36776

SUPREME COURT OF CANADA

BETWEEN:

Chippewas of the Thames First Nation

v.

Enbridge Pipelines Inc., et al.

AND BETWEEN:

36692

Hamlet of Clyde River, et al.

v.

Petroleum Geo-Services Inc. (PGS), et al.

(FC) (Civil) (By Leave)

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TRANSCRIPTION OF COMPACT DISC

Wednesday, November 30, 2016

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APPEARANCES

36692
Hamlet of Clyde River, et al. v. Petroleum Geo-Services Inc. (PGS), et al.
(Federal Court) (Civil) (By Leave)

Party: Hamlet of Clyde River

Counsel	Agent
Nader R. Hasan	David Taylor
Justin Safayeni	
Pam Hrick	
Stockwoods LLP	Power Law
77 King Street West, Suite 4130	130 Albert Street
Toronto-Dominion Centre	Suite 1103
Toronto, Ontario M5K 1H1	Ottawa, Ontario K1P 5G4
t: 416-593-7200	t: 613-702-5563
f: 416-593-9345	f: 613-702-5563

Party: Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine

Counsel	Agent
Nader R. Hasan	David Taylor
Justin Safayeni	
Pam Hrick	
Stockwoods LLP	Power Law
77 King Street West, Suite 4130	130 Albert Street
Toronto-Dominion Centre	Suite 1103
Toronto, Ontario M5K 1H1	Ottawa, Ontario K1P 5G4
t: 416-593-7200	t: 613-702-5563
f: 416-593-9345	f: 613-702-5563

Party: Petroleum Geo-Services Inc. (PGS)

Counsel	Agent
Sandy Carpenter	Nancy K. Brooks
Ian Breneman	
Blake, Cassels & Graydon LLP	Blake, Cassels & Graydon LLP
Ste 3500, Bankers Hall East Tower	1750 - 340 Albert Street
855-2nd St. S.W.	Constitution Square, Tower 3
Calgary, Alberta T2P 4J8	Ottawa, Ontario K1R 7Y6
t: 403-260-9600	t: 613-788-2218
f: 403-260-9700	f: 613-788-2247

APPEARANCES

Party: Multi Klient Invest AS (MKI)

Counsel	Agent
Sandy Carpenter	Nancy K. Brooks
Ian Breneman	
Blake, Cassels & Graydon LLP	Blake, Cassels & Graydon LLP
Ste 3500, Bankers Hall East Tower	1750 - 340 Albert Street
855-2nd St. S.W.	Constitution Square, Tower 3
Calgary, Alberta T2P 4J8	Ottawa, Ontario K1R 7Y6
t: 403-260-9600	t: 613-788-2218
f: 403-260-9700	f: 613-788-2247

Party: TGS-Nopec Geophysical Company ASA (TGS)

Counsel	Agent
Sandy Carpenter	Nancy K. Brooks
Blake, Cassels & Graydon LLP	Blake, Cassels & Graydon LLP
Ste 3500, Bankers Hall East Tower	1750 - 340 Albert Street
855-2nd St. S.W.	Constitution Square, Tower 3
Calgary, Alberta T2P 4J8	Ottawa, Ontario K1R 7Y6
t: 403-260-9600	t: 613-788-2218
f: 403-260-9700	f: 613-788-2247

Party: Attorney General of Canada

Counsel	Agent
Mark R. Kindrachuk, Q.C.	Christopher M. Rupar
Peter Southey	
Attorney General of Canada	Attorney General of Canada
123 - 2nd Ave. S., 10th Floor	50 O'Connor Street, Suite 557
Saskatoon, Saskatchewan S7K 7E6	Ottawa, Ontario K1A 0H8
t: 306-975-4765	t: 613-670-6290
f: 306-975-6240	f: 613-954-1920

Party: National Energy Board

Counsel	Agent
Jody Saunders	Colin S. Baxter
Kristen Lozynsky	Conway Baxter Wilson LLP
National Energy Board	400 - 411 Roosevelt Avenue
517 Tenth Avenue SW	Ottawa, Ontario
Calgary, Alberta T2R 0A8	K2A 3X9
t: 403-299-2715	t: 613-780-2012
f: 403-292-5503	f: 613-688-0271

APPEARANCES

Party: Amnesty International
Counsel
Colleen Bauman
Goldblatt Partners LLP
500-30 Metcalfe St.
Ottawa, Ontario K1P 5L4
t: 613-482-2463
f: 613-235-3041

Party: Nunavut Tunngavik Incorporated

Counsel	Agent
Dominique Nouvet	Michael J. Sobkin
Marie Belleau	
Sonya Morgan	
Woodward & Company	
200-1022 Govrnment Street	331 Somerset Street West
Victoria, B.C. V8W 1X7	Ottawa, Ontario K2P 0J8
t: 250-383-2356	t: 613-282-1712
f: 250-380-6560	f: 613-288-2896

Party: Attorney General for Saskatchewan

Counsel	Agent
Richard James Fyfe	D. Lynne Watt
Attorney General for Saskatchewan	Gowling WLG (Canada) LLP
Constitutional Law Branch, 8th Flr	160 Elgin Street, Suite 2600
820, 1874 Scarth St.	Ottawa, Ontario
Regina, Saskatchewan S4P 4B3	K1P 1C3
t: 306-787-7886	t: 613-786-8695
f: 306-787-9111	f: 613-788-3509

Party: Canadian Chamber of Commerce

Counsel	Agent
Neil Finkelstein	Jeffrey W. Beedell
McCarthy Tétrault LLP	Gowling WLG (Canada) LLP
Suite 5300	160 Elgin Street
Toronto Dominion Bank Tower	Suite 2600
Toronto, Ontario M5K 1E6	Ottawa, Ontario K1P 1C3
t: 416-601-8200	t: 613-786-0171
f: 416-868-0673	f: 613-788-3587

APPEARANCES

Party: Makivik Corporation

Counsel	Agent
David Schulze	David Taylor
Nicholas Dodd	
Dionne Schulze senc	Power Law
507, Place d'Armes	130 Albert Street
Bureau 502	Suite 1103
Montréal, Quebec H2Y 2W8	Ottawa, Ontario K1P 5G4
t: 514-842-0748	t: 613-702-5563
f: 514-842-9883	f: 613-702-5563

Party: Nunavut Wildlife Management Board

Counsel	Agent
Eugene Meehan, Q.C.	Marie-France Major
Thomas Slade	
Supreme Advocacy LLP	Supreme Advocacy LLP
100 - 340 Gilmour Street	100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3	Ottawa, Ontario K2P 0R3
t: 613-695-8855 Ext: 101	t: 613-695-8855 Ext: 102
f: 613-695-8580	f: 613-695-8580

Party: Charlie Watt, Rosemary Kuptana, Peter Ittinuar and Tagak Curley

Counsel	Agent
Peter W. Hutchins	Marie-France Major
Hutchins Légal inc.	Supreme Advocacy LLP
424 Saint-François-Xavier	100- 340 Gilmour Street
Montréal, Quebec H2Y 2S9	Ottawa, Ontario K2P 0R3
t: 514-849-2403	t: 613-695-8855 Ext: 102
f: 514-849-4907	f: 613-695-8580

Party: Beaver Lake Cree Nation and Ermineskin Cree Nation

Counsel	Agent
Meaghan M. Conroy	Marie-France Major
MacPherson Leslie & Tyerman LLP	Supreme Advocacy LLP
10235 101st Street, Suite 2200	100- 340 Gilmour Street
Edmonton, Alberta T5J 3G1	Ottawa, Ontario K2P 0R3
t: 780-969-3500	t: 613-695-8855 Ext: 102
f: 780-969-3549	f: 613-695-8580

APPEARANCES

Party: Inuvialuit Regional Corporation

Counsel	Agent
Kate Darling	Marie-France Major
Lorraine Land	
Matt McPherson	
Krista Nerland	
Olthuis, Kleer, Townshend LLP	Supreme Advocacy LLP
107 MacKenzie Road	100- 340 Gilmour Street
Inuvik, NWT X0E 0T0	Ottawa, Ontario K2P 0R3
t: 867-777-7077	t: 613-695-8855 Ext: 102
f: 877-289-2389	f: 613-695-8580

Party: Attorney General for Ontario

Counsel	Agent
Manizeh Fancy	Robert E. Houston, Q.C.
Richard Ogden	
Attorney General of Ontario	Burke-Robertson
720 Bay Street, 8th Floor	441 MacLaren Street, Suite 200
Toronto, Ontario M7A 2S9	Ottawa, Ontario K2P 2H3
t: 416-314-2177	t: 613-236-9665
f: 416-326-4181	f: 613-235-4430

Party: Prophet River First Nation and West Moberly First Nations

Counsel	Agent
John W. Gailus	Cynthia A. Westaway
Devlin Gailus Westaway	Devlin Gailus Westaway
2nd Floor, 736 Broughton Street	230-55 Murray Street
Victoria, B.C. V8W 1E1	Ottawa, Ontario K1N 5M3
t: 250-361-9469	t: 613-722-9091
f: 250-361-9429	f: 613-722-9097

Party: Mikisew Cree First Nation

Counsel	Agent
Karey Brooks	Marie-France Major
JFK Law Corporation	Supreme Advocacy LLP
640-1122 Mainland Street	100- 340 Gilmour Street
Vancouver, B.C. V6B 5L1	Ottawa, Ontario K2P 0R3
t: 604-687-0549	t: 613-695-8855 Ext: 102
f: 604-687-2696	f: 613-695-8580

APPEARANCES

Party: Algonquins of Pikwakanagan First Nation

Counsel	Agent
Patrick M. Nadjiwan	Marie-France Major
Nadjiwan Law Office	Supreme Advocacy LLP
915 Jocko Point Road	100- 340 Gilmour Street
Nipissing First Nation	Ottawa, Ontario
North Bay, Ontario P1B 8G5	K2P 0R3
t: 750-753-9815	t: 613-695-8855 Ext: 102
f: 866-280-9174	f: 613-695-8580

Party: Tsleil-Waututh Nation

Counsel	Agent
Scott A. Smith	Guy Régimbald
Paul Seaman	
Gowling WLG (Canada) LLP	Gowling WLG (Canada) LLP
550 Burrard Street	160 Elgin Street
Suite 2300, Bentall 5	Suite 2600
Vancouver, B.C. V6C 2B5	Ottawa, Ontario K1P 1C3
t: 604-891-2764	t: 613-786-0197
f: 604-443-6784	f: 613-563-9869

Party: Chiefs of Ontario

Counsel	Agent
Maxime Faille	Guy Régimbald
Jaimie Lickers	
Gowling WLG (Canada) LLP	Gowling WLG (Canada) LLP
2600-160 Elgin Street	160 Elgin Street
P.O. Box 466, Station D	Suite 2600
Ottawa, Ontario K1P 1C3	Ottawa, Ontario K1P 1C3
t: 613-233-1781	t: 613-786-0197
f: 613-563-9869	f: 613-563-9869

APPEARANCES

36776
Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., et al.
(Federal Court) (Civil) (By Leave)

Party: Chippewas of the Thames First Nation

Counsel	Agent
David C. Nahwegahbow	Moira Dillon
Scott Robertson	
Nahwegahbow, Corbiere Genoodmagejig	Supreme Law Group
5884 Rama Road, Suite 109	900 - 275 Slater Street
Rama, Ontario L3V 6H6	Ottawa, Ontario K1P 5H9
t: 705-325-0520	t: 613-691-1224
f: 705-325-7204	f: 613-691-1338

Party: Enbridge Pipelines Inc.

Counsel	Agent
Douglas E. Crowther, Q.C.	K. Scott McLean
Joshua A. Jantzi	
Aaron Stephenson	
Dentons Canada LLP	Dentons Canada LLP
15th Floor, Bankers Court	1420 - 99 Bank Street
850-2nd Street SW	Ottawa, Ontario
Calgary, Alberta T2P 0R8	K1P 1H4
t: 403-268-6821	t: 613-783-9600
f: 403-268-3100	f: 613-783-9690

Party: National Energy Board

Counsel	Agent
Jody Saunders	Colin S. Baxter
Kristen Lozynsky	
National Energy Board	Conway Baxter Wilson LLP
517 Tenth Avenue SW	400 - 411 Roosevelt Avenue
Calgary, Alberta T2R 0A8	Ottawa, Ontario K2A 3X9
t: 403-299-2715	t: 613-780-2012
f: 403-292-5503	f: 613-688-0271

APPEARANCES

Party: Attorney General of Canada

Counsel	Agent
Peter Southey Mark Kindrachuk, Q.C.	Christopher M. Rupar
Attorney General of Canada The Exchange Tower, Box 36 Suite 3400, 130 King Street West Toronto, Ontario M5X 1K6 t: 416-973-2240 f: 416-973-0809	Attorney General of Canada 50 O'Connor Street, Suite 500, Room 557 Ottawa, Ontario K1A 0H8 t: 613-670-6290 f: 613-954-1920

Party: Attorney General for Saskatchewan

Counsel	Agent
Richard James Fyfe Attorney General for Saskatchewan Constitutional Law Branch, 8th Flr 820, 1874 Scarth St. Regina, Saskatchewan S4P 4B3 t: 306-787-7886 f: 306-787-9111	D. Lynne Watt Gowling WLG (Canada) LLP 160 Elgin Street Suite 2600 Ottawa, Ontario K1P 1C3 t: 613-786-8695 f: 613-788-3509

Party: Nunavut Wildlife Management Board

Counsel	Agent
Eugene Meehan, Q.C. Thomas Slade	Marie-France Major
Supreme Advocacy LLP 100 - 340 Gilmour Street Ottawa, Ontario K2P 0R3 t: 613-695-8855 Ext: 101 f: 613-695-8580	Supreme Advocacy LLP 100- 340 Gilmour Street Ottawa, Ontario K2P 0R3 t: 613-695-8855 Ext: 102 f: 613-695-8580

Party: Beaver Lake Cree Nation and Ermineskin Cree Nation

Counsel	Agent
Meaghan M. Conroy	Marie-France Major
MacPherson Leslie & Tyerman LLP 10235 101st Street, Suite 2200 Edmonton, Alberta T5J 3G1 t: 780-969-3500 f: 780-969-3549	Supreme Advocacy LLP 100- 340 Gilmour Street Ottawa, Ontario K2P 0R3 t: 613-695-8855 Ext: 102 f: 613-695-8580

APPEARANCES

Party: Mikisew Cree First Nation

Counsel	Agent
Karey Brooks	Marie-France Major
JFK Law Corporation	Supreme Advocacy LLP
640-1122 Mainland Street	100- 340 Gilmour Street
Vancouver, B.C. V6B 5L1	Ottawa, Ontario K2P 0R3
t: 604-687-0549	t: 613-695-8855 Ext: 102
f: 604-687-2696	f: 613-695-8580

Party: Suncor Energy Marketing Inc.

Counsel	Agent
Martin Ignasiak	Patricia J. Wilson
W. David Rankin	
Tom McNerney	
Geoffrey Langen	
Thomas Kehler	
Osler, Hoskin & Harcourt LLP	Osler, Hoskin & Harcourt LLP
450 - 1st Street S.W.	340 Albert Street
Suite 2500, TransCanada Tower	Suite 1900
Calgary, Alberta T2P 5H1	Ottawa, Ontario K1R 7Y6
t: 403-260-7007	t: 613-787-1009
f: 403-260-7024	f: 613-235-2867

Party: Haisla Nation

Counsel	Agent
Allan Donovan	Brian A. Crane, Q.C.
Jennifer Griffith	
Mary Anne Vallianatos	
Donovan & Company	Gowling WLG (Canada) LLP
73 Water Street	2600 - 160 Elgin St
6th Floor	Box 466 Station D
Vancouver, B.C. V6B 1A1	Ottawa, Ontario K1P 1C3
t: 604-688-4272	t: 613-233-1781
f: 604-688-4282	f: 613-563-9869

APPEARANCES

Party: Mohawk Council of Kahnawà:ke

Counsel	Agent
Francis Walsh	Justin Dubois
Suzanne Jackson	
Mohawk Council of Kahnawake	Juristes Power
Legal Services	
P.O. Box 720	130, rue Albert
Mohawk Territory of	Bureau 1103
Kahnawà:ke, Quebec	Ottawa, Ontario
J0L 1B0	K1P 5G4
t: 450-632-7500	t: 613-702-5560
f: 450-638-3663	f: 613-702-5560

Party: Algonquins of Pikwakanagan First Nation

Counsel	Agent
Patrick M. Nadjiwan	Marie-France Major
Nadjiwan Law Office	Supreme Advocacy LLP
915 Jocko Point Road	100- 340 Gilmour Street
Nipissing First Nation	Ottawa, Ontario
North Bay, Ontario P1B 8G5	K2P 0R3
t: 750-753-9815	t: 613-695-8855 Ext: 102
f: 866-280-9174	f: 613-695-8580

Party: Attorney General for Ontario

Counsel	Agent
Manizeh Fancy	Robert E. Houston, Q.C.
Richard Ogden	
Attorney General of Ontario	Burke-Robertson
720 Bay Street, 8th Floor	441 MacLaren Street, Suite 200
Toronto, Ontario M7A 2S9	Ottawa, Ontario K2P 2H3
t: 416-314-2177	t: 613-236-9665
f: 416-326-4181	f: 613-235-4430

Party: Canadian Chamber of Commerce

Counsel	Agent
Neil Finkelstein	Jeffrey W. Beedell
Brandon Kain	
McCarthy Tétrault LLP	Gowling WLG (Canada) LLP
Suite 5300	160 Elgin Street
Toronto Dominion Bank Tower	Suite 2600
Toronto, Ontario M5K 1E6	Ottawa, Ontario K1P 1C3
t: 416-601-8200	t: 613-786-0171
f: 416-868-0673	f: 613-788-3587

APPEARANCES

Party: Mississaugas of the New Credit First Nation

Counsel	Agent
Jason Madden	Matthew Estabrooks
Nuri G. Frame	
Jessica Labranche	
Pape Salter Teillet	Gowling WLG (Canada) LLP
546 Euclid Avenue	2600 - 160 Elgin Street
Toronto, Ontario	P.O. Box 466, Stn. A
M6G 2T2	Ottawa, Ontario K1P 1C3
t: 416-916-2989	t: 613-786-0211
f: 416-916-3726	f: 613-788-3573

Party: Tsleil-Waututh Nation

Counsel	Agent
Scott A. Smith	Guy Régimbald
Paul Seaman	
Gowling WLG (Canada) LLP	Gowling WLG (Canada) LLP
550 Burrard Street	160 Elgin Street
Suite 2300, Bentall 5	Suite 2600
Vancouver, B.C. V6C 2B5	Ottawa, Ontario K1P 1C3
t: 604-891-2764	t: 613-786-0197
f: 604-443-6784	f: 613-563-9869

Party: Chiefs of Ontario

Counsel	Agent
Maxime Faille	Guy Régimbald
Jaimie Lickers	
Gowling WLG (Canada) LLP	Gowling WLG (Canada) LLP
2600-160 Elgin Street	160 Elgin Street
P.O. Box 466, Station D	Suite 2600
Ottawa, Ontario K1P 1C3	Ottawa, Ontario K1P 1C3
t: 613-233-1781	t: 613-786-0197
f: 613-563-9869	f: 613-563-9869

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Ottawa, Ontario

--- Upon commencing on Wednesday, November 30, 2016 at 9:32 a.m.

(0932) **MADAM CHIEF JUSTICE:** Thank you. Merci.

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., et al. and Hamlet of Clyde River, et al. v. Petroleum Geo-Services Inc. (PGS), et al.

Scott Robertson and David C. Nahwegahbow for the Appellant in the first action;

Francis Walsh and Suzanne Jackson for the Intervener Mohawk Council of Kahnawà:ke;

Nuri G. Frame, Jason T. Madden and Jessica Labranche for the Intervener Mississaugas of the New Credit First Nation;

Douglas E. Crowther, Q.C., Joshua A. Jantzi and Aaron Stephenson for the Respondent Enbridge Pipelines;

Peter Southey and Mark R. Kindrachuk, Q.C. for the Respondent Attorney General of Canada;

Jody Saunders and Kristen Lozynsky for the Respondent National Energy Board;

Manizeh Fancy and Richard Ogden for the Intervener Attorney General of Ontario;

Richard James Fyfe for the Intervener Attorney General for Saskatchewan;

Martin Ignasiak for the Intervener Suncor

Energy Marketing Inc.

Then, in the second action, Nader H. Hasan, Justin Safayeni and Pam Hrick for the Appellants;

Dominique Nouvet, Marie Belleau and Sonya Morgan for the Intervener Nunavut Tunngavik Incorporated;

Kate Darling, Lorraine Land, Matt McPherson and Krista Nerland for the Intervener Inuvialuit Regional Corporation;

Sandy Carpenter and Ian Breneman for the Respondents Petroleum Geo-Services Inc.;

Mark R. Kindrachuk, Q.C. and Peter Southey for the Respondent Attorney General of Canada;

Marie-France Major and Thomas Slade for the Intervener Nunavut Wildlife Management Board;

Maxime Faille, Jaimie Lickers and Guy Régimbald for the Intervener Chiefs of Ontario;

No one appearing for the Intervener Makivik Corporation.

We will begin with you, Mr. Roberston.

