crown and the Chippewas First Nation. Missing from the process was not only someone from Canada's side empowered to respond meaningfully at some point, but someone from Canada's side *at all*.

110. The Supreme Court has emphasized that Crown consultation must engage affected Aboriginal groups in a meaningful way in order for adverse impacts to be understood and minimized. The Court in *Mikisew* reviewed the actions undertaken by the Crown with respect to consultation and provided the following guidance:

> The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.[117]

111. Binnie J. was particularly critical of the process in *Mikisew* in that it failed to engage affected Aboriginal groups in a meaningful way. They were essentially given the same standing as any other Park user, as opposed to treated as a group with a constitutionally protected right that required enhanced consultation and accommodation: "Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."[118]

112. The Appellant submits that due to the Crown's continuing treaty obligations and the potential adverse impact on Aboriginal, treaty and title rights, the Crown should have established a similar consultation process to that set out by the Court in *Mikisew*. An invitation by the Board to participate in a Board hearing does not constitute meaningful engagement and is insufficient to

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[116] *Gitxaala Nation*, 2016 FCA 187 at para 279.
[117] *Mikisew*, 2005 SCC 69 at para 64.
[118] *Mikisew*, 2005 SCC 69 at para 54.

discharge the Crown of its duty to consult. The Aboriginal group must be consulted "as a First Nation" and not "as members of the general public".

113. Moreover, to be meaningful, the consultation process must afford a genuine opportunity for accommodation by the Crown, not simply a forum in which it is assumed all adverse impacts will be mitigated by the proponent. Because the Board failed to apprehend or address the seriousness of the Appellant's treaty and title rights and minimized the impact of the potential infringement on those rights, the Appellant's participation in the Board's process was ultimately nothing more than "blowing off steam".

114. For all of the above reasons, the Board process cannot be viewed, as Ryer J.A. appears to view it, as a generally acceptable substitute for meaningful Crown consultation and accommodation, undertaken in good faith in the spirit of reconciliation.[119] The Board process, on its own, fell far short of ensuring that adverse impacts on Aboriginal rights protected under s. 35(1) were recognized and accommodated in a manner consistent with the honour of the Crown.

E. Conclusion

115. The Crown has a duty to engage in meaningful consultation with affected First Nations. The Crown cannot be entitled to rely entirely on a regulatory process that fails to provide for such meaningful consultation or that allows the Crown to avoid its duty altogether. The majority's decision below fails to treat the Crown's duty to consult and accommodate Aboriginal Peoples 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 Crown and Aboriginal Peoples and the principle of constitutionalism.

116. The Chippewas First Nation respectfully submits that the decision under appeal fails to address the purpose and intent of s. 35(1) of the *Constitution Act*. It fails to uphold the honour of the Crown, is contrary to the principle and goals of reconciliation, and is inconsistent with the reasoning of this Court in previous decisions. As emphasized by this Court, the Board is required to conduct its decision-making process in a manner that respects subsection 35(1). There is no principled basis for permitting the Board to approve an application which potentially impacts a

[119] …"Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected: *R v Sparrow*, [1990] 1 SCR 1075 at p 1110.

First Nation's constitutionally protected rights, circumvents its enabling statute, and allows the Crown to fully avoid its duty to consult. Crown conduct that permits the infringement of Aboriginal or Treaty rights essentially renders the constitutional protection of those rights meaningless.

117. The dissent of Justice Rennie in the Federal Court of Appeal is based on a thorough review and application of well-established legal principles as set out by this Court. With respect, the majority of the Federal Court of Appeal misapplied its own decision from *Standing Buffalo* and failed to address the leading decision of this Court in *Carrier Sekani*.

118. For these reasons, the Chippewas First Nation respectfully submits that the appeal be allowed, and that the decision of the Board be quashed.

PART IV: SUBMISSIONS AS TO COSTS

119. The Chippewas First Nation seeks costs in this appeal and in the court below against the Minister and Enbridge, in any event of the cause.

120. The Chippewas First Nation notes that it was awarded costs in the cause in relation to its application for leave to appeal the decision of the Court below.

PART V: NATURE OF THE ORDER SOUGHT

121. The Chippewas First Nation respectfully requests:

i) that the appeal be granted and the order of the Board be quashed;

ii) a declaration that the Crown has a duty to consult and accommodate the Chippewas of the Thames with respect to the application before the Board; and

iii) that the application be sent back to the Board with instructions that a final decision not be rendered until the Board is satisfied that the Crown has fulfilled its duty to consult and accommodate the Chippewas of the Thames First Nation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Rama First Nation, in the Province of Ontario, 20th day of July, 2016.