ARGUMENT FOR THE APPELLANT (36776)

CHIPPEWAS OF THE THAMES FIRST NATION

(0935) MR. ROBERTSON: Good morning, Chief Justice, Justices.

I would like to begin by acknowledging the Algonquin Nation whose traditional territory we have

gathered on today. I would also like to acknowledge the Elders, Chief Leslee White-Eye, the Chief of the Chippewas First Nation and her Council Members who are present among us to witness these important discussions. I would also like to acknowledge the Chippewas Eagle Staff, which is in the room, and I would like to thank the Court for making those accommodations for this very significant request.

I represent the Chippewas of the Thames First Nation, part of the Anishinaabe Nation that has occupied their traditional territory, including the lands and waters since time immemorial.

The legal questions arising on this appeal relate to the jurisdiction and mandate of the National Energy Board under section 58 of the *NEB Act*. Specifically we submit that the Board was required to assess the adequacy of Crown consultation before issuing its decision under section 58.

We further submit that the Board does not have the authority to engage in consultation on behalf of the Crown.

More broadly, this appeal is the examination of the historic and evolving relationship between the Crown and indigenous people and the strengthening of this nation-to-nation relationship in the spirit of reconciliation. The nature of this unique and special

relationship is recognized in section 35(1) of the *Constitution*, in the jurisprudence of this Court, and indeed in the federal government's own consultation guidelines, all of which suggest that reconciling pre-existing indigenous sovereignty with Crown sovereignty requires meaningful and substantive consultation.

For a summary of my oral argument, my oral submissions will address three main points specific to the Board's powers.

Number one, the Board has the jurisdiction and the duty to assess the adequacy of Crown consultation.

Number two, the Board does not have the jurisdiction or the duty to engage in consultation itself/

And, three, the Board process cannot be a substitute for the Crown's duty to consult.

And, fourthly, I will -- not one of the three issues, but I will also briefly address remedies in the event the Court grants the appeal.

I will be referring to my compendium which is in front of you for the appellant Chippewas of the Thames. And if I may, with the Court's guidance, I would like to provide a little bit of a background in terms of how we got to this point, if I may.

So this proceeding started when Enbridge filed an application under section 58 the *National Energy Board*

Act. Under this section the Board is the final decision-maker, unlike a section 52 certification case that we are going to hear this afternoon. In advance of the Board hearing the Chippewas wrote to the Crown indicating the approval of the project would adversely impact their Aboriginal treaty and title rights, and while it's not in our compendium I would refer you to Volume 6 of our record and just give you the tab pages. So it's Tab 11. And I will give you the response to that, Tab 14. Those are the letters and the correspondence between the Chippewas of the Thames and the minister in question. I can take you to those if you want, if you have any questions, but I just wanted to provide to you in terms of where they are located.

So with respect to the rights that were asserted by the Chippewas, I would like to take you to -- if you would open up your compendium at Tab 1. You should be looking at a map, it looks something like this, and the reason for providing the map is just to give you some reference in terms of we're going to be talking about locations and rights and whatnot, it would probably be good to have some reference as to what we're talking about.

So the map that's in front of you, it was part of a traditional land-use study that was prepared as part of the process for the National Energy Board. It was produced by an independent company, it's called a Summary Land Use

Study, what would be a preliminary land-use study specifically based on the timing in terms of responding to the National Energy Board. It didn't provide enough time to provide a full -- a more fulsome, but as part of the land-use study this map was produced. And just to give you some reference, there's a line that runs across at the top kind of outside the box, that is the Line 9 pipeline that we are discussing.

On the far right-hand side of the map there's a squiggly line that goes down, that is the Thames River. The Thames River, if you follow it down, flows into the community of Chippewas of the Thames. That's the community at the bottom. The centric circles and the -- I would describe it as an Easter egg type of circle, those are areas that are identified within the traditional land-use with respect to hunting, fishing, gathering, those type of things. And this was the map that was provided to the Board.

Specifically with respect to the rights that were asserted, if you can turn over to Tab 2 of your compendium, in the Tab 2 of the compendium are excerpts of Chief Joe Miskokomon's affidavit that was provided to the Board. And the reason why I'm bringing you to here is I want to show you in terms of specifically which rights were asserted by the Chippewas of the Thames.

So if you go down to paragraph 10, starting at paragraph 10, the Chippewas of the Thames First Nation Aboriginal and treaty rights. And it's important that we walk through this very slowly in a sense of I just want to make sure the Court understands in terms of what's being asserted. There's lots of correspondence within the record, people call them interests, some people call them Aboriginal rights, some people call them treaty rights, what I'm going to take you to here is that there is actually three sets of rights that are being asserted and to be concise in terms of what we're talking about with respect to those rights is important to this case.

So if you go to 10(a):

> "(a) Aboriginal harvesting rights in our 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...
>
> (b) the right to access, preserve, and conserve sacred sites for traditional, social, and ceremonial purposes;
>
> (c) Aboriginal title to the bed of the Thames River, as well as the airspace over

the Thames River and other lands throughout our traditional territory;

(d) in the alternative to (c), an Aboriginal right to use the water and resources in the Thames River and the air space over the lands in our traditional territory; and

If you turn over the page to (e):

"(e) a solemnly negotiated treaty right promising (Chippewas of the Thames) exclusive use and enjoyment of our reserve lands."

And then if you go through the next few pages it's a discussion in terms of they talk about the seasonal rounds, you will see there's a diagram there, and what that basically describes is how the Chippewas move throughout their territory on an annual round following the resources within, harvesting maple sugar, fish in certain areas, hunting in other areas.

And if you go over to the last page in that Tab, paragraph 30. And so what we are talking about here is there are three separate treaties that the Chippewas signed and those are laid out in terms of paragraph 26 and paragraph 27 of this compendium tab.

But what's more important here is with respect

to what we're having in paragraphs 30, 31 and 32 is an interpretation provided by Chief Joe Miskokomon of what those treaties meant. And if you read the affidavit of Chief Joe Miskokomon he talks about the fact that the treaties were written by the colonial powers, but the interpretation of those treaties from the oral tradition of the Chippewas have specific meaning and so I want to take you to what those meanings are.

So paragraph 30. Chief Joe Miskokomon is now speaking:

> "Our ancestors retained the right to harvest throughout our traditional territory and to control parts of our traditional territory..."

Then he has brackets:

> "... (lakes, rivers, lakebeds, riverbeds, subsurface resources which lay under our lands below the depth of a plow, and the air space above our lands) despite having entered into treaties with the Crown. There was no discussion of ceding our harvesting rights or control and ownership over the above-noted parts of our traditional..."

And I believe the word that's missing there is

"lands". It would make no sense that "lands" wouldn't be included there:

> "... during the treaty-making process. Simply put the Chiefs of the day never agreed to surrender those rights."

And then he goes on to state at paragraph 31:

> "Unlike other treaties which explicitly deal with ownership of waterlots, Treaties Nos. 21 ... and 25 only address ownership of land up to the "water's edge of the River Thames". This reflects the intent and understanding of our ancestors to only surrender land up to the water's edge, leaving the land under water plainly unaffected by the Treaties and still subject to our control and ownership."

And then finally paragraph 32:

> "While our ancestors that executed the treaties were aware of the British Crown's desire to use the surrendered land for settlement and agricultural purposes, our oral history confirms that their intention in executing the treaties with the Crown, and the spirit of the treaties, was to preserve and protect our way of life.

> This involved preserving our rights to continue our seasonal harvesting cycles and the necessary ongoing right to access and use our traditional territory as needed."

I would put to the Court that what you have in terms of those three treaties is a stewardship. It's a stewardship in terms of there is going to be an agreement between the Crown and the Chippewas and what they're going to take with them is some kind of control and management over their traditional territory with respect to resources. That's what I would put to the Court.

So those specifically are the rights that were asserted in this case. And again I just wanted to point out that what you have is you have an Aboriginal right that's with respect to the hunting and the fishing and the gathering; you have the treaty right which you talked about in terms of the management; and you also have a title right, which is clearly asserted in Joe Miskokomon's affidavit.

With that information provided, the Crown in this case failed to make any efforts to meaningfully consult the Chippewas. The Crown failed to conduct a strength of claims analysis and so did the Board. And I will come back to this. You may want to put your thumb on that because it will be discussed later in my argument what the potential of

that is and the potential I say is there is a danger in mischaracterizing those rights, what rights are being asserted and what informs those protection of those rights.

The Crown responded to the Chippewas' letter three months after the Board had concluded its hearing and the record was closed. And, again, those are the letters that I gave you with respect to in the volume and those tabs.

The Crown in this case actively chose not to participate in the Board hearing and relied on the Board and its regulatory process to satisfy its duty. The Board failed to assess the adequacy of Crown consultation and to this day the Chippewas have not been consulted.

I will now proceed to an examination of the Board's jurisdictions in this case, subject any questions.

As this Court -- so I will begin in terms of my examination of the Board's jurisdiction.

As this Court set out in *Carrier Sekani*, an administration tribunal has one of four roles. Of course we know that a Board may have the power to assess the adequacy of Crown consultation, it may have the power to engage in the duty to consult, and it may have both powers or it may have neither. We submit under section 58 of the *NEB Act*, the Board has the power and the duty to assess the adequacy of Crown consultation, but does not have the power to engage

in consultation itself.

The Board's power to assess the adequacy of Crown consultation. With respect to this argument, I would point the Crown to our factum at paragraphs 63 to 86. I don't intend to go into great detail on this, there doesn't seem to be too much -- there is a general agreement within the parties in terms of the duty to assess the adequacy, I would rather focus my arguments today, if I can, on the Board's jurisdiction to consult.

Moving to the issue of the Board's jurisdiction to consult, we submit it is clear that Parliament did not expressly delegate the authority to the Board to carry out consultation. This is supported by the unanimous decision of the court below and indeed the Attorney General agrees with this position.

The real issue before this Court is whether the Board's power to carry out consultation can be implied or read into section 58 of the *National Energy Board Act*. We say that it cannot.

If you can turn to Tab 12 of the compendium, this is a passage from *Carrier Sekani*. Much of what we're going to be discussing -- much of what I'm going to be discussing specifically -- will refer to this passage.

So as we know -- as set out in *Carrier Sekani*, the power to engage in consultation itself as distinct from

the jurisdiction to determine whether a duty to consult exists cannot be inferred from the mere power to consider questions of law. It is a distinct and often complex constitutional process and in certain circumstances a right involving facts, law, policy and compromise. The Tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation.

The question then becomes: Can the NEB satisfy the duty to consult by exercising its remedial powers? It is important to recognize that remedial powers alone are not sufficient to imply jurisdiction to actually engage or fulfil the duty to consult, the Board must also possess the power and expertise to assess the asserted Aboriginal rights and the impacts on those rights.

In order to determine whether these powers can be implied we must look at the legislative intent. This requires that we look at section 58 in the context of the *NEB Act* as a whole. Looking at the *NEB Act* as a whole, we determine that the purpose of the *NEB Act* is to provide regulatory oversight to the power and energy sectors in the Canadian public interest. There is no express mention of the Crown's a duty to consult within the *NEB Act*. The NEB is accountable to Parliament through the Minister of Natural Resources.

There are two sections in the Act dealing with pipelines where the Crown's duty to consult is potentially engaged. There was some discussion at the Federal Court of Appeal on when the Act was enacted and there was discussion with respect to how could Parliament have known that they were going to have to deal with indigenous issues at that time, but we say there are definitely two sections within the Act where there is a potential that you're going to be engaged with indigenous Aboriginal rights. If you are building a pipeline that spreads across five provinces generally speaking you're going to run into a First Nation in Canada.

So a look at section 52 -- sorry, the two sections within the Act, I should have mentioned, are section 52 and section 58.

A section 52 approval requires a public hearing and Cabinet has the final decision in terms of approving the decision. By contrast, section 58 provides a streamlined process which does not automatically require a public Board hearing and it may not even require an application and makes the Board itself the final decision-maker. Comparing and contrasting these two it is evident that Parliament has contemplated that section 52 processes include Aboriginal consultation by the Crown.

MR. JUSTICE ROWE: Is that the distinction or

is it really that 58 is about more technical matters that it was contemplated the Board could deal with without the broader policy considerations that one usually brings to bear at the Cabinet level?

MR. ROBERTSON: That may have been the intent, but with respect to what 58 actually does is there are exemption provisions within 58. So there are provisions within the Act that you have to carry out in fulfilling a certificate under section 52, you're exempted from those under 58.

So that may have been the intention, but we would argue and say with respect to the impacts of even a 58 project, still have significant -- may potentially have significant impacts. So while the regulatory system may have been set up to deal with what we would call lesser projects, I don't think it had the intention in dealing with lesser impacts of those projects.

It is unlikely -- so coming back to comparing and contrasting these two statutes it is evident that Parliament has contemplated that section 52 include Aboriginal consultation by the Crown.

It is unlikely that Parliament contemplated that the Board would be conducting Crown consultation under section 58. The fact that a hearing is not required and the Governor in Council does not approve projects suggests that

Parliament did not intend for the Board to discharge the Crown's duty to consult under section 58 regardless of its remedial powers.

This Court in *Haida* -- and I will take you to Tab 9 of our compendium, if you're looking for that reference. This Court in *Haida* stated that engaging in consultation first requires an assessment of the strength of the claim, therefore for the Board to exercise its remedial powers under section 58 it must first determine what if any substantive Aboriginal and treaty rights are being asserted. Without such an assessment the Board is unable to determine if there are any potential impacts on those asserted rights. More concerning, the Board would be unable to determine the appropriate accommodations for those impacts. In other words, the exercise is rights-driven and not results-driven.

The Board's remedial powers do not provide it with the authority to engage in Aboriginal consultation. Those powers must relate to the assessment of the rights asserted and the power to accommodate those rights.

Again, referring back to Tab 12, as the Court set out in *Carrier Sekani* engaging in consultation involves politics, law, negotiations and compromise, thus you need to look at the character of the Tribunal. The NEB is a quasi-judicial tribunal, is not an entity that ought to be engaging in the politics of consultation.

MR. JUSTICE WAGNER: Mr. Robertson, I have a question for you. Is it your submission that your clients' concerns were not properly considered by the Board and in your opinion do you think that a parallel process of consultation by the Crown, who decided not to participate, would have changed anything on this consideration?

MR. ROBERTSON: I would clarify two points to that question.

One is, it wasn't just their interests. The Board didn't assess their interest, they didn't assess their rights. In order to actually deal with impacts -- and if you're talking about remedial powers, and the remedial powers deal with what can we do to alleviate those, they don't actually deal with the substance of what those rights are. They haven't carried out an assessment of what are you alleging in terms of your right. And the way that plays itself out in this case is you have in the decision from the Board they talk about interests, they talk about treaty rights, they talk about Aboriginal rights, there's no mention of title, no mention of an assertion of title.

And with respect to a parallel process, I don't think it's a parallel process that we're asking for specifically, I think the front-end of that discussion is how do you determine and who assesses those rights. That doesn't require a parallel process, that's a front-end

process that should be done first before even entering into any kind of a tribunal or general consultation process.

I think that answers your question.

MADAM JUSTICE KARAKATSANIS: Can I ask you, Mr. Robertson, is it your position then that any time a statute provides the final decision-making belongs to a government agency that it would never have the right to consult -- or the duty to consult?

MR. ROBERTSON: I'm remiss to say that. Again, that's a hypothetical that require some unpacking.

So if the Board in question, as the section 58 NEB Board, is the final decision-maker, if there was oversight or if there was a Board or commission that was able to address this issue, right, if the Board had the capacity or the power or the expertise to conduct that kind of an assessment, then it very may well, but again as a final decision-maker to the application that's put before it and not as a final decision-maker as to we control the process, no one gets to see into it, the Crown has hands-off participation.

MR. JUSTICE ROWE: You keep referring to "the Crown". Who is the Crown?

MR. ROBERTSON: The Crown in this case would be the Crown at large I suppose in terms of -- we don't know who the Crown was in this case because there was no Crown.

MADAM JUSTICE CÔTÉ: Mr. Robertson, am I right to say that there were people from Environment Canada who participated in the consultation?

MR. ROBERTSON: Yes. I'm glad you brought that up, yes.

MADAM JUSTICE CÔTÉ: Yes. I would like to know if we can --

MR. ROBERTSON: There were people that applied as interveners to appear before the National Energy Board and if you -- I will have to look and I will get that tab for you, but if you look at the application from Environment Canada to participate in the Board, similar to all the First Nations, to the landowners, public interest groups, they applied as an intervener and in their application form they specifically stated that they would be addressing issues relating to the *Species at Risk Act* and the *Migratory Bird Act*.

So my answer to you would be there was a representative from the Department of the Environment, but it wasn't to consult with First Nations.

MADAM JUSTICE CÔTÉ: (Off microphone). You answered to my colleague Justice Wagner that the rights of your clients were not considered and when I --

MR. ROBERTSON: No. If I may...? I said they weren't assessed.

MADAM JUSTICE CÔTÉ: They were not assessed.

So when we read Chapter 7 of the Board's decision and the heading is "Aboriginal Matters", and when they say:

> "the Board takes the interest and concerns of Aboriginal groups into consideration..."

So for you it's not an assessment of the Aboriginal rights?

MR. ROBERTSON: My response to that would be what are they taking into -- what are they assessing? They're saying the Aboriginal people can come forward, present their rights and their interests, but what assessment has taken place to determine what those rights actually are?

What the Board is doing then is they take it to the next step, saying we have looked at your rights and your interests and we will require Enbridge to accommodate those. So if your interest is making sure that the pipeline is more safe, then we will put conditions on the order to say make the pipeline safer.

MADAM JUSTICE CÔTÉ: Yes.

MR. ROBERTSON: Okay. So as the NEB is a quasi-judicial tribunal it is not an entity that ought to be engaging in the politics of consultation. And the reason

for that is quite simple. If we go back to the rights in this case, so the Chippewa of the Thames, they are asserting a treaty right, co-management, stewardship, call it what you will, they have interpreted it, the issue in this case was all those rights were accepted at face value. There was no controverted evidence, nothing was put in by the Crown as to say, "Your claim to that is not very good, you don't even have a claim to that". None of that was before the Board so so they accepted these assertions as they were.

So if we take that right in terms of a co-management or a stewardship agreement and we look at what could have happened in this case had there been an assessment to that treaty right -- now keep in mind the Crown is always aware of treaty rights so when they are asserted the Crown knows that. That's a nation-to-nation relationship.

In this case asserting that treaty right would have at least required the Crown to take it under consideration as to what is that right, what's the right that's being asserted? And what could have happened in that case, if the Crown had considered the rights properly, had showed up, carried out any kind of a consultation, there may have been an opportunity for the Chippewas to structure a co-management agreement or some kind of stewardship agreement or an IBA or a compensation, but none of those

things were ever undertaken. There was no opportunity to do so. The Board can't consult with the Chippewas of the Thames.

MR. JUSTICE BROWN: I guess I understand your point (off microphone) consult hasn't been expressly delegated, but I wonder if you could explain to me why it couldn't have been taken as being implicitly delegated here. This I guess goes to Justice Rowe's question, you know, who is the Crown.

MR. ROBERTSON: Who is the Crown. So with respect to -- and again my argument on that is if you're relying on the implication of the duty to consult as set out in Carrier Sekani, that --

MR. JUSTICE BROWN: I'm not relying on anything, I'm just wanting to understand why it isn't implicit from the powers under section 58.

MR. ROBERTSON: The justification is you look at the remedial powers to justify that implication. My argument to that is, if that's what you're doing you're not able to actually fulfil the duty to consult. There is no assessment of those rights, all you're doing is you're providing the Board with the remedial powers to say: What's your issue? Okay, Enbridge, you fix X, Y and Z and that will address those issues. That doesn't give the Board the power to carry out consultation. That's not enough.

MR. JUSTICE BROWN: Well, you are remedying something, right. You call them issues.

MR. ROBERTSON: You are remedying something, but we don't even know what that something is.

The analogy I would use is throwing a dart at a dartboard and not really knowing what you're going to hit. We will try to fix that issue -- we will try to fix that issue, but you don't even know what the real issue -- and I'm going to use rights because that's what are asserted -- you don't know what the right is.

There's a flaw in the process. There should be the assertion of the right, it should be assessed, reviewed and then you go to accommodation.

MADAM JUSTICE KARAKATSANIS: What if the decision-maker, the Tribunal, accepts the rights as asserted. So there's no assessment, there's an acceptance of the rights as asserted and then there are powers to consult and there is an ability through broad terms and conditions to accommodate, and what if in the circumstances of a particular case that was sufficient to meet the duty of the Crown, would you say then that that would be implicit, it's implicitly authorized by the legislation? Would it be sufficient to make the decision a valid decision, one that's in the public interest that also complies with the constitutional requirement?

I guess I'm asking you perhaps it may not be sufficient in every case, but if in a particular fact scenario where rights are asserted and accepted at face value and there is consultation and there is some accommodation, could that not be relied on?

MR. ROBERTSON: I would preface that with who is going to carry out that consultation. And very specific to this --

MADAM JUSTICE KARAKATSANIS: Let's assume that it's the Tribunal or the regulatory agency at issue.

MR. ROBERTSON: In this specific case I would say that Tribunal could not carry out the consultation. If what you're saying is they're going to address issues related to what is the -- and you're saying take the right at face value, then how would the Tribunal, if we're going to take the right at face value, satisfy what the Chippewas have said and interpret their right to be in terms of a co-management right or a stewardship right, what would the Tribunal do? How would they address that?

MADAM JUSTICE KARAKATSANIS: I was trying to stay away from these particular facts and asking you this hypothetical.

MR. ROBERTSON: In the hypothetical.

With a properly constituted Tribunal with the expertise and the know-how to have some idea of how to

assess Aboriginal rights in terms of what they're doing, to have the expertise to sit down and deal with consultation as to what can we really do to accommodate this within your treaty rights -- don't forget, and there are cases where people are asserting title rights as well, that's a very specific fact pattern in terms of I don't think the National Energy Board has the expertise currently to deal with that.

But to answer your question, if the Board was properly constituted they may. And those remedial powers, which come with other powers in terms of, okay, we can remediate, but what else can we do? Can we also assess these rights?

MADAM JUSTICE CÔTÉ: Mr. Robertson, you referred earlier to a letter received from the Minister, this is the letter of January 30, 2014 after the public hearing was closed, was finished, but the decision of the Board was rendered more than a month later, March 6, 2014. Was there anything done during that month period to say to the Board, "We do not agree with the Minister's -- or the Crown's position expressed in that letter"?

MR. ROBERTSON: There was not.

MR. JUSTICE ROWE: Now, my colleague Justice Karakatsanis asked a general question, I'm going to go the opposite direction, I'm going to get a little more specific.

This pipeline exists and product is being moved

through the pipeline. The authorization, as I understand it, was to change what flowed through the pipeline and the volume. So is not the only possible infringement of the rights of the Chippewas -- would not the only possible infringement be leakage from the pipeline, because the pipeline is now in use and the potential for greater damage if there's a rupture, and is it not within the competence of the NEB to address questions of pipeline safety?

MR. ROBERTSON: And I would answer that, yes, that is their competency, but when you talk about impacts -- so if we can agree that the potential impact would be caused by a rupture, within that traditional territory, within their interpretation of how they look at their treaty rights and what should be done -- and don't forget, that treaty is based on a nation-to-nation agreement -- if those decisions are going to be made within their traditional territory there should be some form of not just addressing what those potential impacts will be, but in the grander scheme in terms of what can we do to assist? What can the Chippewas do in terms of how do we address those issues to make sure that we know, not just what the National Energy Board is telling us, but what role can we play in protecting ourselves and our traditional territory?

And again it goes back to who determines what those impacts are. So if you're saying there's a rupture

and then the issue is that that is brought up to the Board and the Board says, "Enbridge, just make the pipeline safer, increase the integrity", you still don't know what rights you're potentially impacting by a leak.

MR. JUSTICE ROWE: I accept there is a fundamental distinction between the broad public interest in environmental protection and the quite distinct rights and interests of Aboriginal peoples to use their lands and to benefit from those lands. Now, there is some overlap in a technical sense, but they are in their nature distinct.

But I guess I will just leave it with a broad question: Is it not possible to protect both sets of interests by a properly crafted order by the NEB?

MR. ROBERTSON: Well, in a hypothetical sense I guess it would depend on the order. In this case it wouldn't be. The order that is provided in this case doesn't satisfy the duty to consult.

And keep in mind in terms of what we're dealing with here, the order that's provided and the application that is approved doesn't end the duty to consult. That pipeline is ongoing and there are accommodations that are provided that still need to be followed up on, where there still can be input from the Chippewas on the Thames based on their treaty right. And so I would argue and say those rights are still being denied today. Despite the fact

that the pipeline has been approved, the application is up and running, there is a continuing obligation and yet we still don't have any consultation and no prospect of consultation now.

MADAM CHIEF JUSTICE: Do you accept that the consultation could -- the degree of consultation required, who can do it, can vary with the issue, what you're consulting about? If it's a minor intrusion perhaps a very brief consultation and perhaps a consultation that could be undertaken by a Board like the NEB?

The sense I'm getting from your submission is that there's this broad overarching archetype consultation that has to happen in the same way in every case, you have to have this expansive exploration of the treaty or other indigenous rights, you have to get all that set out, then you have to look at that and you have to go through this whole process, but I didn't quite see that, if I can just put it this way, in the paragraph you read from *Carrier Sekani* where it seems there's a more flexible approach.

First you have to ask not only what are all these rights, which of course are very important, but you have to ask what are we -- what is the potential impact here and how would that impose -- how would that intersect with the rights.

So if I'm putting up a tower somewhere that

only goes to little part of a property and there is -- assume for purposes of argument there's going to be very little or no impact on any of the potential rights, maybe a bird could hit a wire or something like that, surely we wouldn't have to have this whole exploration of the whole extent of the rights and all the paraphernalia and details.

I think that's what some of the questions may be -- at least my question is getting at -- there has to be some -- it seems to me -- I will put it to you and you can respond -- a great deal of flexibility in what is required for an adequate consultation with respect to a particular project.

MR. ROBERTSON: And I would agree with that. And what I would say to that is the Crown in their consultation accommodation guidelines clearly lays out issues with respect to early assessment, preliminary assessment, right, and in terms of any kind of project, whether it be a little project, whether it be a major project, there has to be some consideration as to the rights that are being asserted before you get to what the potential impacts are.

So is it a massive type of overhaul, do you have to actually provide a written legal argument to say, "Here are your rights and this is how we interpret them as being asserted"? I would answer that, "No, you don't", but

someone has to look at it and if it is the Board that's looking at it, they have to have the expertise to be able to give you that opinion.

MR. JUSTICE BROWN: So just to be clear, is it your submission that the Board operating under section 58 can never do that, irrespective of the degree of intrusion that, you know, the bird on the wire or, you know, a clear-cut, just two extremes?

MR. ROBERTSON: The bird on the wire. This is going to be the bird on the wire case.

MR. JUSTICE BROWN: It's been Leonard Cohen month, okay.

MR. ROBERTSON: Not a good movie by the way.

--- Laughter

MR. ROBERTSON: With respect to the answer, can the Board ever -- and again you are asking me in the hypothetical and it would really depend on the rights.

MR. JUSTICE BROWN: Well, your submission seems very categorical and I'm just wanting to make sure that I understand it, that it's meant to be.

MR. ROBERTSON: The Board as structured today, no.

MR. JUSTICE BROWN: Can't do it?

MR. ROBERTSON: No, it can't.

MR. JUSTICE BROWN: Never. Okay. All right.

Got it.

MR. ROBERTSON: Under 58.

MR. JUSTICE BROWN: Right. And that was my question.

MADAM JUSTICE ABELLA: Can it do it under section 12, general jurisdiction section?

MR. ROBERTSON: Of facts in law. Section 12(2) is the jurisdiction statute?

MADAM JUSTICE ABELLA: Yes.

MR. ROBERTSON: Could it satisfy the duty under section 12? I guess it would depend on what right is being asserted and what the project is. The bird on the wire, I don't know.

Under section 12 -- but what would be the initiative that was filed under section 12? What would start the application?

MADAM JUSTICE ABELLA: I guess my question goes more to looking at the authority of the NEB generally. We are focusing on section 58 properly because we're dealing with pipelines, but are we precluded from looking at the rest of the Act to see what the legislative intent was about the scope of its authority generally and does that encompass the possibility of considering these kinds of issues?

MR. ROBERTSON: Which is why I did a comparison between 52 and 58. In a 52 sense where you have a Board,

it's a mandatory Board hearing, right, so there is some consideration there in terms of making sure you have a Board hearing, and they then send that up to the Governor in Council who makes a decision. Again, under 58, no Board hearing, it's completely within the discretion of the Board to have that hearing, there is no Governor in Council so I'm not sure section 12 gets them to satisfying that they need to consult.

MADAM JUSTICE ABELLA: Would it be conceivable that an NEB decision could be made without a process of consultation with all affected parties and their assertions about what the possible implications are? In other words, you seem to be suggesting that they can consult widely, they can take into account the consequences of particular decisions, but we are carving out of that authority the ability to consider the interest and rights of indigenous peoples. Is that what you're saying?

MR. ROBERTSON: That's what I'm saying.

MADAM JUSTICE ABELLA: So read the legislation as excluding that capacity, even where the effect of their decision is to have an impact on those rights and interests?

MR. ROBERTSON: Yes.

MADAM JUSTICE KARAKATSANIS: Can I ask you this, would it make a difference if the Crown gave notice that it would be relying on the processes of a tribunal or

regulatory agency to either fully or partially meet its duty to consult, either to do it explicitly or through legislative interpretation or depending on the facts notice could be different, something different?

MR. ROBERTSON: I think it would make a big difference and one of the differences is -- so first of all the First Nation would know what was happening within the process, right, I think the Board itself would then know, which I'm not convinced the Board knew what it was doing in this sense, clearly from the factum they're asking for instructions as to what their role is, so yes, I think it would make a big difference. And then you could ask questions as to how is that going to happen? If you are putting that authority in the Board, right, then you can go and say, "Well, how is that going to happen?"

You don't go into a process, right, and then be told three months after the Board hearing is closed that, "Oh, by the way, that process you were just in, that was your consultation."

MADAM JUSTICE KARAKATSANIS: So in your submission, then, if the letters had been exchanged and the notice had been given before the hearing?

MR. ROBERTSON: It could have been exchanged before. Also incumbent on that would have been the Board itself could have provided some very clear instructions as

to, "This process that you're in is the consultation."

MR. JUSTICE BROWN: Of course the Board has to (off microphone).

MR. ROBERTSON: The Board has to -- yes, they have to know what their authority is, I would agree.

I have a ticking down time here and I have two other issues that I would like to get to.

MADAM CHIEF JUSTICE: (Off microphone).

MR. ROBERTSON: So the third issue, which really wasn't before the Federal Court of Appeal but it is now, the Crown -- and so this issue is essentially the Crown's duty to consult cannot be discharged through a process in the absence of direct Crown engagement.

So assuming that you don't have a delegated or an implied authority, there's a third test now where maybe if you're in the process, the Board process itself can satisfy that duty to consult. We submit there is no constitutional basis or precedent in law to support that argument.

And what I would take you to is the cases that my friends rely on with respect to a tribunal process being able to be relied upon to satisfy that duty. I think it's important to look at the facts of those cases, specifically *Beckman v. Salmon*, if you remember that case.

The issue there was someone wanted to get a

farming licence and so that was in the context of a land claims settlement and when that application went forward it went to a review board. Before it even went into consideration it went to a review board. That review board did an assessment, that assessment was then provided onto a Yukon Government group to do a further assessment, and then the application was set forward. So while that case stands for the proposition that, yes, you can rely on tribunal processes, in that case specifically you have a lot of Crown consultation before the application even gets initiated.

So could you rely on that tribunal process knowing that that vetting had already been done, that they had looked at the Land Claims Settlement Agreement, that they looked at the potential impacts? Yes. And we're talking about a farm licence, we're not talking about a pipeline.

And I would say similar, *Taku River*, the other case they rely on with respect to what tribunals can do. If you recall in that case, there were years of consultation with the Crown before the road was even considered so -- the mining licence, sorry, was even considered.

So I would say in both of those cases it's not a free-for-all, there is a reliance on that tribunal but there still is Crown participation.

MADAM JUSTICE KARAKATSANIS: I think what I

hear you saying is that you can rely -- the Crown can rely on Board processes, the question is whether it's sufficient or not and in those cases you say that it was and in this case you say it isn't.

MR. ROBERTSON: There was no Crown participation. There was no tribunal, there was no -- in terms of a tribunal that was set up with First Nations on the Board as in *Beckman*, right, you had First Nations participating in that Board. The Board was a creature of the land claim.

Further to that, this Court has said that -- and this is with respect to the third issue -- consultation must be meaningful. 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. Consultation means something more than just procedural fairness.

And if you look at the recent case, the *Gitxaala* case, if you look at what was stated in terms of the majority's decision:

> "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."

This case at its core is really about Crown and indigenous relationships and I would suggest this Court has a role in defining what that relationship is. We clearly need some direction. I think if there's one thing the parties can agree upon it's we need some clarity -- all parties need clarity, the First Nations, the Board, the proponents -- and the overriding objective here obviously is reconciliation and to achieve reconciliation would be a benefit to all Canadians.

I would just like to touch upon the last issue I have and that's the remedy in this case, in the event that you do grant the appeal.

So what is the appropriate remedy in the event this Court allows the appeal?

A remedy for a constitutional breach must recognize and respect the significance of underlying rights. The Crown in this case breached its duty by failing to consult, the Board breached its duty by failing to consider the adequacy of the Crown's consultation and the result is an unconstitutional decision to approve the application under section 58 of the *NEB Act*. We submit that the only appropriate remedy in the circumstance would be to quash the decision of the Board.

MADAM JUSTICE ABELLA: Can I just ask you one -- are you finished your submission?

MR. ROBERTSON: No.

MADAM JUSTICE ABELLA: Oh, go ahead. I'll wait.

MR. ROBERTSON: No, no, ask. Go ahead.

MADAM JUSTICE ABELLA: It's a technical question.

MR. ROBERTSON: Okay.

MADAM CHIEF JUSTICE: Just looking at the beginning of the Board's decision, it notes that 178 people -- 178 applicants sought permission to participate, 171 made it, including the Chippewas, your clients.

MR. ROBERTSON: Yes.

MADAM JUSTICE ABELLA: My question is: Did they make representation that the Board had no jurisdiction to consider the nature of the consultation process or to engage in this process at all until a decision had been made by the federal government?

MR. ROBERTSON: Until the Crown consulted.

MADAM JUSTICE ABELLA: Until the Crown had consulted.

MR. ROBERTSON: Yes. Yes, there was. I can get those for you, they are in the transcript. And, yes,

that was plainly put before the Board in oral argument.

MADAM JUSTICE ABELLA: A request that the proceedings be stayed?

MR. ROBERTSON: A request that the Board -- actually the request was the Board should be contacting and requesting that the Crown show up.

MADAM JUSTICE ABELLA: But they did participate fully, notwithstanding --

MR. ROBERTSON: Yes, they did.

MADAM JUSTICE ABELLA: Okay.

MR. ROBERTSON: Yes.

MADAM JUSTICE ABELLA: So I just remembered at the beginning you said the Chippewas to this day weren't consulted, but they -- that's in connection with your assertion that the Crown should have gotten involved, but they were full participants at the NEB process?

MR. ROBERTSON: Yes. They provided oral argument, they provided a traditional land-use study, they provided studies with respect to the integrity, they were fully involved in the Board process.

MADAM JUSTICE ABELLA: Okay. And if I'm right, just looking out what you submitted to us at Tab 2, that included their submission that there were concerns about the impact on constitutionally protected rights?

MR. ROBERTSON: Yes.

MADAM JUSTICE ABELLA: So they did make that assertion before the Board?

MR. ROBERTSON: Absolutely.

MADAM JUSTICE ABELLA: Okay, thank you.

MR. ROBERTSON: Definitively.

Subject to any further questions, those are my submissions.

MADAM CHIEF JUSTICE: Thank you.

That then takes us, I think, to Mr. Walsh.

--- Pause

(1029) **MADAM CHIEF JUSTICE:** Yes...?

ARGUMENT FOR THE INTERVENER (36776)

MOHAWK COUNCIL OF KAHNAWÀ:KE

(1029) **MR. WALSH:** Chief Justice, Justice's on behalf of the Mohawk Council of Kahnawà:ke I will use my time to address three main issues, the first being the importance of the nation-to-nation relationship and of conducting an explicit duty to consult assessment; the second being the benefits of the NEB's role as a facilitator of Crown consultation; and the third point I will explain why it's important for this Court to provide guidance to the NEB on the legal test that it should apply to assess Crown consultation.

As the appellants rightfully point out, *Carrier Sekani* establishes that the NEB had the jurisdiction to

assess adequacy of the Crown's duty to consult and accommodate. The NEB had the authority to determine constitutional questions and to assess the application based on the national public interest. This encompasses the Aboriginal consultation element.

In addition to the reasons advanced by Justice Rennie and the appellant as to why the NEB was required to exercise this authority, the MCK invokes the importance of the nation-to-nation relationship. The nation-to-nation relationship, in our view, is always at stake in fulfilling the duty to consult since it is the cornerstone of reconciliation. This relationship informs both the procedural and substantive components of the duty.

From a procedural standpoint this relationship means that both parties must engage in good faith dialogue, in particular when indigenous nations identify outstanding concerns to discuss with the Crown.

Furthermore, this relationship dictates that the Crown must demonstrate flexibility in adapting consultation procedures when indigenous nations identify limitations to establish processes.

From a substantive standpoint there are certain concerns that can only be substantially addressed through direct Crown-indigenous consultation. Building on *Carrier Sekani* and United Nations Declarations on the Rights of

Indigenous Peoples, indigenous rights and perspectives pertaining to high-level strategic decision-making must be fully considered as part of assessing whether projects like pipelines are in the national interest.

We also raise certain more specific examples in our factum at paragraphs 29 to 32 and 34 on areas that we felt should have been subject to direct Crown-indigenous engagement.

Justice Rowe had asked earlier if there were any outstanding issues other than the potential of a pipeline rupture that were at issue here. I can provide one example. The issue of the calculation of the upstream and downstream greenhouse gas emissions related to the project approval were never assessed by the Board, because the Board said that it was not within their mandate to regulate this aspect. This is one area where perhaps direct indigenous and Crown consultation could have addressed a very important issue.

Now, the issue of whether or not that issue was properly within the scope of consultation on that project should have at least been determined and subject to direct Crown consultation, but no such consultation occurred.

Given the examples we provided in our factum, we reject the assertions that there were no valid outstanding potential project-related concerns or

accommodation measures that should have been subject to direct Crown-indigenous consultation. At an absolute minimum -- and this relates back to I believe Justice Abella's question of, "Well, if you receive a letter at the beginning of the process indicating that the Crown is going to fully rely on this NEB process, you know, if that alleviate some of the concerns" -- I believe it doesn't. I mean at a absolute minimum, even if one takes the view that the duty to consult was at the lower end of the spectrum, the Crown could not determine that there were no outstanding issues to be discussed and considered outside of the NEB process without first engaging in some degree of meaningful consultation and dialogue with the appellant.

MR. JUSTICE BROWN: Can I ask you about nation-to-nation where on one hand we have the Crown but on the other hand we have multiple nations.

MR. WALSH: Yes.

MR. JUSTICE BROWN: What does that look like? Is it one-on-one, one-on-one, one-on-one or can you group the nations together? How does that work?

MR. WALSH: Certainly. I would say that you can't group the nation-to-nation relationship into one concept that applies to all nations, especially if it's invoked as a discrete right by a particular community.

MR. JUSTICE BROWN: Right.

MR. WALSH: And each community has the right to define what that means for them depending on, you know, the legal structure and history of the community.

What I would say, however, is that the concept of nation-to-nation as we are presenting it before you today is really that the nation-to-nation relationship is a relevant factor to consider in assessing whether the reconciliation process and the promise of section 35 has been achieved through a particular consultation and an accommodation process.

And we have certain cases in the past that this Court has decided that indicate there are elements of this nation-to-nation relationship that are integral to the duty to consult. For example in *Haida* this Court said that the promise of section 35 is that of rights recognition and that:

> "This promise is realized and sovereignty claims reconciled through the process of honourable negotiation."

And it's on that basis that we feel that the nation-to-nation relationship is part, an integral part, of the duty to consult and accommodate.

I also want to expand a little bit on the argument that was raised by the appellant on what exactly did the Board assess and why was it problematic.

Well, the NEB purported to assess potential project impacts on Aboriginal rights and interests.

MADAM CHIEF JUSTICE: You are aware that it's really not appropriate for an intervener to talk about whether the NEB decision was right or wrong, you will confine yourself to more general comments.

MR. WALSH: Okay. I can do that.

I guess maybe just speaking more generally about the process that was followed, I would like to refer you back to the quote that we put in our factum from *Graben & Sinclair*, which said basically that one of the problematic aspects of the NEB business in general was that it didn't assess potential adverse effects within the meaning of *Haida* or with respect to any known legal standard nor treated constitutional obligations to consult as relevant to the approval.

MADAM CHIEF JUSTICE: (Off microphone).

MR. WALSH: Okay. Maybe I will move on to my next point, which is the value that we see in having the *NEB Act* as a facilitator of Crown consultation. That was in the first section of our factum.

We don't see the NEB as irrelevant to ensuring that the Crown's constitutional duty to consult and accommodate is discharged. To respond to some of the questions before, we do acknowledge -- and we acknowledge it

in our factum -- that there is some overlap between the Crown's duty and the NEB's process.

However, we see great potential for the NEB to request evidence early on and then throughout the process on the outstanding issues that cannot be dealt with by the NEB process and on how the Crown intends to address these issues moving forward. We believe that this will result in a more transparent identification of issues and dialogue on what the respective NEB and Crown roles and responsibilities are during the project approval process.

Furthermore, we firmly believe that reconciliation can best be achieved through a nation-to-nation dialogue as opposed to solely through conditions imposed by a court or administrative tribunal.

As outlined above, we feel that direct Crown engagement was a prerequisite to meet the requirements of section 35 in this case, so even if some of the inconvenience foreseen by Canada did materialize, the delays associated with these would be justified to preserve the honour of the Crown. As acknowledged by Justice Rennie, this constitutional imperative trumps any inconvenience to the parties.