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PART VI: TABLE OF AUTHORITIES

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PART VII: STATUTORY PROVISIONS

Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (UK*), 1982, c 11, s.35(1)

National Energy Board Act, RSC 1985, c. N-7, ss. ss. 2.1, 12(2), 52, 54 and 58

CONSTITUTION ACT, 1982

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

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

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

(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.

(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.

LOI CONSTITUTIONNELLE DE 1982

PARTIE II

DROITS DES PEUPLES AUTOCHTONES DU CANADA

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s’entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d’accords sur des revendications territoriales ou ceux susceptibles d’être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

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 March 16, 2014

À jour au 16 mars 2014

Last amended on July 3, 2013

Dernière modification le 3 juillet 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

used or proposed to be used solely for municipal purposes;

"power" [Repealed, 1990, c. 7, s. 1]

"registrar of deeds" « *directeur de l'Enregistrement* »

"registrar of deeds" includes the registrar of land titles or other officer with whom title to land is registered;

"Secretary" « *secrétaire* »

"Secretary" means the Secretary of the Board;

"Special Act" « *loi spéciale* »

"Special Act" means

(*a*) an Act of Parliament that authorizes a person named in the Act to construct or operate a pipeline or that is enacted with special reference to a pipeline that a person is by such an Act authorized to construct or operate, and

(*b*) letters patent issued under section 5.1 or 5.4 of the *Canada Corporations Act*, chapter C-32 of the Revised Statutes of Canada, 1970, except for the purpose of paragraph 115(*b*) of this Act;

"toll" « *droit* »

"toll" includes any toll, rate, charge or allowance charged or made

(*a*) for the shipment, transportation, transmission, care, handling or delivery of hydrocarbons or of another commodity that is transmitted through a pipeline, or for storage or demurrage or the like,

(*b*) for the provision of a pipeline when the pipeline is available and ready to provide for the transmission of oil or gas, and

(*c*) in respect of the purchase and sale of gas that is the property of a company and that is transmitted by the company through its pipeline, excluding the cost to the company of the gas at the point where it enters the pipeline.

R.S., 1985, c. N-7, s. 2; R.S., 1985, c. 28 (3rd Supp.), s. 299; 1990, c. 7, s. 1; 1994, c. 24, s. 34(F); 1996, c. 10, s. 237, c. 31, s. 90; 2004, c. 25, s. 147; 2012, c. 19, s. 69.

b) toute substance désignée comme produit pétrolier aux termes des règlements d'application de l'article 130.

« pipeline » "*pipeline*"

« pipeline » Canalisation servant ou destinée à servir au transport du pétrole, du gaz ou de tout autre produit, et reliant une province et une ou plusieurs autres provinces, ou s'étendant au-delà des limites d'une province ou de la zone extracôtière, au sens de l'article 123, y compris les branchements, extensions, citernes, réservoirs, installations de stockage ou 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 à l'exclusion des égouts ou canalisations de distribution d'eau servant ou destinés à servir uniquement aux besoins municipaux.

« secrétaire » "*Secretary*"

« secrétaire » Le secrétaire de l'Office.

« terrains » "*lands*"

« terrains » Terrains dont l'acquisition, la prise ou l'usage est autorisé par la présente loi ou par une loi spéciale. Les dispositions les concernant s'appliquent également aux biens réels et intérêts fonciers, ainsi qu'aux droits et intérêts afférents et, dans la province de Québec, aux immeubles ainsi qu'aux droits afférents et aux droits des locataires relativement aux immeubles. Ces droits et intérêts peuvent porter sur la surface ou le sous-sol de ces terrains.

L.R. (1985), ch. N-7, art. 2; L.R. (1985), ch. 28 (3e suppl.), art. 299; 1990, ch. 7, art. 1; 1994, ch. 24, art. 34(F); 1996, ch. 10, art. 237, ch. 31, art. 90; 2004, ch. 25, art. 147; 2012, ch. 19, art. 69.

APPLICATION

Binding on Her Majesty

2.1 This Act is binding on Her Majesty in right of Canada or a province.

1990, c. 7, s. 2.

CHAMP D'APPLICATION

Obligation de Sa Majesté

2.1 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

1990, ch. 7, art. 2.