Secondly, we submit that if all parties act in good faith and with transparency there would be a limited duplication of consultation. Early identification of issues

that must be dealt with through direct Crown engagement would only be beneficial. It would eliminate a lot of confusion, help the parties manage their respective expectations and provide greater certainty to all parties involved.

Now, the suggestion that was made at the Federal Court of Appeal level that indigenous nations should simply wait and then litigate if unhappy with the final result is contrary to the goal of reconciliation, in our view. This leaves assessment of the Crown's duty inaccessible to all indigenous nations except those with the financial means to file legal proceedings against the Crown after a decision has been made and rights have already been impacted.

I would just like to touch on our last point.

In our factum we argue that this Court, should it quash the order and send the application back to the NEB for determination, that this Court should provide guidance on the applicable legal test for assessing whether the duty to consult and accommodate has been met.

The reasons for this request are simple. Pipeline projects in Canada are extremely controversial and indigenous and public confidence in the approval process is low. It is a matter of public importance, in our view, that the decision-making process regain public trust. The MCK

submits that any additional clarity or guidance that the Court can provide is welcome. Furthermore, providing clarity as to the legal test that will be applied by the NEB also reduces the odds that the NEB's redetermination of the issue of Crown consultation will be subject to additional appeal, thus adding to the delays and uncertainty related to the project.

In closing, the MCK's position on this matter is that the NEB had the legal obligation as the final decision-maker to assess whether the Crown met the duty to consult prior to issuing an order approving the project. Moreover, the NEB was not delegated the Crown's duty --

MADAM CHIEF JUSTICE: This is not what goes on in this case. You're not talking about this case.

MR. WALSH: Pardon?

MADAM CHIEF JUSTICE: You're talking generally, are you, rather than the result in this case.

MR. WALSH: Right. Okay, yes.

We believe in this case -- sorry, we believe that more generally --

--- Laughter

MR. WALSH: -- issues pertaining to whether or not they had the duty to assess Crown consultation or not and issues pertaining to whether or not they had a duty to discharge the consultation or not are reviewable on the

standard of correctness since these are threshold issues.

MADAM CHIEF JUSTICE: Correctness.

MR. WALSH: So we believe -- we would like to insist, finally in the end, that the importance -- the importance of the nation-to-nation relationship as a reason why the NEB was obligated to exercise the assessment.

MADAM CHIEF JUSTICE: Thank you. Thank you very much.

MR. WALSH: Thank you.

(1039) **MADAM CHIEF JUSTICE:** Mr. Frame.

ARGUMENT FOR THE INTERVENER (36776)
MISSISSAUGAS OF THE NEW CREDIT FIRST NATION

(1040) **MR. FRAME:** Good morning, Madam Chief Justice, Justices.

If we leave you with one thing from our submission today we would like it to be this: Reconciliation needs to happen on the territory, in the territory and with an understanding of the territory of the impacted First Nations and the traditional territory of the appellants and my client the Mississaugas of the New Credit are among the most heavily developed parts of southern Canada, they are in southern Ontario's Golden Horseshoe. This is a territory that has become urbanized and industrialized; it's not pristine wilderness. It's Toronto and it's Hamilton and it's London and Brantford and the

Gardiner Expressway. It's a territory that's crisscrossed with pipelines, not only Line 9, the pipeline subject to the appeal today, but also Enbridge's Line 7, Line 8, Line 10, line 11, among others.

For consultation to work, for engagement to mean something, for real reconciliation to occur the specific circumstances and the contemporary realities of the impacted First Nation matter.

Reconciliation is about building renewed relationships for the future, but we can't move forward if we don't know where we have been. We can't move forward if we don't know where we're going and we can't move forward if we don't know where we are today.

The appellant and my client, as with so many First Nations in Southern Ontario, have treaty relationships with the Crown extending back to the 18th century. Those treaties and these peoples' relationship with the Crown are premised on what you, Chief Justice McLachlin, referred to in *Van der Peet* as the "*Grundnorm* of settlement in Canada". That fundamental understanding, that *Grundnorm*, was that Aboriginal people could only be deprived of the sustenance they drew from their lands and their waters by solemn treaty with the Crown on terms that would ensure to them and to their successors a replacement for the livelihoods that their lands and waters provided them.

Respecting that fundamental understanding is as important now as it was when settlement first occurred, but massive and relentless development has fundamentally and irrevocably changed the appellant's and my client's territories and it has transformed how these nations can use and be sustained by their traditional territories.

But that said, it hasn't severed these people's relationships with their lands. They need to find their futures, they need to build futures for themselves and for their children, they need to find prosperity here in that place, in their traditional territories as they are now. And this Court has identified the duty to consult as a key tool, perhaps as the key tool to ensure that happens, to ensure that we don't repeat the mistakes of the past, to ensure that First Nations don't once again find themselves watching helplessly as their lands are changed and their livelihoods are lost forever.

We submit that it's critical that any consultation process must, at first instance, consider the history, consider the context and consider the contemporary reality of the First Nation, its traditional territory and its relationship with the Crown.

What we submit was needed was a consultation process that was mindful of and informed by these contemporary realities. We needed a process that, as

Justice Binnie wrote in *Mikisew Cree*, took account of the rights, the interests and the ambitions of these people today, in the land that they have now, as it is now. What was needed was an understanding of, again, as Justice Binnie referred to it in *Mikisew Cree*, what was needed was an understanding of the context.

We submit that this regulatory process failed to appreciate and reconcile the rights and interests and ambitions --

MADAM CHIEF JUSTICE: You are on the merits.

MR. FRAME: Sorry.

We submit that any regulatory process that fails to appreciate the rights, interests and ambitions of an Aboriginal people, that fails to consider any discussion about the replacement of their livelihoods that have been lost, that fails to consider how they will sustain themselves in their territories going forward is fundamentally flawed.

Now, we submit that First Nations have to know with whom they can consult, not only about specific biophysical impacts but also about the intent of the treaties, intent of their -- where their relationship with the Crown is going and how they would build futures for themselves in their territories, particularly when, as with my client, their territory has been so fundamentally altered

by development and urbanization. We submit that any consultation process that doesn't account for this history, that doesn't account for these relationships, that doesn't account for the facts on the ground as they exist is inadequate and is fundamentally flawed.

Particularly we submit that what can't happen is what happens all too often in regulatory processes around the country, what can't happen is the limitation of the discussion of the engagement and of the consultation to specific biophysical impacts or to issues only of harvesting and site-specific land rights. We submit that a process is fundamentally inadequate if it sees consultation only as a discussion of harvesting, only as a discussion of traditional site-specific land use. Aboriginal people are individualized, their histories are unique, their treaty relationships are unique, their rights, their interests and their ambitions are unique, and the way in which they will use and sustain their traditional territory as it is today is unique. And, in our submission, any process which relies on a predetermined and generic set of categories, looking at heritage sites, looking at harvesting sites, looking at traditional land use and stopping there is insufficient.

We submit that what cannot happen in a consultative relationship between the Crown or a regulatory process is an approach that treats Aboriginal people, treats

their rights and treats their interests as museum pieces, understands them through only a single myopic lens. Aboriginal people must be treated as the dynamic and complex polities that they are, struggling to survive and thrive in an increasingly complex world and, especially in Southern Ontario, an increasingly complex and transformed territory.

We submit that not only have the territories of my client and the appellants been transformed by centuries of urbanization and development, but they are being transformed again today. But in the last few years alone section 58 of the *NEB Act*, the provision at issue in this appeal, has been used not just in one case or two, but in case after case after case as the tool the pipeline proponents use to redevelop, to repurpose, to expand pipelines throughout my clients' traditional territory and throughout Southern Ontario.

Section 58 is essentially causing death by 1,000 cuts. The question was asked earlier today: Are the effects that significant? Is it a bird on a wire? Is it really just the risk of a spill? And I think that that's the problem with the way section 58 is being used and that's the problem with how all of this is playing out, is that each discussion is limited to that bird on that wire. Each discussion is limited to, "Well, this is only a repurposing, this is only a flow reversal, this is only 2 kilometres in

length, but for the people who live here, for the people whose traditional territory this is, for the people who have been in treaty relationships with the Crown for hundreds of years, that's not the experience.

A single section 58 application for a 1.7 kilometre stretch isn't the reality, it's Line 9 and Line 7 and Line 8 and Line 10 and Line 11 and it's section 58 application after section 58 application, but because of the way the *NEB Act* is structured, because of the way this provision is being understood and applied we find ourselves in a situation where there are no high-level strategic discussions taking place.

There is no high-level consultation about what do pipelines mean for the First Nations in Southern Ontario, rather, we are having this conversation: Is this one really a big deal? What could possibly happen with Line 9? What could possibly happen with this portion of Line 10? But we submit that that fundamentally misapprehends what the real issue is. The real issue is an ongoing and fundamental transformation of the territory of these indigenous people, territory which is already under tremendous stress and which is now finding itself transformed once again.

MADAM JUSTICE ABELLA: Could you just help me, I don't want to take you to the merits, but I'm looking at the Board's decision, you made representations -- your

clients made representations about environmental sensitivity, the risk of a leak, the effect on wildlife habitat, land use, et cetera. I'm trying -- as did other groups, and that was the Board specifically noted that those representations had been made.

My question to you is: What is it that you're saying is missing that you did not have or that someone representing an indigenous community does not have the opportunity to do in an NEB hearing? What is missing? What should have been -- what didn't you get a chance to say and what should have been considered?

MR. FRAME: Sure. Thank you, Justice Abella.

MADAM JUSTICE ABELLA: Generally.

MR. FRAME: I understand. And I'm not speaking to the merits.

--- Laughter

MR. FRAME: To give you an example, economic participation. This is a matter that was specifically identified in the correspondence between the appellants and the Crown, that they wanted to talk about how they could economically participate in the developments -- this and others, but the developments going on in their traditional territory. This gets back I think to that language from *Van der Peet* that we talked about earlier, finding the replacement for the livelihood that has been lost.

Quite frankly, nobody in Southern Ontario is making a living by trapping these days.

MADAM JUSTICE ABELLA: So my question is, you are making very important policy statements generally about what the implications are of pipelines, my question is, looking at the legal issue we have to grapple with, which is who needs to consult and about what, given that there is a process that the Legislature has put in place for the NEB, what are we talking about?

MR. FRAME: There's a process. You are correct, Justice Abella, there is a process and obviously we have been talking about that process all morning, but we would submit that that process as it is currently being implemented and as it is currently being conceived is entirely inadequate.

If you look to the NEB's decisions, again they talk about harvesting, they talk about site-specific land use, they talk about biophysical impacts, but they don't talk at all about treaty relationships.

And again, I would suggest that certainly the indigenous interveners in this case, and speaking in a general way, brought these issues forward. So again, treaty relationships, sustaining themselves on their territory, economic participation, I think these are all issues that seem to have fallen beyond the scope of the Board's process.

MADAM JUSTICE ABELLA: Thank you.

MADAM CHIEF JUSTICE: Thank you.

MR. FRAME: Thank you.

MADAM CHIEF JUSTICE: The Court will take its morning recess.

--- Upon recessing at 10:51 a.m.

--- Upon resuming at 11:04 a.m.

(1104) MADAM CHIEF JUSTICE: Mr. Crowther...?

ARGUMENT FOR THE RESPONDENT (36776)

ENBRIDGE PIPELINES INC.

(1104) MR. CROWTHER, Q.C.: Thank you and good morning, Justices. You should have available to you the condensed book of Enbridge Pipelines Inc., an outline of my oral argument is included under Tab 1.

You will know from your review of the factums that Enbridge takes the position that when the NEB is operating under section 58 of the *National Energy Board Act*, as it was in this instance, it has the power to itself carry out Aboriginal consultation. In Enbridge's submission, this jurisdiction is implicit in the Board's statutory role and remedial powers. This aspect of the Enbridge argument is distinct from those of the other respondents and provides the context for my submissions.

Subject to your questions I have four main points to make. They are:

first, the Aboriginal consultation that was completed in this case was at least adequate and the honour of the Crown was upheld.

Second, Aboriginal consultation carried out by a Tribunal such as the National Energy Board should not be viewed as or feared to be inferior to consultation conducted by a different government actor.

Third, no separate so called Crown consultation or other capital "C" Crown involvement is necessary if, as here, the Tribunal in question is empowered to carry out Aboriginal consultation.

And fourth, the NEB has been empowered by Parliament to carry out Aboriginal consultation when it is operating under section 58 of the *National Energy Board Act*.

The paragraph under the last heading in the argument outline highlights some of the important factual distinctions between the two appeals that are before you today. I will also speak briefly to those, time permitting.

But before turning to my four main points I will take just a moment or two to address certain matters arising from what we heard this morning.

You heard from the appellant that there was no strength of claim analysis completed by the National Energy Board in this case. In my submission a strength of claim analysis is unnecessary. The principal utility of a

strength of claim analysis is to assist the consultor in determining what depth of consultation is required in any particular case. These matters are addressed at paragraph 109 of the Enbridge factum and I won't bother repeating those submissions.

You also heard from the appellant's counsel that the National Energy Board failed to consider the potential impacts of the project on the rights of the appellant and the other Aboriginal groups. If you turn to Tab 7 of the condensed book, and to the page that is numbered 115 at the top, this is page 98 of the National Energy Board's Reasons for Decision. There is a heading about one third of the way down the page, "Impacts on Aboriginal Groups", and I will just -- because I think this is important I will take your time to read it.

> "The Board considered all the relevant information before it, including information regarding the consultation undertaken by Enbridge with Aboriginal groups, the views of Aboriginal groups in their evidence and final arguments, Project impacts on the rights and interests of Aboriginal groups, and proposed mitigation measures."

You also heard from Appellant's counsel this

morning, at least as I understood him, that Aboriginal consultation may arise in the context of section 52 of the *National Energy Board Act*. I will only remark here that if it's there it's implicit in section 52 as well. There is certainly no express mention made of it in section 52.

The appellant's counsel submitted this morning that one of the principal failings was that there was no consideration of a stewardship -- or co-management agreement I believe is how he termed it -- but there was no mention of any such stewardship or co-management agreement in either the appellant's evidence or the argument that it made to the Board and, in my submission, it was certainly open to the appellant to have argued to the Board, for example, that the project should not be allowed to proceed without such agreements first being entered.

MR. JUSTICE ROWE: It's interesting you say that because is it within the competence of the National Energy Board to deal with such matters?

MR. CROWTHER, Q.C.: I would submit it certainly is within the Board's competence. It is tasked -- it is required to consider all matters of the public interest and in weighing a project, in assessing an application before it, if it was to hear from an Aboriginal group that the potential impacts on the project were so significant as to require either mitigation or

accommodation, and the necessary accommodation might be for example the stewardship or co-management agreement, then I would certainly suggest it's within the purview of the National Energy Board to take that public interest -- that aspect of the public interest into consideration. Certainly any project that would proceed in breach of section 35 rights would not be in the public interest, in my submission.

There was a discussion earlier about who is the Crown and we know that the appellant argues that the Crown actively chose to not participate in the NEB process in this case. It does not define the Crown, although it seems that it must mean some part of the executive branch other than the National Energy Board, the appellant does not say which. And you also heard the appellant say, or as it said in its factum -- it's a contradictory argument actually because the appellant argues that the NEB decision constituted government conduct, and here I'm quoting, "that triggered the duty to consult".

But in my submission the Crown versus not the Crown distinction is at best confusing. Remember that in paragraph 16 of *Haida*, which is included under Tab 10 of the condensed book, this Court referred to the government's duty to consult, it certainly also referred to the Crown's duty to consult, but that seemed to me to be a shorthand

expression for the government.

And in my respectful view that is a clearer and more helpful construct, especially since it avoids the conceptual difficulties that arise from a formalistic who is the Crown inquiry in the context of any specific consultation.

Turning to the last of my preliminary points, the Mississaugas of the New Credit First Nation, did participate in the National Energy Board hearing, as did the Mohawk Council of the Kahnawà:ke. The Enbridge reply factum discusses the positions that they advanced to the Board and also the fact that they did not avail themselves of the opportunity to comment on the issues list. I won't repeat what's said in the Enbridge Reply factum on these points.

So turning then to my argument as outlined in the condensed book. I will begin by offering the observation that despite what the appellant and some of its supporters contend, this most certainly is not a case of inadequate consultation or of running roughshod over Aboriginal rights. More than reasonable efforts were made to inform and to consult the appellant.

And consultation was no mere afterthought. Quite the opposite. For instance, the Board wrote to the appellant in February 2013, at the very outset of its process and even before it had issued its hearing order, to

advise of the Enbridge application and that the application would be considered in a public hearing. The appellant was informed of the Board's Participant Funding Program and that one of the purposes of the public hearing would be to allow expressions of views as to how the project may affect Aboriginal rights. The appellant was encouraged to contact Board staff if there were any questions about participation in the process and was alerted that one of the NEB Aboriginal engagement specialists would be contacting the appellant directly to determine its interest in receiving such information.

Consultation with Aboriginal groups and the potential impacts of the proposed project on Aboriginal interests were included in the list of issues when the hearing order was published by the National Energy Board later in February 2013 and the appellant's participation in the NEB proceeding was focused on those matters.

In my submission, the record and the NEB's Reasons for Decision clearly show that the appellant was afforded every reasonable opportunity to formulate and express its concerns about potential adverse impacts on its rights and that those concerns were appropriately addressed by the Board before it's section 58 order was issued.

The importance of the duty to consult is undeniable, however the appellant and its supporters seem to

ignore this Court's direction that the duty not be viewed as an end in itself. This error leads to their insistence that consultation must proceed only in certain ways, a topic to which, time permitting, I propose to return shortly.

According to the guidance of this Court, for example as expressed in *Little Salmon*, the relevant excerpts of which are at Tab 2 of the condensed book, the duty to consult plays a supporting role and is not to be viewed independently from its purpose, which is the promotion of reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship. It is the substance of consultation that matters in any case and not its form.

The appellant asserts that the Board's process fell far short of protecting and accommodating the appellant's rights, but I submit that by any fair and reasonable measure, and having regard for the requirements as summarized in paragraph 64 of *Mikisew Cree*, found at Tab 4 of the condensed book, the consultation that the Board carried out was at least adequate and all the more so in light of the very limited nature and scope of the Enbridge project.

The risk of spills from the pipeline and their potential impacts were what concerned the appellant about the Enbridge project. You can see this from the appellant's

factum. For example, at paragraphs 57, 58 and 62, and from Chief Miskokomon's affidavit, excerpts of which are included at Tab 6 of the Enbridge condensed book.

Spill risk and the potential impacts of spills were also discussed at length in the appellant's argument before the Board, which can be found at Tab 10 of Volume 6 of the appellant's record. These concerns about the risk of spills and their potential impacts were squarely addressed by the Board and its Reasons for Decision.

I have already taken you to Tab 7 of the condensed book, it also includes excerpts from the Reasons for Decision, the chapter that focuses on Aboriginal matters, which is where I took you, but also the chapter that focuses on pipeline safety and integrity. If you take a moment to review those excerpts, you will see that each component of the risk of spills and the specific potential sources of the risk were assessed in detail.

You will find in the pages numbered 104 and 105 at the top, just back a few from where I took you earlier, the Board's explanation of its approach to Aboriginal consultation, and in my submission that explanation comports exactly with what occurred in this case.

It should also be kept in mind that the Board is not merely a passive decision-maker in relevant respects. To the contrary, it actively seeks and obtains information

about the concerns that Aboriginal groups may have regarding the project applications that it considers. For instance, in addition to providing the extensive information mandated by the NEB Filing Manual, which is at Tab 25 of the Enbridge authorities, Enbridge responded to dozens of formal information requests from the Board and many of those -- many of those questions related to matters of specific concern to the appellant.

I submit that it is also noteworthy that although the appellant did not do so, several participants in the NEB hearing availed themselves of a further opportunity to participate in the decision-making process by commenting on draft approval conditions for the Enbridge project. Revised, different and additional conditions were proposed and those recommendations are reflected in the 30 conditions that were attached to the section 58 order that the Board ultimately issued.

If I can turn to my second main point. Given the arguments that are advanced by the parties opposite, it must be mentioned that the idea that a regulatory tribunal can have the power to carry out Aboriginal consultation is of course not a revolutionary one, having been expressed by this Court more than six years ago in *Carrier Sekani*. The pertinent passages from that decision will of course be familiar, but they are nevertheless included under Tab 8 of

the condensed book.

Notwithstanding that the possibility of a Tribunal as consultor would not be a new concept in Canadian law, running as a common thread through the arguments of the appellant and its supporters is the assertion or at least the implication that Aboriginal consultation completed by such a body is inherently inferior to one conducted by some other government actor like a Cabinet Minister for instance. With respect, that is simply not so and there is no reason that consultation by an entity like the NEB should be either regarded as or feared to be second rate in any sense. The Court has established the criteria by which adequacy of consultation is to be judged and those same criteria apply and must all be satisfied no matter the consultor. Whether it be the Governor in Council, a Minister, a senior bureaucrat, a regulatory tribunal or someone else, the courts are available to decide, if necessary, the adequacy of consultation in any particular case. In fact, instead of being inferior an impartial expert tribunal like the NEB, with structured, transparent and evidence-based procedures, can provide precisely the kind of forum in which consultation can be productive and reconciliation thereby promoted.

Under the Board's procedures, which are discussed at paragraph 54 of the Enbridge factum, concerns

about potential adverse impacts on Aboriginal rights can be formulated, expressed and appropriately taken into account in the relevant decision. And further, since the *Haida* duty to consult framework hinges in material part on an adverse effects determination, the expertise of the Board to assess the risks of such effects is highly relevant, for example, as mentioned earlier, the potential adverse effects on its rights that the appellant alleges are rooted in concerns about spills from the pipeline. In my submission there can be no doubt that the Board is best situated to decide the complex engineering, safety and environmental issues that comprise a proper assessment of such risk. It is therefore the government actor most capable of properly considering and appropriately responding to the appellant's concerns.

I begin my third point, that no separate consultation is required, by emphasizing that when, as here, a regulatory tribunal is empowered to carry out Aboriginal consultation it can fully discharge the duty without involvement from another executive government actor. Separate consultation processes need not be created.

That principle was established early on by this Court, including in *Taku River* as highlighted in the excerpts included at Tab 9 of the condensed book.

As I mentioned a moment ago, the appellant and several of its supporters argue that Aboriginal consultation

must only proceed in certain ways or by certain government actors. For example, the appellant insists on "direct involvement from Canada's side". And similarly the appellant argues in its reply factum to the intervener factums that there would be profound implications for indigenous peoples if this Court were to find that the NEB is empowered to carry out Aboriginal consultation. There is no explanation as to what those implications may be, apart from the warning that confusion for First Nations communities would be amplified "where the Crown offloads its consultation obligations entirely to a Board". But in my submission, all of these arguments seek to elevate form over substance and to impose unnecessary and impractical separations between so-called Crown consultation and regulatory processes.

Moreover, requiring that duplicative and less expert processes be used to gauge potential impacts on Aboriginal groups or to determine appropriate safeguards and accommodations of those rights is simply unworkable. I'm not suggesting that the protection of section 35 rights should be sacrificed for administrative convenience, nor that the Board's jurisdiction to carry out consultation should be assessed solely as a determination of expedience or cost-effectiveness for governments, project proponents and Aboriginal groups, but administrative convenience and

practicality are not unimportant when one considers the realities facing modern governments in this country and they are worthwhile objectives so long as they can be achieved in conjunction with meeting the duty to consult, as they can be under section 58 of the *NEB Act*.

MR. JUSTICE MOLDAVER: Could I just ask you this question, to the extent that the Board is of the view that an accommodation may be warranted but it does not feel that it has the power to do so, I take it that your position would be that they will not approve but they will turn it back to the government and ask for the government's opinion on this. And when I say "government" you know what I'm talking about, but -- or do you say that if they have the right to do the consultation they have the right to make any accommodations that they might feel are necessary? I'm just a little bit confused about this.

MR. CROWTHER, Q.C.: Well, certainly in Enbridge's submission the Board has broad remedial powers and they are identified at paragraph 53 I believe it is of the factum, but if there were to be a case -- and I must confess it's difficult for me to conceive of one where there wasn't going to be a concern about impacts on Aboriginal rights, recognizing that it must causally linked to the government conduct in question, but if there were to be, in some case that I'm unable to conjure at the moment,

something that required accommodation that might be beyond the Board's jurisdiction, then the Board would be, I think, in a position to not approve the project and what steps would follow after that I guess would be up to both the project proponents and the Aboriginal groups in question.

As my fourth and final principal point, and as I have already noted, Enbridge says that the Board's jurisdiction to carry out Aboriginal consultation is implicit in its statutory role and remedial powers, including its authority to attach approval conditions as we just discussed, its power to reject a project and the other important powers enumerated in paragraph 53 of the factum.

In the words of *Carrier Sekani*, the NEB's structure and its processes are capable of dealing with the potential impacts of its decisions on Aboriginal interests and it has the powers necessary to effect compromise. The Board is able to do what it is asked to do in connection with the consultation. It is not, as some parties have argued in this appeal, boxed in by its legislation.

And in the small amount of time left available to me, may I speak briefly just to the factual distinctions between this appeal and the one that you will hear later today. Certainly the Board was operating under two different statutes, but to name only a few of the other important differences.

First the nature and scope of the projects themselves are obviously and significantly distinct.

In our case the NEB convened a formal public hearing which differs in substance from the community meetings that took place in Clyde River.

The third important difference is that the appellant was permitted to and did file written evidence in the Enbridge case. That evidence specifically articulated what the appellant considered to be the potential adverse impacts.

And the other factual distinctions are summarized under that particular heading in the outline of my oral remark.

Thank you. Those are my submissions.

(1130) MADAM CHIEF JUSTICE: Thank you very much, Mr. Crowther.

We will turn to Mr. Southey.

ARGUMENT FOR THE RESPONDENT (36776)

ATTORNEY GENERAL OF CANADA

(1130) MR. SOUTHEY: Chief Justice, Members of the Court, it was honourable for the Crown to rely on the National Energy Board's extensive process of Aboriginal consultation and accommodation in this case. The Crown's reliance was honourable for three reasons.

First, the NEB is required to consult

Aboriginal parties early and fully in order to make a lawful decision that is consistent with section 35 of the *Constitution*.

Second, in this case, the Board fully heard and accepted for its consultative purposes the asserted Aboriginal claims of the appellants and other Aboriginal groups. The Board then carried out a comprehensive process of consultation that considered the appellant's concerns and accommodated them as far as was possible in the Board's decision.

Third -- and this speaks to Justice Moldaver's question of my friend a moment ago in another hypothetical case -- if the Board's jurisdiction prevented the Board from providing accommodation necessary in a matter, the Crown's duty to consult would require the Crown to do that, and if the Board were asked to withhold a permit until that discussion was had with the Crown, then the Board would do so.

In this case the Board concluded that the impacts of the project on the rights of the Aboriginal people would be minimal and would be mitigated by the requirements and conditions imposed on Enbridge.

MR. JUSTICE MOLDAVER: Could I just stop you there for a moment if I may? In terms of your friend opposite the first submissions that were made talking about,

well, what really are the rights here and the Board really isn't in a position perhaps to determine what really the rights are and that's critical because unless and until we know exactly what the rights are we don't know the nature and extent of the duty to consult and how deep, and so on and so forth, and the implications, and I just wanted your view on that.

If in fact -- first of all, does the Board have a duty or does it have the right to determine what the rights are -- I would of thought it would, but that may be wrong -- and if it gets that wrong, though, I guess that would be a reviewable error, it would be reviewed on a correctness standard because it would go to the nature and the duty and the extent of the consultation, and so on.

It's not a very well put question, but do you understand what I'm saying?

MR. SOUTHEY Yes, Justice Moldaver. The Board is a court of record, an administrative tribunal with the powers of a court, it can answer constitutional questions that are necessary for it to carry out its regulatory decision making. It has the power to evaluate asserted Aboriginal rights in order to determine for its consultative purposes the degree to which it's going to have to consider and accommodate within its regulatory jurisdiction. It's not determining the right finally or title, it's simply able

to hear, consider, recognize and then to take into account when it does what it's required to do constitutionally in carrying out its regulatory decision-making. So it is empowered to do that.

In this case it heard all of the rights that my friend read to this Court, it considered them, it considered them in the context of this project, which is the reversal of the direction of hydrocarbon product in a pipeline and the return to product that had been carried for 20 years, between 1977 and 1999, with the addition of a drag reducing agent. That was the project and it considered those in relation to all OF the claims that were asserted.

MR. JUSTICE ROWE: Now, you have referred to, quite properly, the ambit or range of the regulatory jurisdiction of the Board, I'm going to come back to a question that I asked before, "Who is the Crown and is not the Crown the NEB for the purposes of its jurisdiction"?

MR. SOUTHEY That is a question that has been a very difficult one to wrestle down because who is the Crown itself is a question that has puzzled authors and judges and the jurisprudence is full of tests relating to whether a public body has an agency relationship such that it's the Crown whether it's statute says that it's the Crown.

In this case the National Energy Board is not an agent of the Crown and in part that's because it carries

out quasi-judicial responsibilities in making decisions, but it is in emanation of the executive, it is subject to review by the court, it is subject to the requirements of the *Constitution* and it is part of the government generally. It is part of Canada when it does its regulatory responsibilities.

MR. JUSTICE ROWE: I disagree with you to this extent, it is not in emanation of the executive, is it not a creation of Parliament?

MR. SOUTHEY It is indeed a creation of Parliament, yes.

MR. JUSTICE BROWN: (Off microphone) then whomever -- I mean Parliament advises -- I mean to get technical about this, Parliament advises the Crown, Her Majesty, who enacts on the advice and consent of Parliament and if Her Majesty can be taken to have implicitly or explicitly delegated certain responsibilities to the NEB, does that not effectively or *de jure* make the NEB the Crown?

MR. SOUTHEY Effectively I think it is a possible argument and my friend's submission to you that there is an implicit delegation to the NEB is consistent with the effective nature of the NEB being like the Crown, but I think that the administrative law lawyers in the Department of Justice who might be watching this right now are probably chewing on their fingernails if I were to give

up this quasi-judicial tribunal as being technically part of the Crown. I don't think that that technically is so, but it is as close to being the Crown as one could possibly have a creation of Parliament.

MADAM JUSTICE ABELLA: Do we need to answer that in this case, Mr. Southey? I ask you that for this reason: In the letter that was written by the Crown they have talked about the responsible resource development plan which had been put in place in 2012 which was to deal with integrating Aboriginal consultation. And then on the second page it says "The government relies on" -- it doesn't delegate, it "relies on the NEB process to address potential impacts" and then concludes the letter by saying you were notified about this, you have -- we are giving you access to the funding which gives you the right to participate, but know that we are relying on the NEB.

So the question whether technically this is the Crown consultation it seems to be is different from whether or not the Crown is entitled, having put them on notice, to rely on the consultation that was undertaken by the NEB.

MR. SOUTHEY Indeed, Justice Abella. Our argument, in distinction to my friends, based on the more technical concerns we have about this identity of the Crown, is that there was reliance here, that the Crown's duty to consult was triggered and that the Crown has indeed made

very clear that it will rely on the processes of Aboriginal consultation and accommodation of the NEB in discharging the Crown's duty to consult.

And that takes me to a preliminary point that I wanted to make first and that was, Justice Côté, you drew to the intention of my friend that Environment Canada was involved in the proceeding and my friend said that's true, but that was only in relation of endangered species and other environmental concerns.

Then, Justice Karakatsanis, you said: Well, would it have made a difference if the Crown had stated in advance that it was relying on the consultation of the Board and my friend said it would make a big difference, but they didn't here. And, with respect, that's incorrect for two reasons.

First, generally -- and I don't have the exact reference for you, but if you make a note that in the Chippewas supplementary book of authorities there is a Crown consultation guideline and at page 17 on the right-hand side, top paragraph that guideline says:

> "Agencies, boards, commissions and tribunals, including the National Energy Board (NEB) and the Canadian Nuclear Safety Commission (CNSC) have a role to play in assisting the Crown in

discharging, in whole or in part, the duty to consult."

And then if you go -- and I'm sorry, do you have the Attorney General's condensed book? I think you do.

MADAM CHIEF JUSTICE: Yes, we do.

MR. SOUTHEY And this again, it's a green book and it has both titles of proceeding on the front, and if you go to Tab 6, it's an excerpt from the decision in *Clyde* and at page 78 or 21 of that decision, Justice Dawson in the bullet point at the bottom states:

"The Board understands that Crown consultation is an issue of interest to Aboriginal groups. In recent hearings, the Crown has stated that it will rely on the Board process to the extent possible to meet any duty the Crown may have to consult with Aboriginal groups."

Now, those are general statements that existed before this consultation, but if you go to Tab 12 of the condensed book, this is a response of Environment Canada, which did participate in this proceeding and so the Federal Court of Appeal's decision is incorrect in saying the Crown wasn't there, which was your point Justice Côté, but further to that if you go to this information request, which is behind the green page at Tab 12, a member of the Chippewas

of the Thames First Nation wrote an interrogatory and said:

> "Please explain why the Government of Canada has not filed evidence relating to aboriginal consultation or accommodation issues in the Line 9B proceedings?"

And the answer was given:

> "It is our understanding that, prior to making a decision under s. 58 of the *National Energy Board Act*, the National Energy Board carefully considers the evidence provided by the proponent, registered parties (including First Nations), and the Crown during the hearing process. The hearing process allows for Aboriginal consultations and, where appropriate, accommodation."

So Environment Canada is making clear that it is indeed relying on the process of the hearing and that was given September 12th, before the hearing that was the final arguments that were heard starting October 8th in Montréal.

And while I'm dealing with submissions made by parties and you have the condensed book open, my friend from the second intervener used as an example, when asked about what else might have been dealt with in the consultation, and he talked about upstream and downstream environmental

impacts of the pipeline. Now, those issues were first dealt with by the NEB and the NEB said, "We are dealing with this project and we aren't going to deal with whether oil sands should occur, whether people should be driving cars. We're not dealing with either of those issues at either end.

But the court's own jurisprudence speaks to this issue. So at Tab 15 is *Carrier Sekani*, of the condensed book again, and if you go to Paragraph 53, which is at the top of the page 67, several green pages over, this Court writes, halfway through -- sorry, paragraph 53:

> "...it confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue -- not to larger adverse impacts of the project of which it is a part."

And that is the full answer to my friend saying that there should be in the duty to consult this broader consultation about bigger policy issues. That's not what the duty to consult is supposed to do and I submit to you therefore that my friend was incorrect in saying that that was something that should a been delved into.

The approval sought by Enbridge, as I stated before, is relating to an existing operating pipeline that was built in 1976. The approval was to change the flow and the product in the pipeline back to the way it operated

between 1977 and 1999. The Board is the expert in the design and operation of pipelines and was best placed to hear and consider the Aboriginal concerns about the requested approval, as my friend submitted. In fact, the Board is very best placed to deal with issues that concerned Aboriginal parties might raise in relation to the operation of the pipeline. There is no other emanation of the executive in the Government of Canada that's better placed to consider and to accommodate concerns in relation to the operation of pipelines.

During the NEB hearing a representative of the Crown was asked why the Crown was not carrying out a parallel process of consultation and the Crown representative advised that the NEB hearing process allowed for that consultation. That's the excerpt that I just took you to.

The parallel process that my friends seek would not have assisted in the fulfilment of the Crown's duty to consult. The expert Board is best placed to do that.

Trigger. The Federal Court of Appeal decision, in our respectful decision, was not correct in its finding that the duty to consult was not triggered here because the Crown wasn't present. The regulatory approval of the National Energy Board is State action with the potential to affect Aboriginal rights and therefore the Attorney General

agrees that the Crown's duty to consult is triggered.

On the question of whether the Board can discharge the Crown's duty, the dilemma here is that in *Carrier Sekani* there was this requirement that there be some sort of statutory indication that the power to discharge exists and certainly there is no explicit statement in the *NEB Act* that the NEB itself can discharge the Crown's duty to consult.

Implicitly would it be a good policy for the Board to have that power within issues that are in its regulatory jurisdiction? Perhaps. The trouble in this area is that the rules apply to such an enormous variety of potential matters that it's very difficult to specifically say one thing that might work in this case and not in another, so the Crown says to only -- that where the Crown has indicated clearly, as it has, that it relies to the extent possible on an expert tribunal that's carrying out a regulatory responsibility, that having said that in advance, unless issues like the issue Justice Moldaver suggested in a hypothetical way arise, then the Crown's reliance is sufficient to discharge that duty based on the consultation -- the process of consultation that the Tribunal carries out.

I was going to lay out the extensive consultation that the Board gave in this process, I think my

friend indicated it, I think there's a good clear record that at the earliest time possible Enbridge was required to consult, was required to get input from Aboriginal parties, was required to report to the Board on them, the Board then considered those, the Board then funded the Aboriginal parties so that they were able to ask questions of Enbridge, raise all of their concerns, the Board then had a final hearing in which it heard arguments, it considered carefully all of the rights that were asserted, it provided accommodation in its conditions and it ultimately came to the conclusion that the impacts were minimal and could be mitigated by the extensive requirements and conditions that were imposed in the project.

MR. JUSTICE MOLDAVER: Can you help me out with one thing? Accepting that the Board has the right to do the consultation, that it can go ahead and carry out that duty, then the second aspect is was the consultation adequate, and this is smacking to me a little bit of being judge and jury in your own case. The Board decides the nature and extent, and so on, of the consultation, and then the second question is was the consultation adequate. How does that work? Just where am I getting confused on that?

MR. SOUTHEY Well, I mean thankfully the Board is subject to judicial review. If consultation was not --

MR. JUSTICE MOLDAVER: So that's the answer,

they're subject to judicial review.

MR. SOUTHEY Yes. It is subject to judicial review, it is subject to the *Constitution*. All of those things are matters about which complaint can be made if there was inadequate consultation.

MR. JUSTICE MOLDAVER: But I would of thought then in that case there really is no -- they wouldn't have to sort of go on and consider: Now, was our consultation adequate? They are the ones who have decided what it should be, they are the ones who have decided what they want to do and so that becomes really a non-question for the Board, really --

MR. SOUTHEY It does.

MR. JUSTICE MOLDAVER: -- subject to judicial review if they got it wrong.

MR. SOUTHEY It does. It goes to the issue of you know -- in *Carrier Sekani* the Court also determined that if properly constituted a tribunal can answer questions relating to the duty to consult and certainly this Tribunal has that capacity.

Now, the question is: What questions might arise during the course of its process? And theoretically the Chippewas could have asked the question: We say that what you have done isn't sufficient for the Crown to rely on what you have done because more should have been done. They

could have said that I suppose and then, Justice Moldaver, your concern would be -- it would be very awkward for the Board to do that. But the Board tries really hard to be sure that its consultative process is sufficient.

MADAM CHIEF JUSTICE: I have another question. As I understand your submission, you say the Crown, whatever it is, didn't delegate its duty to consult, but that it relies on the Board for the consultation the Board does. Arising out of that is a question in my mind: What if the Crown, whatever it is, standing by, looks at what the Board decision is, or the Board process is, and says, "In our opinion this isn't adequate", at that point are they obliged to wait for judicial review through the courts or can the Crown then step in and say, "We are not satisfied that our duty, our superior duty, our constitutional duty, has been adequately discharged by the Board so we're going to have a supplementary hearing, or whatever?"

So I see the possibility of two outcomes from a Board decision, one an appeal route, secondly the possibility that the Crown itself would say, "We don't think this is adequate, it's our duty, we're going to step in and supplement it". And I'm not sure how this will work out on the ground. Could you help me with that?

MR. SOUTHEY Chief Justice, the Board's process is laid out and is really comprehensive and so if you're

describing what would happen if an issue of accommodation in the hypothetical case that Justice Moldaver for example spoke to arose then what is the recourse. The recourse there is first that the Aboriginal group should go to the Board and say, "In this case, this additional accommodation outside your jurisdiction should be given, withhold your approval until the Crown considers and speaks on that point." If the Board says no, then the Aboriginal party should go to the Crown and should, frankly, bring a proceeding that seeks to have a declaration that more was required, that seeks to enjoin the Board from doing the things that it's going to do in order that there can be a determination of whether in fact there was additional accommodation that was owing.

MADAM CHIEF JUSTICE: Just one supplementary. That second process that the Aboriginal community would take would be through the courts?

MR. SOUTHEY Yes.

MADAM CHIEF JUSTICE: And the idea would be the courts would tell the Crown, the Attorney General for Canada or whatever, that more is required?

MR. SOUTHEY That's one possibility, yes.

Now, it could be brought better and more efficiently before the Board, I'm only saying if the Board says no then the second.

MR. JUSTICE MOLDAVER: Could I just ask -- oh, sorry, go ahead.

MADAM JUSTICE ABELLA: Sorry. Go ahead.

MR. JUSTICE MOLDAVER: Well, this just really follows up on the Chief Justice's question and I'm looking to the next case, but Justice Dawson, at paragraph 65 of that decision -- you don't have to turn it up, I will just read it quickly to you. She says:

> "Of course, when the Crown relies on the Board's process..."

So in other words the Crown has let the Board engage in the consultation:

> "... in every case it will be necessary for the Crown to assess if additional consultation activities or accommodation is required in order to satisfy the honour of the Crown."

Do you agree with that statement?

MR. SOUTHEY I think it goes a bit further than is correct. I think that it is true that the Crown has to be satisfied that the process being carried on by the tribunal is a robust one which in the normal course it could rely on and then I would submit to you that the responsibility lies equally with the Aboriginal party if they believe something more should be done by the Crown to

raise it with the Crown first and then to seek further remedy otherwise.

I don't submit to you that Justice Dawson was completely correct in that, I think there needs to be some shared responsibility there.

MADAM JUSTICE ABELLA: Mr. Southey, I'm wondering what role you see in responding to these questions about how do you correct any perceived inadequacy in what happened before the Board. You haven't mentioned section 52 or 53 of the legislation which gives the Governor in Council the ability to look at the report and send it back to the Board if they think there are any things -- any factors that weren't taken properly into account. How does that fit into this remedial scheme?

MR. SOUTHEY Section 52 is quite different from section 58. There is no Governor in Council review. Section 58 is final, a final decision of the Board and is quite different than a section 52 where there's a recommendation made by the Tribunal that then has to go to the Governor in Council.