Expeditious proceedings

(4) Subject to subsections 6(2.1) and (2.2), all applications and proceedings before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit provided for under this Act, if there is one.

R.S., 1985, c. N-7, s. 11; 2012, c. 19, s. 74.

Rapidité

(4) Sous réserve des paragraphes 6(2.1) et (2.2), l'Office tranche les demandes et procédures dont il est saisi le plus rapidement possible, compte tenu des circonstances et de l'équité, mais en tout état de cause dans le délai prévu sous le régime de la présente loi, le cas échéant.

L.R. (1985), ch. N-7, art. 11; 2012, ch. 19, art. 74.

Jurisdiction

12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(*a*) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or

(*b*) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.

Compétence

12. (1) L'Office a compétence exclusive pour examiner, entendre et trancher les questions soulevées par tout cas où il estime :

a) soit qu'une personne contrevient ou a contrevenu, par un acte ou une omission, à la présente loi ou à ses règlements, ou à un certificat, une licence ou un permis qu'il a délivrés, ou encore à ses ordonnances ou instructions;

b) soit que les circonstances peuvent l'obliger, dans l'intérêt public, à prendre une mesure — ordonnance, instruction, autorisation, sanction ou approbation — qu'en droit il est autorisé à prendre ou qui se rapporte à un acte que la présente loi ou ses règlements, un certificat, une licence ou un permis qu'il a délivrés, ou encore ses ordonnances ou instructions interdisent, sanctionnent ou exigent.

Idem

(1.1) The Board may inquire into any accident involving a pipeline or international power line or other facility the construction or operation of which is regulated by the Board and may, at the conclusion of the inquiry, make

(*a*) findings as to the cause of the accident or factors contributing to it;

(*b*) recommendations relating to the prevention of future similar accidents; or

(*c*) any decision or order that the Board can make.

Idem

(1.1) L'Office peut enquêter sur tout accident relatif à un pipeline, une ligne internationale ou toute autre installation dont la construction ou l'exploitation est assujettie à sa réglementation, en dégager les causes et facteurs, faire des recommandations sur les moyens d'éliminer ces accidents ou d'éviter qu'ils ne se produisent et rendre toute décision ou ordonnance qu'il lui est loisible de rendre.

Matters of law and fact

(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.

R.S., 1985, c. N-7, s. 12; 1990, c. 7, s. 5.

Questions de droit et de fait

(2) Pour l'application de la présente loi, l'Office a la compétence voulue pour trancher les questions de droit ou de fait.

L.R. (1985), ch. N-7, art. 12; 1990, ch. 7, art. 5.

Mandatory orders

13. The Board may

(*a*) order and require any person to do, forthwith, or within or at any specified time

Ordres et interdictions

13. L'Office peut :

a) enjoindre à quiconque d'accomplir sans délai ou dans le délai imparti, ou à un mo-

Application of subsections 121(2) to (5)

(3) Subsections 121(2) to (5) apply, with such modifications as the circumstances require, in respect of an offence under this section.

1994, c. 10, s. 25.

Application des paragraphes 121(2) à (5)

(3) Les paragraphes 121(2) à (5) s'appliquent, avec les adaptations nécessaires, à l'infraction prévue au présent article.

1994, ch. 10, art. 25.

CERTIFICATES

CERTIFICATS

Report

52. (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

(*a*) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(*b*) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

Rapport de l'Office

52. (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent :

a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;

b) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.

Factors to consider

(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

(*a*) the availability of oil, gas or any other commodity to the pipeline;

(*b*) the existence of markets, actual or potential;

(*c*) the economic feasibility of the pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

Facteurs à considérer

(2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :

a) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;

b) l'existence de marchés, réels ou potentiels;

c) la faisabilité économique du pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

Environmental assessment

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

Time limit

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

Excluded period

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline 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

(6) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

Extension

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

Minister's directives

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(*a*) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

(*b*) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

(*c*) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

Order binding

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

Publication

(10) A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

Évaluation environnementale

(3) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale (2012)*, le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

Délai

(4) Le rapport est présenté dans le délai fixé par le président. Ce délai 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.

Période exclue du délai

(5) Si l'Office exige du demandeur, relativement au pipeline, 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

(6) L'Office rend publiques, sans délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.

Prorogations

(7) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

Instructions du ministre

(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté;

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

Caractère obligatoire

(9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président.

Publication

(10) Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

Report is final and conclusive

(11) Subject to sections 53 and 54, the Board's report is final and conclusive.