MADAM JUSTICE ABELLA: So 52 says:

> "If the Board is of the opinion that an application ... in respect of a pipeline is complete, it shall prepare and submit to the Minister ... a report..."

And you're saying that's completely different from what takes place under 58 in that there's no connection between the conclusion of a section 58 process, even though it deals with pipelines, and the remedy available under 52 which refers to pipelines?

MR. SOUTHEY Well, 52 isn't a remedy, 52 is a two-step process in which there is contemplation that --

MADAM JUSTICE ABELLA: Of free consideration.

MR. SOUTHEY -- there will be a recommendation and a Governor in Council decision.

MADAM JUSTICE ABELLA: Right.

MR. SOUTHEY Fifty-eight is an exemption from having to go through a fuller process that's given where there's no disturbance of land, where there's only a change in machinery --

MADAM JUSTICE ABELLA: Right. So your position is 52 and 53 are not available --

MR. SOUTHEY Yes.

MADAM JUSTICE ABELLA: -- when you're dealing with 58 exemptions. Okay, thank you.

MADAM CHIEF JUSTICE: Thank you very much.

(1159) Ms Saunders...?

ARGUMENT FOR THE RESPONDENT (36776)

NATIONAL ENERGY BOARD

(1159) **MS SAUNDERS:** Good morning. The Board did not

file a condensed book this morning as we don't anticipate having to take you to any particular parts of the record or the book of authorities today.

What we would like to be able to do is respond to any questions you have had, either raised with other parties or have as a result of our submissions in relation to our jurisdiction and our process.

Perhaps I can start with the question that just finished off the last discussion.

In terms of the ability for the Crown to come back in to the Board and say, you know, "We aren't sufficient(sic) that there was sufficient Crown consultation". Beyond the ability of judicial review or appeal there is ability of the Board to review its own decision and it can be made -- that decision to review can be made on its own motion or it can be made on behalf of a party to a proceeding or a non-party to the proceeding. The review provisions in the *NEB Act* are broader than an error of law or of jurisdiction and they can include change factor circumstances or new facts that weren't discoverable at the original time. So there is an additional avenue there.

There was some discussion this morning about the Board's expertise and its ability to assess impacts. In our view the Boards assessment of potential impacts on Aboriginal interests, including constitutionally protected

rights and interests, necessarily involves seeking to understand the nature of those interests being impacted, as well as both the likelihood and the seriousness of potential impacts and the degree of concern expressed by Aboriginal groups in relation to the project.

When we assess these impacts, and as well as the level of consultation necessary to understand those impacts throughout our process, it's a fluid and iterative process. We assess it at the initial stages when we set out our initial expectations for consultation. The format of the Board's process depends on its preliminary assessment of the type of rights impacted and the nature of the concerns that are raised.

Changes to the Board's process can be made as a result of motions made by any of the parties if they feel sufficient opportunities aren't available and we have made those types of decisions quite often in terms of expansion of deadlines, additional rounds of information requests, those types of things.

MADAM JUSTICE KARAKATSANIS: Do you take the position that the Board is required to give reasons about what the nature of the Aboriginal rights involved are, about what the potential impacts are and accommodation, in other words, whether the duty to consult has been satisfied?

MS SAUNDERS The Board goes to fairly explicit

lengths to set out what the consultation that was undertaken in our processes were, the consultation that was undertaken by the proponent and the information that we are able to gather through those consultation process in terms of the impacts of potential project. We then will provide an analysis of how the project may impact those interests and a discussion of the mitigation measures that are imposed through either terms and conditions or through the other regulatory framework that's surrounding it, regulations or our ability to enforce follow-up with our lifecycle oversight processes.

So to that extent we do provide written reasons that set it out. We don't -- we haven't framed it in the concepts explicitly set out in the *Haida* analysis, but we focus on what we do and how we do it and how that has made a difference in our assessment of both the project and how that factors into our approval or denial of a project.

The type of information that we gather also impacts the quality and detail of information about those identified concerns that we ask for in our process. So there was discussion about whether -- if a Crown participant wasn't appearing before us. We have a number of options available in our toolbox essentially to gather information. So we can ask the proponent to go out and ask the Crown departments or the government departments for that

information and file it with us. If there are government departments participating we can ask them directly. We have the authority to issue subpoenas if necessary. We have the ability under our Act to make our orders conditional on the happening of an event, a future event. We also have the ability of course to deny the application entirely if we determine that the level of impact based on our assessment of the risk is overwhelming.

MR. JUSTICE BROWN: Can I ask you to address the question Justice Moldaver asked earlier of one of your friends where an accommodation -- and I realize everyone seems to think that this is sort of hypothetical and remote and maybe it is, but where an accommodation is required that the NEB concludes it does not have jurisdiction to direct or to impose as a condition upon the proponent, what happens then?

MS SAUNDERS There are a number of ways that we might be able to deal with that. For example, we can try to get information onto our record about how that other government department, or whoever that body is that's going to provide that accommodation, will be addressing that issue and we can consider whether that's a sufficient way of it being addressed. We can rely on the fact that there might be another legal process that will have to make a decision, also in a constitutionally appropriate way, on that

particular issue. If there are -- if it is a significant impact we can also, as I mentioned, put a conditional -- a condition on our order that that event has to happen before our condition comes into -- or our order comes into effect. So there are multiple ways that we can deal with it.

MR. JUSTICE BROWN: Okay. Thank you.

MS SAUNDERS The Board recognizes the unique role that Aboriginal groups with constitutionally protected interests must be afforded. In recognition of that unique role and the related constitutional obligation the Board pays extra attention to those potential project-related impacts to those interests and we can customize and adapt our process as necessary to be able to deal with those.

The Board imposes significant and distinct consultational requirements on the proponent in relation to potentially impacted Aboriginal groups. They are summarized in our factum.

In addition, through the Board's processes we make special efforts to hear about the concerns and impacts directly from the Aboriginal groups or indirectly through the information provided by the proponent, other participants or other government departments. The importance of constitutionally protection interests may also be reflected in the weighing of evidence and the implementation and mitigation measures.

Importance is also reflected in the structure and format of our reasons in which we provide a distinct section within which we discuss these matters in addition discussing any concerns that have been raised of a more general nature in the other sections.

The Board is not making any submissions about whether in the particular facts of the case before us we actually -- it's appropriate to rely on our process, only that it is robust enough to be able to do so in a practical and effective and efficient way.

If you are of the view that the Crown can rely on the consultation and accommodation that occurs through the implementation of our regulatory framework, but on the particular facts of the case that our reasons or our actions were not sufficient, we would appreciate guidance as to what would be sufficient so we can adjust our regulatory framework accordingly.

Subject to your questions, those are our submissions.

MADAM JUSTICE ABELLA: I have one question.

MS SAUNDERS Sorry. Yes...?

MADAM JUSTICE ABELLA: Just relating to the very first point that you made that you have the right -- the Board has the right to reconsider any of its decisions.

MS SAUNDERS Yes...?

MADAM JUSTICE ABELLA: Can it do that even if the request for reconsideration comes from somebody like the Crown --

MS SAUNDERS Yes.

MADAM JUSTICE ABELLA: -- who wasn't a party?

MS SAUNDERS Yes, it does. There's no restriction on who can ask for a review and there's no time limit within which you can ask for a review.

MADAM JUSTICE ABELLA: Okay. Thank you.

And is there a section under which that takes place?

MS SAUNDERS The review provisions in the Act are in section 21. I will just double check, 21.

MADAM JUSTICE ABELLA: And that's being treated by the Board as anyone can bring an application for review.

MS SAUNDERS Yes. In some cases whether they could have raised the issue before us, it might be a factor as to whether we will have a review or not, but there is no restriction on who can bring forward a review.

MADAM JUSTICE ABELLA: Okay. Thank you.

MR. JUSTICE BROWN: Do you need (off microphone) new facts in every case?

MS SAUNDERS No. Our Rules of Practice and Procedure set out a non-exhaustive list of the types of issues that will allow us to review, it includes error of

law, it includes change facts, other circumstances.

MR. JUSTICE BROWN: Got it, thank you. Great, thank you.

MADAM CHIEF JUSTICE: Thank you very much.

MS SAUNDERS Thank you.

(1209) MADAM CHIEF JUSTICE: Mr. Fancy. Ms Fancy, apologies.

ARGUMENT FOR THE INTERVENER (36692-36776)

ATTORNEY GENERAL OF ONTARIO

(1209) MS FANCY: Good morning.

Ontario is an intervener in both appeals and we have two submissions.

First, government tribunals can discharge the duty to consult when they are authorized to do so. Absent statutory language, no further Crown review or oversight is required.

Second, the requirements of deep consultation, which is more relevant to the second appeal that you're hearing this afternoon, depend on the facts of each case and any guidance that this court provides should encourage flexibility and responsiveness. Fixed procedural requirements for deep consultation should be rejected by this court.

Ontario's submissions seek to preserve the flexible principles that this court has developed with

respect to the duty to consult. Flexibility permits and promotes reconciliation and relationship-building within the wide range of factual situations and legislative regimes that give rise to the duty to consult. Parties to the present appeals are encouraging this Court to add inflexible requirements to the flexible approach that has been developed to date. They seek to constrict the ability of tribunals to consult, they propose additional Crown review of Tribunal consultation and they suggest fixed requirements for deep consultation. Ontario's position is that these suggestions do not necessarily promote meaningful consultation and its goal of reconciliation.

I now move to my first submission which is that government tribunals can discharge the duty to consult and no further Crown review should be required.

In the *Haida Nation* decision this Court started a new dialogue between indigenous peoples and the Crown. As my friend said this morning, this dialogue goes to the core of the relationship between indigenous peoples and the Crown.

Haida and the duty to consult have transformed the way Ontario approaches these relationships. The consultation is not necessarily easy or straightforward, it can be highly complex and contextual. In Ontario there are many different indigenous communities. They have unique

histories, cultures and languages and different Aboriginal and treaty rights. There is a considerable range of projects and development activities going on at all times throughout the province in all shapes and sizes, involving a wide range of proponents, public proponents, private proponents and indigenous communities themselves as well, and there are complex and intersecting regulatory regimes. Government tribunals often play a role in these regulatory processes and sometimes more than one role.

The complexity and diversity of the circumstances in which the duty to consult arise means that one size cannot fit all. This Court has recognized in *Haida*, has recognized this in *Haida* where it said that every case must be approached individually and each must also be approached flexibly. Flexibility includes providing the Crown the opportunity and the scope to have government tribunals discharge the duty to consult.

Ontario's submission is that this Court was clear in *Rio Tinto v. Carrier Sekani* that tribunals can consult if they are authorized to do so. That authority may be express or implied, as per *Carrier Sekani* and as we have heard this morning.

Tribunals that are empowered to engage in consultation can discharge the Crown's constitutional duty to consult. When a government tribunal does discharge the

duty an absent statutory language, further review or consultation by another Crown actor is not required and may at times be counterproductive.

First, Crown review of a tribunal's consultation process is not necessary because --may not be necessary because a tribunal may be well-suited or better suited than other government actors, such as ministry employees or Crown agents, to engage in effective and meaningful consultation.

Tribunals often have robust consultation processes already in place to hear from stakeholders and interested parties. These processes can be used for section 35 consultation. Tribunals regularly balance interests, make good-faith efforts to understand concerns, and have the willingness and the ability to address them. Tribunals are also well-suited because they offer expertise in their given subject area.

MR. JUSTICE MOLDAVER: Can you just help me with something, Ms Fancy? How does any particular body, Board, whatever it might be, know whether it has the implicit right to engage in the consulting duty? And there's kind of a follow-up question to that, I mean concern about notice to the various people that are involved to let them know that they are dealing with the body that is going to be -- that is charged with and is going to be responsible

for the duty to consult?

So there are kind of two questions there, but how do you know? Does somebody tell you from on high?

--- Laughter

MS FANCY: Thank you, Justice Moldaver.

So two good questions and in Ontario's submission the implicit authority to consult that this Court has spoken about in *Carrier Sekani* is implicit authority that a tribunal can look to its legislative authority and look to the powers that it may have either under the legislation that empowers it or other legislation in Ontario, for example the *Statutory Powers and Procedures Act*, and can look at the different authorities that it has, and there may also be guidelines and other policies that a tribunal has that will explain what it can do and whether it has the actual remedial authority to do what is necessary in a given case.

And in both *Taku*, the *Taku* case and the *Beckman* case, in both of those cases the tribunals or the statutory decision makers in those cases, one was an EA assessment and the other a body set up under the treaty, but a government body as well, wouldn't -- in those cases they didn't know they had the duty to consult or they were denying it, it did not mean that consultation was not sufficient.

Certainly it would be helpful -- it's not a

legal requirement, though it would be helpful for tribunals to know.

MR. JUSTICE BROWN: Well, from the standpoint of the people being consulted who have to decide how to marshal and devote their resources and where they -- you know whether to try and secure expert evidence or things like that, wouldn't it be useful to know that this is being done pursuant to the section 35 right to be consulted?

MS FANCY: Yes, Ontario submission is it would be useful. Again, the case law to date has not made that a legal requirement, but yes it would be useful. There appears to be some clarification that could be provided to assist in that regard.

MR. JUSTICE BROWN: Okay.

MS FANCY: And I think, Justice Moldaver, your second question -- I'm not sure if I answered your second question as well.

MR. JUSTICE MOLDAVER: I'm sure you have.

MS FANCY: Okay. Okay, thank you.

--- Laughter

MS FANCY: So to move on, my submission was the Crown -- tribunal processes may be -- tribunals may already have processes in place to conduct meaningful consultation and that they have expertise to deal with the issues before them. They are often better placed than some government

officials for example to understand -- other government officials to understand the project, the impacts of the project and how the impacts can be addressed.

A final reason tribunals are well-suited is that tribunals can also be very accessible, they are impartial, they can be -- it's a very public process and often it may be appropriate for a tribunal to be the body who does the consultation because it may be that the proponent in front of it is a Crown proponent or another government proponent.

Crown review of a government tribunal's process can also be impractical and may not necessarily further meaningful consultation and may have -- may not offer a lot of utility. Further Crown review may simply duplicate consultation process. Often tribunal processes can span several years of hearings I'm hearing from numerous witnesses and experts for another Crown official who is not as familiar with the evidence for example to come in and review that process may not -- may be duplicative, may delay proceedings and may delay proceedings both -- and cause a burden both on the indigenous communities before that tribunal as well as the proponents and other interested stakeholders. Even then that reviewer may not have the expertise that the tribunal has to actually review the decision and they may not have review beyond decision-making

powers to do anything about it.

MR. JUSTICE ROWE: Now, I would put the proposition which has been pushed back that somehow a regulatory agency could be a manifestation of the Crown for purposes of consultation, I'm going to reflect further upon that, but you seem to be saying to us that if the regulatory agency has a sufficient expertise the Crown, as the Cabinet and the departmental structure, need not turn their mind to it, but if the point is that the Crown, as the Minister or the departmental structure, is relying upon what the tribunal has done, must they not determine that it was adequate?

MS FANCY: In our submission *Carrier Sekani* made it clear that a tribunal that can discharge the duty -- a tribunal that can consult has the authority to do so can also discharge that duty to consult. It's the tribunal's decision oftentimes that is the Crown's decision as pursuant to the case law of this Court, that is a Crown decision that triggers the duty to consult. It is that approval -- there are no further Crown approvals, that government approval is the approval that triggers the duty to consult. In that sense, that tribunal has the character to also conduct that consultation and discharge the duty.

MADAM CHIEF JUSTICE: But you sound like you're saying that the Crown has delegated its duty then they can't

go further, but the position we had put for us is that's not what's happened here, it's just reliance. And if it's just reliance surely that's not the end of it if the process -- the Crown has this overarching fiduciary duty they have to satisfy, they have to make their own inquiries surely to determine that the constitutional duty to consult has been fulfilled and if it's just reliance we're in this murky area. Does the Crown then have an obligation to supplement? Can they just say, "Well, it's all a matter for the courts and if the courts say it's okay" -- I'm really confused about this.

And I recognize that this tribunal can reopen, and so on, but who is going to get it to reopen and is that something the Crown does of its own initiative. Let's assume that the indigenous groups didn't get their resources together to mount an appeal or something.

Following on my colleague's question it's an area that is worrying me. Either you relying in which case you don't get rid of the responsibility, or you delegate in which case you do and it goes through judicial review.

MS FANCY: Yes, Chief Justice. Our submission would be that if you do rely on the duty -- pursuant to *Carrier Sekani* this Court again has said that you can either -- whether you call it delegation and you're delegating to the tribunal and the tribunal as a government

actor can discharge the duty and make -- and in most cases, practically speaking, most have the ability to first do the consultation, or if they have the ability to do the consultation they also have the powers to assess consultation. It is at that stage that they will assess consultation and determine whether that duty has been fulfilled. If it has not been fulfilled, then the tribunal may refuse the approval before it and that would go to judicial review.

MADAM CHIEF JUSTICE: Yes, I understand all that, but I'm just talking about a case where the tribunal doesn't do what it should do and the Crown still -- but anyway I guess we have your position on that.

I do say I think -- for those that are coming after -- for me anyway it's important to get the right legal concepts in place and I'm still struggling with that as to the relationship of a tribunal that does have the authority and the overarching Crown responsibility.

MS FANCY: Okay.

(1223) MADAM CHIEF JUSTICE: Thank you.

MS FANCY: Okay. Thank you, Chief Justice.

ARGUMENT FOR THE INTERVENER (36692-36776)

ATTORNEY GENERAL FOR SASKATCHEWAN

(1223) MR. FYFE: My turn. I am Richard Fyfe from the Attorney General for Saskatchewan, let me just begin.

I hear the questions being posed by the Court and I'm not sure if I'm going to be able to answer them any better than any other of the counsel before me, but let me just begin by clarifying that the Attorney General did not intervene here because he has some particular interest in the jurisdiction of the National Energy Board. The Attorney General intervened more particularly because he is interested in this Court keeping a practical and flexible approach to how the duty to consult can be satisfied whether by a tribunal or otherwise.

So in our factum what we tried to do is take a step back and identify some key concepts that we say inform the duty and those are practicality, flexibility, a word that has been bandied about already a little bit, and substance. And I don't propose to go through these concepts one by one, I'm going to focus my comments on the concept of practicality and I'm going to be very general. I don't think you will be disappointed, Chief Justice, in that regard.

I thought it might be helpful on the question of just keeping the duty practical to refer the Court to a case out of Saskatchewan. Now, I will just say that there aren't many duty to consult cases that emanate out of Saskatchewan, it's something that we think is a good thing, but there is a recent decision of the Saskatchewan Court of

Appeal called *Buffalo River Dene Nation v. Saskatchewan*. I referred to it in our factum, it's in our book of authorities, I'm not going to take you there now, but let me just talk a little bit about that case.

I confess it's not a case that deals with the duty to consult and administrative bodies. It had to do -- it's one of these cases that had to do with hypothetical or speculative impacts on rights and whether the duty was triggered and it's helpful because the Court in that case, Justice Caldwell, undertook a very thorough review of the case law in relation to the duty to consult and after conducting that review he came to a number of conclusions on behalf of the Court, one of which was this pithy statement that we encourage the Court to consider which is that the duty to consult is at its core a practical doctrine.

Now, what I would say about that that's helpful, is that encapsulates what courts around the country -- how they have been applying the duty to consult on a case-by-case basis. In the *Buffalo River* case what the Court said is that it would be impractical for the Crown to consult in relation to hypothetical impacts on rights, in that case there would be nothing tangible to consult about.

But I think the case stands for a broader or more general principle, that the duty to consult does not require the Crown to do impractical or unnecessary things.

What I say is that is the nugget that can be taken out of that case that has application in this matter. So what we say is not getting caught up in what's the Crown and what's the Board and these sort of distinctions, but just generally where one arm of government effectively satisfies the duty there should be no requirement for another arm of government to duplicate those efforts.

So those are sort of the general concerns that Saskatchewan has, is to preserve that practicality.

The second thing I thought might be helpful is to give the Court an idea of how the duty to consult might play out in Saskatchewan in a case like this where we don't rely on administrative bodies, we rely on line ministers to satisfy the duty. And in a case like this where there's a third party proponent that's seeking permission to do something, some sort of project, well, what would happen under our policy is that the Minister -- it's important to remember this, the Minister would delegate procedural aspects of the duty to the proponent.

That is an enormously important part of what the duty to consult is on the ground and it's an enormously practical aspect of the duty because the proponent is the actor that is most knowledgeable about the project that they are proposing. They are best situated to inform the relevant communities of the details of the project and to

adequately respond to the concerns raised by the communities in ways that make sense for the project that it's trying to plan.

It's also very practical because proponents need to develop relationships with communities, because if the project is approved everybody is going to have to live together out there.

So what I would say is that a big part of what the Crown's role is all of this is to oversee the consultation efforts undertaken by her proponent, making sure the proponent provides adequate information to the communities, making sure that communities are being heard by the proponent and that their concerns are being accommodated and mitigated at that ground level and then, in addition to that, hearing directly from communities and imposing additional mitigation measures in the terms of the licence itself.

Now, from our perspective that seems to be a lot of what the National Energy Board does. It looks like a duck, walks like a duck and what we would say is that effectively a Board like that has stepped into the shoes of the Crown for purposes of satisfying the duty.

MADAM JUSTICE KARAKATSANIS: Can I ask you this: can the Crown delegate its duty to consult in a particular case, by case-specific notice, and then, if it

sees something that it thinks is not adequate, withdraw or modify that delegation?

MS FYFE: Yes. Yes, it can. A line Minister could do that, I think in a similar way that the Board itself has a lot of flexibility and how it manages how the duty is being satisfied, a line minister would do very much the same thing.

MADAM JUSTICE KARAKATSANIS: I guess what I'm asking is, we have been talking about it in terms of delegating the duty specifically in legislation or just relying on the processes and I was wondering whether there was a third option which is a fact-specific delegation for a particular case through case-specific notice.

MS FYFE: I think that would be possible. I'm trying to wrap my head around and interpret that from the perspective of a jurisdiction that doesn't rely on tribunals, but I think a Minister could on a case-by-case basis delegate the duty to a Board for example or a tribunal, or possibly a Minister or a government has the ability to on a specific case create a tribunal for the purposes of a particular project.

MR. JUSTICE MOLDAVER: Just to go back in terms of what you say kind of the duty of the Crown -- you said the Crown, or whatever body it is, kind of plays an overseer role and yet it has to be much more proactive than that,

doesn't it? I mean it has to -- I understand what you're saying about having the proponent go out there and get into the communities, and so on and so forth, but ultimately it's that body that's deciding the nature and extent of the duty, how deep it is, how not deep it has to go, and so they're more than just an overseer, they're guiding it, they're directing it, aren't they?

MS FYFE: Yes. And I don't mean to -- I'm oversimplifying a lot here and of course I have to say that of course the Crown always holds the duty, it's not as if they can delegate the duty wholesale to our proponent, but the proponents consultative activities play a huge role in satisfying the duty. I raise that because I think it's something that has not been really put to the Court as an important thing to consider.

In the time that I have left what I thought I would do, one of the roles we see -- an Attorney General intervening in a case, one of our roles is to provide the Court with something that's a little different, a little creative, and so this is what I'm going to offer to you today. So it's just a little pinch of philosophy that we think might be relevant to this case. I refer to this in our factum and provide some materials about it, but there is an enduring principle of philosophy related to reasoning and it's called *Occam's razor*. Some of you may have heard of

that principle in the past and it stands for this proposition, which is that entities should not be multiplied without necessity.

There's another formulation of this principle that's directly attributable to the actual philosopher William of Ockham, a philosopher from the 1400s, and it goes like this: It is vain to do with more that which can be done with less. So what the Attorney General does with this is it offers this as encapsulating the notion of practicality that we say is at issue in these appeals.

Those are my submissions, unless there are any questions from the Court.

MADAM CHIEF JUSTICE: Thank you.

MS FYFE: Thank you.

MADAM CHIEF JUSTICE: Thank you.

Mr. Ignasiak...?

ARGUMENT FOR THE INTERVENER (36776)
SUNCOR ENERGY MARKETING INC.

(1233) MR. IGNASIAK: Madam Chief Justice and Justices, Suncor's participation in this proceeding arises because the appellant requests that the Board's order be quashed, a declaration be issued, and that the Enbridge application be remitted back to the Board.

Suncor's scope of argument is limited to the legal framework applicable to determining a remedy should

this Court determined that there has been a breach of the Crown's constitutional duty to consult.

The appellant, in its reply factum and again in oral argument today, suggests that once it is determined there has been a breach of section 35(1) rights the only appropriate remedy is to quash the underlying decision or order. We submit this position is inconsistent with the applicable legal framework.

First, the appellant's position in this regard is wholly inconsistent with this Court's decision in *Carrier Sekani* where it was stated that the remedy for a breach of the duty to consult also varies with the situation. This Court went on to state that the Crown's failure to consult can lead to a number of remedies ranging from injunctive relief to damages or to an order to carry out more consultation.

Second, this Court in other cases involving other constitutional rights has exercised its discretion when determining the appropriate remedy in a given case.

In *Khadr* this Court, after determining Mr. Khadr's section 7 rights to liberty and security of the person were breached, took into account evidentiary uncertainties, the Court's institutional competence and the prerogative of the executive.

In *PHS Community Services*, after determining

that there was a breach of section 7 rights, this Court took into account the seriousness of the infringement and the grave consequences that might result if only declaratory relief was granted and therefore issued an order in the nature of *mandamus*.

These cases, including *Carrier Sekani*, demonstrate that there are a number of factors the Court will take into consideration when determining the appropriate remedy and that these factors vary depending on the circumstances of each case.

Am I going too quickly, Madam Chief Justice?

MADAM CHIEF JUSTICE: No. The clock wasn't working (off microphone).

--- Laughter

MR. IGNASIAK: I'm going to take that as a compliment.

--- Laughter

MADAM CHIEF JUSTICE: Thank you. Apologies.

MR. IGNASIAK: I will continue if it suits the Court.

MADAM CHIEF JUSTICE: (Off microphone).

MR. IGNASIAK: So what factors should be taken into account in this particular case when, if necessary, determining what the appropriate remedy is?

First and foremost we submit the Court must

take into account that the grand purpose of section 35 is reconciliation. Therefore, as stated in *Haida*, the appropriate remedy must balance, where possible, Aboriginal interests with other societal interests with a view to reconciliation.

The goal of reconciliation necessitates taking into account impacts not only on the main parties to the proceeding, but also on third parties such as Suncor and other industry participants. In this case the record clearly establishes that Suncor and others will be prejudiced if the order is quashed.

Suncor and another Québec-based refiner, Valero, both provided evidence before the Board about the broad significance of this matter for the Québec petrochemical industry. Competitiveness of Québec refiners is a real issue as evidenced by the fact that Suncor Refinery is the last remaining of six previously in the city. The NEB concluded that the Enbridge project will likely improve the competitive position and long-term survival of the Montréal and Lévis refineries, as well as their associated downstream industries.

The pipeline, with its renewed eastward flow, has been in operation since December of 2015. Therefore, if the order is quashed eastward flow on Line 9 will cease and that supply to the refineries will need to be replaced. We

submit there is insufficient evidence before this Court to fully assess what the ramifications would be of interrupting the supply from Line 9 after it has been in operation with eastward flow for a year.

The evidentiary record in this case does not disclose what has happened to the physical infrastructure that up until December of 2015 supplied the Montréal refinery. The ramifications of interrupting this supply are not before the Court and in this regard, like the Court did in *Khadr*, we submit the Court should take this evidentiary uncertainty into account when determining whether to quash the NEB order.

The other factor to take into account is a practical utility in granting the relief sought by the applicant. If this Court determines there has been a breach of the duty to consult in this case it will set out, like it did in *Haida*, the roles and responsibilities of various parties to advance reconciliation.

Parties participating in regulatory processes throughout Canada, including proponents, Aboriginal groups, regulators and governments, will take steps to act in accordance with the Court's declaration on a go-forward basis.

Counsel for the appellant in oral argument today said all the parties need clarity. We submit that

there is no doubt declaratory relief will have practical utility by, one, providing clarity; and two, advancing reconciliation, as did the *Haida* case. Despite this the appellant maintains that the NEB order must nevertheless be quashed.

The facts that are relevant when considering the practical utility of this remedy in this particular case are as follows:

First --

MADAM CHIEF JUSTICE: At this point I'm going to interrupt. I think you're on solid intervener ground when you tell us that we should take into account third parties and that we should take into account the consequences of a particular remedy, but I'm wondering if as an intervener you should be getting into arguing this remedy versus that remedy.

MR. IGNASIAK: And that wasn't my intention, Madam Chief Justice. My intention here was to simply point out some of the facts that exist in this case that are on the record that the Court should take into account if determining whether or not to quash the NEB order, without stating a position on the ultimate income.

And simply there are two -- and many of them are well known, have been recited by other parties, namely that the appellant participated in the process and that the

NEB considered those submissions and made a ruling regarding the minimal impacts to the appellant.

There is another aspect that hasn't been mentioned and that is that the current order that the appellant seeks to quash contains several conditions imposed on Enbridge and one of those is that Enbridge, every six months for the first three years of operation, shall file an engagement report outlining its consultation efforts with Chippewas and steps taken by Enbridge to address any concerns expressed by the appellant. That obligation by Enbridge is ongoing as a result of the order.

Another condition in the order is that every 12 months for the first three years of operation Enbridge must record on engagement activities with Aboriginal groups with respect to emergency response.

So those are items that should be taken into account when determining the appropriate remedy.

Finally, our view is the appellant has not provided the evidence of the prejudice it would suffer --

MADAM CHIEF JUSTICE: Now you're getting into (off microphone).

MR. IGNASIAK: Okay.

MADAM CHIEF JUSTICE: Thank you.

MR. IGNASIAK: Madam Chief Justice, in conclusion, the factors to be taken into account are

determined in large part by the goal of reconciliation between Aboriginal peoples and the Crown. This requires a balancing of various interests. The ultimate objective of section 35(1) is reconciliation.

As stated in *Beckman v. Little Salmon*, when discussing reconciliation the future is more important than the past.

MADAM CHIEF JUSTICE: Thank you.

MR. IGNASIAK: Thank you.

MADAM CHIEF JUSTICE: Reply...?

--- Pause

(1242) MADAM CHIEF JUSTICE: Yes...?

REPLY ARGUMENT FOR THE APPELLANT (36776)

CHIPPEWAS OF THE THAMES FIRST NATION

(1242) MR. NAHWEGAHBOW: Good morning, Chief Justice, Justices. Good afternoon actually.

Just some very brief points in reply.

This case is about the role of tribunals and I should point out that when we were at the Federal Court of Appeal in this matter the position taken by my friend on behalf of Enbridge was that the Crown didn't have the duty to assess adequacy of consultation and here the position being taken is that the Crown has the duty to actually engage in consultation.

In my view, those two duties cannot coexist.

You cannot have a quasi-judicial tribunal which has the duty to assess consultation, which it is the case because of section 12, NEB has the power to decide questions of law and fact. You can't have the Board assessing the adequacy of consultation and at the same time engaging in consultation. The two roles don't exist.

That doesn't mean that you can't structure a tribunal to do those two roles, but you just can't -- the NEB section 58 cannot do it.

In this case, the Crown -- as puzzling as that concept is, we need to look at it from the perspective of indigenous peoples and the perspective -- from the perspective of Aboriginal peoples it was the Crown who engaged in treaty relationships. It wasn't a process like the NEB that engaged in treaty relationships and that's important for the honour of the Crown and for reconciliation. Reconciliation requires some direct engagement and the honour of the Crown cannot be delegated.

Thank you very much.

MADAM CHIEF JUSTICE: Thank you.

Is there further reply? No.

The Court will reserve its decision on this appeal and we will return at 2:00 p.m. to hear the second appeal.

--- Upon recessing at 12:44 p.m.

--- Upon resuming at 2:01 p.m.

(1401) MADAM CHIEF JUSTICE: Thank you.

We will begin the second case with Mr. Hasan.

ARGUMENT FOR THE APPELLANTS (36692)

HAMLET OF CLYDE RIVER, ET AL.

(1401) MR. HASAN: Thank you Chief Justice, Justices.

This case is about taking the duty to consult seriously and for the appellants, the people of Clyde River, many of whom travelled a great distance to get here, these legal issues are not simply matters of theoretical or symbolic importance because for them this case is also about their right to eat and their ability to access the nutritious foods that they have relied on for centuries.

I will be making two primary submissions, one focused on the NEB and its adequacy of its review of consultation and one focused on the Crown conduct itself; more specifically, the NEB erred by failing to take into account the Inuit's section 35 rights and by failing to take into account the duty to consult.

Secondly, the Crown failed to discharge the duty to consult. And in making the second submission, Chief Justice, I hope to specifically address your concern and the concern that was mentioned by some other of the Justices before the break on the relationship between government and regulatory bodies in a case where the regulatory body is

being relied on to some extent to fulfil the duty and when that's permissible and if that's permissible.

I will be making reference to our condensed book and perhaps also to our factum as well.

Now, I do not intend to go into the facts except as necessary for the purposes of argument as it comes up, but I do want to make one factual clarification in light of something that was stated in the respondent proponents factum. The proponents state in their factum at page 3, paragraph 12 that:

> "... seismic surveys ... have been conducted in Baffin Bay and Davis Strait since the 1970s, with fairly continuous activity since the 1990s."

I'm sure this was inadvertent, but that makes it sound like there are surveys going on in the contemplated project area right now and that is just not the case and the NEB's Environmental Assessment Report is clear on this. The Environmental Assessment Report, page 5 of the report -- and its page 14, Tab 2 of the condensed book. I see that some of you are having trouble locating the condensed book, the problem might be that the condensed book is not all that condensed, it's a fairly voluminous compendium and I apologize for that, but I erred on the side of thoroughness.

MADAM CHIEF JUSTICE: We're just getting our

books sorted out here between the two cases, for me anyway. I think I'm okay now, we'll see how other people are. I apologize. Okay.

MR. HASAN: Not at all, Chief Justice.

Tab 2 of our condensed book is the environmental assessment and at the top right-hand corner, I'm referring to those pages, page 14, in the first paragraph under "Future Exploration" the NEB is quite clear that there are no active surveys in the region presently. And the record unfortunately it's not entirely clear when the last time there were surveying -- seismic surveying going on in Baffin Bay and Davis Strait, in this particular area, although the record does indicate that there was some activity in the 1970s and perhaps also the early 1980s.

Back then the Inuit weren't told about seismic surveys in advance, they discovered that they were happening the hard way because deaf seals kept showing up on their shores, seals that presumably had been damaged by the surveying. And that was rather alarming to folks up there because seals are a staple of the Inuit diet and it's also a very important part of Inuit culture, the hunt is a very important part of the Inuit culture, but there is of course no honour in shooting a deaf and defenceless seal.

But, in any event, the point is that there are no surveys going on right now and there haven't been for

quite some time.

Now, before I turn to my submissions more specifically I do want to make a general comment about the nature of consultation owed in this particular case.

In this appeal it is important to keep in mind that we are dealing with the duty to consult at the deep end of the consultation spectrum, the deep end of the *Haida* spectrum. It's what the Court of Appeal found and the respondents have conceded this point, and it's a sensible concession.

When the Inuit signed away Aboriginal title to Nunavut, a tract of land as large as Britain, France and Spain combined, they did so in exchange for the rights contained in the Nunavut Land Claims Agreement, chief of which are the ability to harvest, hunt and fish in the Nunavut settlement area as they have for millennium, and now we have a seismic testing project which threatens to undermine those rights. Many would describe it -- many in Nunavut would describe it as this existential threat potentially to their way of life and livelihood.

So I make this point at the outset because on one hand many of our submissions and many of the legal arguments we are hearing about today are about the duty to consult generally, but in this case at the end of the day what we are talking about is the deep end of consultation

for purposes of the Clyde River case.

Now, with that said I do want to turn to my first main substance of submission on the adequacy of the NEB's review.

We spoke a lot this morning of the NEB's role, both in assessing the adequacy of consultation and also its power to engage in consultation. I do want to do my very best to keep those concepts distinct as *Carrier Sekani* urges us to do and at this juncture I do want to focus on the NEB's assessment of consultation.

The NEB was required to assess the adequacy of consultation and it was required to consider the impact of its decision on Inuit rights. It did neither here. Now there are no -- the Reasons for Decision are the Environmental Assessment Report. Unlike the case we heard this morning there is no separate Reasons for Decision. The proponents and the NEB have asked us to consider the Environmental Assessment Report as the Reasons for Decision.

Now, the problem with that decision is that it does not account for Inuit rights in a meaningful way. There's no mention anywhere in there of section 35 of the *Constitution Act*, no mention of Inuit rights, no mention of treaty rights, no mention of the duty to consult. These omissions matter.

Now, I appreciate that the Court of Appeal

rejected this argument and this harkens back to a question that Justice Côté asked this morning which is: Well, you know, isn't the NEB nonetheless -- even if they didn't use that language isn't the NEB nonetheless aware of Inuit interests? The answer to that question is yes, they are aware of Inuit interests, but that's not good enough. It's not enough for the NEB to turn their minds generally to Inuit interests, that's not the same thing as considering rights, it's not the same thing as considering the duty to consult.

In every case when the NEB makes a determination of whether a project is in the public interest it weighs and balances various stakeholder interests, from Aboriginal interests to the non-indigenous fishing industry to adjacent landowners, all relevant stakeholder interests. So yes, the NEB did take stock of the Inuit's interests as stakeholders with an interest in the outcome of these proceedings, but it's important to emphasize that the Inuit are not mere stakeholders, they are constitutionally entrenched rightsholders and taking into account their interests is different from taking into account their rights. And that's not simply a principled distinction, although it is a principled distinction, but it's also a practical difference.

The NEB at the end of the day reached a

conclusion that the mitigation measures proposed by the proponents were good enough such that the benefits of the project outweighed the potential harms, that's what it did but on what standard, that's what we don't know. If you're weighing the risks by considering the Inuit as mere stakeholders, you know, perhaps the NEB could engage in the calculus that said, "Okay, well, notwithstanding these risks, notwithstanding their interests, we find that those interests have been outweighed.

MR. JUSTICE ROWE: Yes. But in the end seismic guns make a lot of noise and that can disturb marine mammals, it can disrupt their migratory patterns and it can disrupt harvesting. What is it the NEB failed to do to protect that that they should have done?

MR. HASAN: Well, Justice Rowe, my point is both, as I said, it's a principled distinction and it's a practical distinction. One is they had an obligation to consider Inuit rights, not just the geophysical adverse environmental effects and my point is that that changes the analysis. It's not simply about, you know, what were the environmental effects it's also about what did this process require, what the Inuit want, and what is the level of engagement required by either the NEB or the Crown, and none of that analysis takes place here.

Even if one is to read the environmental

assessment charitably and say, okay, although they didn't use the term "rights" we are sufficiently satisfied that the NEB knew what the Inuit were concerned about, even if you grant them that there is still no analysis whatsoever of whether or not the duty to consult was adequately discharge. That question isn't answered at all. There's no question of whether the duty to consult was owed, what is the appropriate level of consultation and whether that duty was adequately discharged.

And we are not merely saying that the wrong test was used or they didn't properly apply the *Haida* framework, we are saying that there is nothing approaching a *Haida* analysis being done here, there's nothing approaching the question of, you know, who owes what to the Inuit here and who discharged that duty and that, respectfully, is an error in and of itself.

MADAM CHIEF JUSTICE: Nevertheless, it would be nice to have an answer to the question of what you say they should have done, if it's possible to address that.

MR. HASAN: What the NEB should have done was to ask the question: What does the duty to consult require in this case? And if it had asked that question it would have arrived, as all the parties and the Court of Appeal decided here, that deep end duty of consultation was owed.

And once it answered that question it could

have asked a further question" Well, in light of that can we address everything -- all of the Inuit's concerns, everything that will be required to satisfy the duty at the deep end and, secondly, if we can't do we need to ensure that the appropriate federal Crown or the appropriate federal Crown agency is involved and, thirdly, given that the duty is owed at the high level, you know, do we need more robust procedural rights to ensure that we get the answer right in this particular question?

MADAM CHIEF JUSTICE: (Off microphone) It's about something and we said that in *Sekani* as well. I mean you have to focus in on what you're consulting about and what was done about the subject of that consultation in this case in the order and what would you like to have had done? What did the process you say was defective leave out? I think that would be a concern that we would like to have you address.

MR. HASAN: In a nutshell, there are two hallmarks of deep consultation, okay. One is direct, continuous, frequent engagement by the Crown and the second hallmark when it involves a regulatory process are robust procedural rights.

Counsel for Enbridge made the helpful point this morning -- I never thought I would say that, but counsel for Enbridge made a helpful point that this case did

not involve a hearing, it didn't involve a formal hearing. There was no ability to test the evidence; no expert evidence in the way we ordinarily think of expert evidence; no opportunities to apply for and obtain funding; none of the hallmarks of fairness that we think of when we are talking about fairness at the deep end of the spectrum.

And I do want to --

MR. JUSTICE BROWN: (Off microphone) your submission which, as I understand your submission, to be that the NEB needs to explicitly do a *Haida* analysis, but you're sort of moving on -- and maybe this is really the issue that matters anyways as to whether the consultation was actually adequate irrespective of whether they turned their mind to what they needed to do. And if they don't turn their mind to what they need to do there is -- that obviously augments the risk of not doing what you need to do.

MR. HASAN: Absolutely, Justice Brown.

MR. JUSTICE BROWN: But for me, speaking solely for myself, the interesting question here is whether the consultation itself was adequate.

MR. HASAN: In that case I will turn directly to that now.

MR. JUSTICE BROWN: Just eight others might feel differently.

MR. HASAN: Now, as I said at the outset, because of the Court of Appeal's unchallenged finding that the duty was owed at the deep end, the core question is whether that duty at the deep end was discharged and I do want to make two points. One is of a more general nature and one is more specific to the deep duty of consultation.

First, there must be direct Crown engagement at some level. Now, the extent of that engagement may vary, but it has to be something. It can never be nothing.

MR. JUSTICE BROWN: What does that mean?

MR. HASAN: I do want to get to that, but I do just want to lay out the two points I want to cover.

MR. JUSTICE BROWN: Okay.