R.S., 1985, c. N-7, s. 52; 1990, c. 7, s. 18; 1996, c. 10, s. 238; 2012, c. 19, s. 83.

Caractère définitif

(11) Sous réserve des articles 53 et 54, le rapport de l'Office est définitif et sans appel.

L.R. (1985), ch. N-7, art. 52; 1990, ch. 7, art. 18; 1996, ch. 10, art. 238; 2012, ch. 19, art. 83.

Order to reconsider

53. (1) After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

Décret ordonnant un réexamen

53. (1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

Factors and time limit

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

Facteurs et délais

(2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

Order binding

(3) The order is binding on the Board.

Caractère obligatoire

(3) Le décret lie l'Office.

Publication

(4) A copy of the order must be published in the *Canada Gazette* within 15 days after it is made.

Publication

(4) Une copie du décret est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

Obligation of Board

(5) The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its reconsideration.

Obligation de l'Office

(5) L'Office, dans le délai précisé — le cas échéant — dans le décret, réexamine la recommandation ou toute condition visée par le décret, établit un rapport de réexamen et le présente au ministre.

Contents of report

(6) In the reconsideration report, the Board shall

(*a*) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and

(*b*) if a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one.

Rapport de réexamen

(6) Dans son rapport de réexamen, l'Office :

a) si le décret vise la recommandation, confirme celle-ci ou en formule une autre;

b) si le décret vise une condition, confirme la condition visée par le décret, déclare qu'il ne la propose plus ou la remplace par une autre.

Terms and conditions

(7) Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that it considers necessary or desirable in the public interest, to which the certificate would be subject if the Governor in Council were to direct the Board to issue the certificate.

Conditions

(7) Peu importe ce qu'il mentionne dans le rapport de réexamen, l'Office y mentionne aussi toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de délivrer le certificat.

Report is final and conclusive

(8) Subject to section 54, the Board's reconsideration report is final and conclusive.

Caractère définitif

(8) Sous réserve de l'article 54, le rapport de réexamen est définitif et sans appel.

Reconsideration of report under this section

(9) After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out

Réexamen du rapport présenté en application du présent article

(9) Une fois que l'Office a présenté son rapport au titre du paragraphe (5), le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rap-

in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.

R.S., 1985, c. N-7, s. 53; 2012, c. 19, s. 83.

port à l'Office pour réexamen. Les paragraphes (2) à (8) s'appliquent alors.

L.R. (1985), ch. N-7, art. 53; 2012, ch. 19, art. 83.

Order regarding issuance or non-issuance

54. (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

(*a*) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(*b*) direct the Board to dismiss the application for a certificate.

Décret concernant la délivrance du certificat

54. (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret :

a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'assortir des conditions figurant dans le rapport;

b) donner à l'Office instruction de rejeter la demande de certificat.

Reasons

(2) The order must set out the reasons for making the order.

Motifs

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

Time limit

(3) The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

Délais

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

Order is final and conclusive

(4) Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

Caractère définitif

(4) Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.

Obligation of Board

(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.

Obligation de l'Office

(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.

Publication

(6) A copy of the order made under subsection (1) must be published in the *Canada Gazette* within 15 days after it is made.

Publication

(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

R.S., 1985, c. N-7, s. 54; 1990, c. 7, s. 19; 2012, c. 19, s. 83.

L.R. (1985), ch. N-7, art. 54; 1990, ch. 7, art. 19; 2012, ch. 19, art. 83.

Application for judicial review

55. (1) Judicial review by the Federal Court of Appeal with respect to any order made under subsection 54(1) is commenced by making an application for leave to the Court.

Demande de contrôle judiciaire

55. (1) Le contrôle judiciaire par la Cour d'appel fédérale de tout décret pris en vertu du paragraphe 54(1) est subordonné au dépôt d'une demande d'autorisation.

Application

(2) The following rules govern an application under subsection (1):

(*a*) the application must be filed in the Registry of the Federal Court of Appeal ("the Court") within 15 days after the day on which the order is published in the *Canada Gazette*;

Application

(2) Les règles ci-après s'appliquent à la demande d'autorisation :

a) elle doit être déposée au greffe de la Cour d'appel fédérale — la Cour — dans les quinze jours suivant la publication du décret dans la *Gazette du Canada*;

b) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

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).

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

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.

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

(2) [Abrogé, 1990, ch. 7, art. 22]

Terms

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

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.

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.

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.

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.

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

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 22*b*) 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.

(*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 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.

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.

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 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.

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.