MR. HASAN: It could be as little as asking whether or not the pre-existing processes are enough for us to rely on, where deep consultation is involved it requires a whole lot more, direct engagement nation-to-nation dialogue, frequent participation in the process, perhaps seeking status as an intervener in the regulatory proceedings. I'm not suggesting a one-hat-fits-all approach, but there has to be something. At a bare minimum the Crown has to turn its mind to what is required.

Now, the second point I do want to make is no matter whether you agree with the first point in this case what happened in this case did fall well short of deep

consultation.

The question came about in various guises this morning about who is the Crown. I don't know that I can fully do justice to that question in a metaphysical sense, but for the purposes of these submissions when we use "Crown" we are referring to the government entity or entities with the power to engage in consultation. In this case we say it was the federal Crown because the federal Crown had the -- is the only entity here that had the authority to actually engage in consultation.

Now, to assess the adequacy of consultation it's important to ask at the outset I think who is doing the consultation, is it the Crown acting through the federal government, is it the tribunal, or is it some combination thereof of the Crown doing some and relying in some part on a tribunal process. So I do want to go through those possibilities one by one.

So looking at what the federal government did in this case, I do think it's important to understand what the Crown did and didn't do. The Court of Appeal, respectfully, correctly found that the Crown, acting through the federal government, did not engage in any independent or direct consultation with the Inuit. That holding is at paragraph 70 of the Court of Appeals Reasons.

Now, to be fair to the federal Crown, the

engagement did involve writing a single letter to the Inuit.

Now, I will make reference to Tab 9 in our compendium. The Inuit had raised the fact that they were section 35 rightsholders and owed a duty to consult at the outset of the regulatory process. That was a letter that -- an example of that can be found at Tab 8, which is a letter by the Qikiqtani Inuit Association. That's an umbrella organization representing various Baffin Island communities, including Clyde River.

Despite not being consulted by the Crown, the Inuit did participate in this limited process of information sessions and town halls and being able to submit letters of comment, despite their frequent frustrations with the process.

But as the process continued to run its course and their concerns were not being addressed, in their opinion, they did again reach out to the federal Minister and that letter is at Tab 9. And what they said in that letter, they outlined their concerns, they reminded the Crown that they are owed a duty to consult and they set out a roadmap for what they thought consultation would look like and what items ought to be discussed, such as a strategic environmental assessment, and that's something the NEB couldn't do for them. And then they closed by saying, "We're available to meet with you on this important matter.

MADAM JUSTICE CÔTÉ: That letter was addressed not only to the Crown, as you say, to the Minister, but also to the Chairman of the Board.

MR. HASAN: Absolutely, Justice Côté.

MADAM JUSTICE CÔTÉ: Yes.

MR. HASAN: That's an important point.

The Crown's response can be found at Tab 12 of these materials. I'm not going to read it to you, but to summarize what the Crown says is: I see you have appropriately put your concerns to the NEB, I respectfully disagree that we need to do an SEA before seismic testing is approved, and I look forward to the outcome of the NEB's review.

MADAM JUSTICE ABELLA: They also said, in the middle of the page on the second page:

> "The department is committed to conducting a strategic environmental assessment concurrently with the National Energy Board's consideration..." (As read)

Is that relevant?

MR. HASAN: Yes. That's a helpful point, Justice Abella.

Number one, that didn't happen, as a point.

Number two, the NEB approved this particular project before the seismic -- sorry the SEA was undertaken.

And, number three, you know, studying it after the fact doesn't do a whole lot of good if the harm has been done. And that's the concern the Inuit had here is, you know, once seismic blasting begins you can't put the genie back in the bottle and that the harm in terms of harm to -- direct harm to the mammals, marine mammals, by killing them or disrupting their migration patterns will already have been done.

MADAM JUSTICE ABELLA: Can I just ask you another clarification.

MR. HASAN: Of course.

MADAM JUSTICE ABELLA: On the first page, the third paragraph, as you pointed out, says:

> "I see that you have appropriately put your concerns in evidence before the National Energy Board." (As read)

Do you dispute that?

MR. HASAN: They put their concerns to the National Energy Board.

MADAM JUSTICE ABELLA: So they had an opportunity --

MR. HASAN: Most definitely.

MADAM JUSTICE ABELLA: -- to express their position?

MR. HASAN: They had an opportunity -- they had

an opportunity, a very limited opportunity, to be heard. They had the opportunities to submit letters of comment. As I said, there was no hearing process, unlike other --

MADAM JUSTICE ABELLA: So I heard you say that before. Am I wrong that it is open to the Board to decide whether to have a hearing, but that it can conduct consultations without a hearing under its legislation, that it's permitted to do so?

MR. HASAN: That would be news to me, Justice Abella. I don't think the Board takes the position that they can conduct consultations. That certainly wasn't their position here.

MADAM JUSTICE ABELLA: Sorry, that they can have -- that they don't need a formal hearing in order to make a decision in every case or do they need to?

MR. HASAN: No. I don't think the Board needs to make -- hold a formal hearing in every case, absolutely.

MADAM JUSTICE ABELLA: Okay.

MR. HASAN: I'm saying you need a formal hearing where the deep duty to consult is owed. And indeed that's not unusual. The NEB frequently holds full-blown hearings notwithstanding --

MADAM JUSTICE ABELLA: Okay. Just to get the template right, so your position is all although they don't they don't have to have a hearing, if there's a requirement

of a deep duty of consultation they must have a hearing?

MR. HASAN: Yes, Justice Abella.

MADAM JUSTICE ABELLA: Okay. Thank you.

MR. HASAN: It's driven by the duty.

MADAM CHIEF JUSTICE: Can I ask you about that? This deep consultation, it comes I believe from 44 of *Haida* --

MR. HASAN: Yes.

MADAM CHIEF JUSTICE: -- which is at Tab 18. Paragraph 44 and the previous paragraphs are describing the range of situations which can be considered which may arise involving consultation and then it says, having described certain situation it says:

> "At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance ... and the risk of non-compensable damage is high."

So I take it that it's common ground that those criteria are generally satisfied and that's why you're talking about deep:

> "In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required."

It doesn't say has to be, but may be:

> "While precise requirements will vary with the circumstances, the consultation required at this stage may..."

MR. HASAN: Yes.

MADAM CHIEF JUSTICE:

> "... entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact.... This list is neither exhaustive, nor mandatory for every case."

So you have just indicated that you feel as a matter of law there has to be an oral hearing, I assume you have some other authority than paragraph 44 of *Haida*.

MR. HASAN: I shouldn't have been quite as categorical. Every single case -- I can't say every single case. That said, I think it would be a rare case where you had a requirement of deep consultation and there weren't robust procedural rights.

I thank the Chief Justice for taking us to the operative paragraph of *Haida Nation*. As the Chief Justice helpfully pointed out, this Court in that case didn't

exhaustively define the deep duty of consultation but provided some guidance and now we have more than a decade of guidance in which the courts, the lower courts, have applied *Haida Nation*, including at the deep duty to consult level.

MADAM CHIEF JUSTICE: But can I just take my concern one step further? *Haida* emphasized that you have to have a case-specific approach and in respect of deep duty said these things are not mandatory in every case. So it seems to me we should be asking what in this case -- what do the circumstances of this case require?

What I'm sensing in your argument is that in every case as a matter of law you have to go through A, B, C, D and E and your complaint is that we didn't go through all those steps here. Rather I would think that the focus should be on what is necessary to come to a solution in this case and so we have to look at the facts of the case, the issue, and so on, rather than suggesting it's mandatory that we have any particular thing.

MR. HASAN: I appreciate the point, Chief Justice, I think. But the point I was trying to get at is when you're dealing with deep consultation that analysis which you are describing is invariably likely to take us to a place where there are more robust procedural rights. I appreciate that it has to be done on a case-by-case consideration, but in the decade plus since *Haida Nation* was

decided the case law in which a deep duty to consult has been found and where it's been found to have been discharged has generally involved two features, usually both. Firstly, direct Crown consultation on a nation-to-nation level and, second, robust procedural rights.

MADAM JUSTICE ABELLA: Can I take you then to this -- I'm assuming your position essentially contradicts the possibility that the Crown can rely on the Energy Board's consultations, but just for the sake of argument let's say it can. Looking at the assessment report in this particular case and the section on Aboriginal consultation, it would be helpful to me if you could go through that -- because it ends with the Board's conclusion at page 23 -- of what you say is wrong with that consultation process and what could have been improved, since we are talking about the quality of the consultation.

MR. HASAN: Justice Abella, you have raised two equally important issues and I would like to take them in turn.

The first question was: When can the Crown rely on the regulatory process to discharge a portion or the entire portion of consultation? That's going to depend in large part on what the regulator can do, okay. If the statutory decision-maker -- if for example the NEB has the power to engage in consultation, then it can rely in

significant part, okay, if they have that power. Now, at the end of the day even where the tribunal has the power, the Crown should still be asking the question: Is anything more required?

Now, where the tribunal does not have the power to engage in consultation -- and we say the NEB does not have the power to engage in consultation -- then the Crown cannot rely on the NEB, at least not entirely, to discharge the duty to consult. That's not to say you can't rely on the NEB in a limited way for the purposes for example of information-gathering, there's a role for the NEB to play in terms of information-gathering, but to rely on it to discharge entirely the duty to consult is problematic. Consultation requires someone on the other side of the table.

MADAM JUSTICE ABELLA: That means looking at, if you don't mind, what they say they did in their consultation process and what you say is missing from that so that the Energy Board would have complied with the nature of the consultation you say the Crown should have engaged in. Are we talking --

MR. HASAN: You're again referring to the section 6 of the EA.

MADAM JUSTICE ABELLA: Yes. Yes, I am.

MR. HASAN: Yes. So there are a couple points

I want to make about that part of the assessment.

Firstly, what the NEB is assessing there is not Crown consultation, right, it's assessing the proponents' engagement.

MADAM JUSTICE ABELLA: No, but we are reviewing their consultation process to see whether it meets the requirements of deep consultation, assuming we accept that the Crown may rely on consultations by the Board. I appreciate you're not accepting that first premise, you're saying there have to be parallel processes, the NEB for its purposes and the Crown for its purposes, two separate streams in your case saying doing the same thing or doing different things.

So what I would like to know from you is, looking at what they did in the Aboriginal consultation process that they have set out, what is it that would be required in order to meet what you say is the Crown's obligation to consult deeply. What didn't they do that they should have done according to your framework.

MR. HASAN: There needed to be someone with the ability to engage in meaningful dialogue sitting across the table. The proponents do not --

MADAM JUSTICE ABELLA: It's the physical -- it comes down to not the nature of the discussions, but the presence of someone from the federal government?

MR. HASAN: In a sense, yes.

MADAM JUSTICE ABELLA: Okay.

MR. HASAN: But it is both -- it is both a principled reason and a practical one.

Having the Crown there is different from having the proponents there. The Crown is bound by the honour of the Crown. The proponents are bound by their fiduciary duty to their shareholders, but the Crown is bound by the honour of the Crown.

And, secondly, functionally, it's the Crown who can engage in the nation-to-nation dialogue that can give the relief that the Inuit are seeking. The Crown -- if meaningful nation-to-nation dialogue, which is what *Haida Nation* requires, would have involved a Crown or Crown delegates sitting down at the table with the Inuit, listening to their concerns and at that point the Crown ought to have asked itself: Well, what more is required here? You know, should we be thinking about this strategic environmental assessment? Should we intervene in this proceeding?

Or, alternatively, they might say: Hey, look, shooting airguns into the ocean at 230 decibels in this ecologically sensitive area, that sounds like a big deal, that sounds like something that requires some study, so maybe we should bring our agency expertise to bear, maybe we

should be involved in procuring technical reports, commissioning technical reports as what the true harm is here.

Because we didn't have that in this case. None of the parties were able to put forward expert evidence. The NEB did rely on the proponents to submit scientific articles, that's not the type -- the level of expert evidence even in other NEB proceedings that we generally see.

MADAM JUSTICE KARAKATSANIS: Can I ask you, if the Board had decided it wanted to hold a hearing, did it have the power to do so under section 35 -- 53?

MR. HASAN: I think it absolutely did have the power to hold hearings here and I think it was obligated here.

MR. JUSTICE GASCON: Now, in the same section that Justice Abella pointed to, if I look -- there are three page numbers in your condensed book, it's either 16, 22 or 25, depending on the number you're looking at, but I read:

> "The Board recognizes that some concerns raised by Aboriginal groups are beyond the scope of the project and this EA."
>
> (As read)

What does that refer to?

MR. HASAN: I'm sorry, Justice Gascon, which

page are you referring to?

MR. JUSTICE GASCON: Well, it's in Tab 2 of your condensed book --

MR. HASAN: Yes.

MR. JUSTICE GASCON: -- the Environmental Assessment. At the top it's 22, first paragraph, last sentence:

> "The Board refers to concerns that were raised and that it cannot address." (As read)

What are they referring to?

MR. HASAN: Most likely the strategic environmental assessment and they did make reference to that earlier in the report.

MR. HASAN: Let me suggest that it might be a reference to the letter to which you referred us to just a moment ago at Tab 9, that of April 8, 2014 to Mr. Valcourt and to Mr. Caron. At page 2 of that letter, 177 by one numbering, there are -- it says:

> "To advance our mutual goals the Inuit propose the following solutions for further discussions..."

And then there are five items set out there.

Upon my reading the first two relate in a very specific and concrete way to the effects of seismic testing

and the potential impacts on marine mammals. As you go down the list toward number 5 you move beyond that immediate and concrete question into questions relating to -- I'm going to say should there be petroleum development in Arctic waters.

So the question -- what was the question properly before the Board and upon which consultation was needed? Was it the impacts on Aboriginal rights, 35(1) rights of seismic testing I propose, or was it the much broader policy question of petroleum development in Arctic waters and upon which did they need to consult?

MR. HASAN: Justice Rowe, that's a helpful question.

The NEB does define its mandate in these types of applications quite narrowly. I think if you look at page 14 of the NEB assessment report there is an explicit reference there under 3.2 to strategic or regional environmental assessments and which the NEB says, I think quite clearly, that they are looking at the immediate impacts of this particular project and that's part of their mandate. These broader issues of whether it makes sense for that particular region in terms of sustainability, environmental effects, what's coming next in terms of potential petroleum development and extraction, that's beyond the purview.

That was also, however, something that the

Crown could have engaged on. The Crown could have looked at this and said, you know, "Hey, notwithstanding this application before the NEB, we are likely not going to allow development here anyways and that's got to weigh -- and that's something that would then weigh into the calculus as to whether or not the NEB should be allowing such a project with its attendant risks.

MR. JUSTICE BROWN: (Off microphone) doesn't *Carrier Sekani* direct us to look at the specific proposal at issue? I mean that's certainly how I read it, that you just -- you look at specific proposals. Just what's before the entity that's doing the consultation.

MR. HASAN: I appreciate what you're saying, Justice Brown, but the point I was trying to make here was that there's a lot --

MR. JUSTICE BROWN: Yes, there's a larger thing going on, I understand that --

MR. HASAN: There's a lot --

MR. JUSTICE BROWN: -- and it might be smart for the Crown to consider that, but the question is what does the Constitution require.

MR. HASAN: Right. And my point is there's a lot that the Crown could do that the NEB couldn't.

MR. JUSTICE BROWN: Okay.

MR. HASAN: That's the only point I'm trying to

make here.

MR. JUSTICE BROWN: All right.

MR. JUSTICE MOLDAVER: Could I ask you to pick up on a question I guess from Justice Brown and Justice Rowe? You have taken us to the letter, Justice Rowe just took you to the letter where you had a wish list.

MR. HASAN: Yes...?

MR. JUSTICE MOLDAVER: Your wish list included five things and, as I see it, Justice Rowe has gone through them, but primarily it seemed to me you were interested in having this assessment, this strategic environmental assessment carry on right away, go for it now before the Board makes a decision. I don't see anything in there, "We would like to have an oral hearing, we would like to have funding, we would like to be able to call expert evidence, et cetera, et cetera. So if we accept that that was what was troubling you, you did write to the Minister, the Minister wrote back to you and said, "Thank you very much, we have considered this, we think it's premature at the moment, let's wait and see what the NEB does."

So you in effect did have a further consultation with the Minister, you just didn't get what it was that you were seeking.

But doesn't that sort of -- it tells me two things. Number one, you did have a consultation with the

Minister, it may not have been a very satisfactory one but you did. And, number two, you weren't asking for the things that you say -- or started off saying here were absolutely fundamental in a deep -- or primarily fundamental, in a deep consultation consideration.

MR. HASAN: Justice Moldaver, thank you for that. You raised two things.

Number one, if you want to call this letter exchange, this two-page letter exchange consultation on some level that's fine, but let's understand that that was it. That was the extent of consultation with the Crown on the deep level on this, okay. That point I think needs to be clear.

The Crown dismissed the request for an SEA out of hand without anything as much as a meeting. I mean that to me also is significant. We're talking about consultation on the deep level.

Now, with respect to various procedural rights, I can't stand here and say that there was a formal motion brought for any particular type of hearing or the ability to file expert evidence or an oral hearing, I can't say that, but I don't think that detracts from our argument. I don't think that gets the Crown off the hook. The question is what the honour of the Crown requires.

MR. JUSTICE MOLDAVER: I don't disagree with

you that it's not up to you to sort of force in the kind of consultation that you are entitled to as a matter of law, I don't disagree with that, but it just seems a little bit strange that when you come here that you're asking for things that -- I mean you weren't shy to ask for things --

MR. HASAN: Yes.

MR. JUSTICE MOLDAVER: -- and I would have thought in that wish list we might have seen the kind of things that you're saying should have been done.

MR. HASAN: I take your point, Justice Moldaver. I mean and this wish list -- this wish list is addressed to the Minister, the Crown, and those are Crown consultation issues.

MADAM JUSTICE CÔTÉ: And to the Board, too.

MR. HASAN: And to the Board as well, yes. But the thrust of this list of requests are things that the federal government could provide that the NEB couldn't. And in terms of setting out these more robust procedural rights that I'm saying ought to have been afforded, my point is more simply to say let's contrast what happened here to other cases where the duty to consult has found to have been discharged. And let's look at what's missing here compared to all of these other cases and I think -- I mean that has to be relevant here.

MADAM CHIEF JUSTICE: Well, we have been asking

you for a long time to tell us exactly what's missing here so I welcome this overture.

MR. HASAN: Direct and meaningful engagement with the Crown, with the federal Minister, okay. That is one important hallmark that you have in deep consultation cases that you don't have here.

And, secondly, where the process involves a regulatory process there has to be meaningful procedural rights, there's two parts to it. And I think the recent decision of the Federal Court of Appeal in the Gitxaala case, the Northern Gateway decision, is a good example of that. Now, in that case the Court held that the duty to consult at the deep end was owed and that wasn't discharged, but in that case, like many other NEB cases, you did have both Crown engagement outside of the tribunal process, you had Ministers and delegates of Ministers and agencies of the federal Crown meeting with the affected indigenous groups, and you had direct participation in the tribunal process.

MADAM JUSTICE ABELLA: Let me try my luck later in the section of the report dealing with the Aboriginal consultation.

If you look now just in dealing with the participatory rights that you say were not afforded, if you look at the bottom of page 22, page 13 of the report, the purpose of the process was to facilitate participation, to

enable them to convey their views, then it talks about how, on the next page, they issued a discussion paper, there were concerns expressed about the content of the discussion paper, it was changed. And then we get to -- and this is what I would appreciate your focus on:

> "Aboriginal groups actively participated during the EA process, they received letters..." (As read)

And then there's a list of the concerns that were raised by the Aboriginal people through the EA process, et cetera, and then the Board's views on all of that.

So I'm still having trouble, Mr. Hasan, trying to figure out -- I accept your point -- I'm not sure how I feel about it -- that there has to be a person physically present during those meetings that they listed in their report, those individual meetings, the 30 meetings, but if there wasn't somebody there what was there about this that didn't reach the necessary constitutional threshold of meaningful consultation as set out in their decision?

So that's what I'm struggling with. I accept that they need to be meaningful, what didn't they do that they should have done, other than have a federal Crown representative there?

MR. HASAN: Yes. Justice Abella, I think I have your point now, your question now and let me try my

best to answer.

You took us to some language in the Environmental Assessment Report, the decision, that talks about the process that was afforded. I do want to highlight I think what is an important distinction in this case, which is what the NEB says the Inuit got and what they actually got.

There were no meaningful opportunities within that process for engagement for exchange of information. My friend in his factum on behalf of the proponents refers to consultation sessions being held. These were not consultation sessions, these were question-and-answer sessions in which the proponents were present and the Inuit were allowed to ask questions and the proponents either didn't know the answer or didn't provide the answer.

I will take you to Tab 3 of our compendium.

MADAM JUSTICE ABELLA: Before we get there, were changes made to the project by the Board as a result of the concerns expressed at those meetings?

MR. HASAN: No meaningful changes were made after those.

MADAM JUSTICE ABELLA: No meaningful changes.

MR. HASAN: Yes. There was talk about the precise drawing of survey lines was changed, don't know exactly what impact that has, but beyond that there were no

changes as a result of those meetings. And those meetings involved -- and at Tab 3, 3-A to 3-J there are excerpts of those meetings. In the interest of time I'm not going to take you through those transcripts, but I have included them in there and they are I think compelling reading. Time and time again the proponents are being asked questions like: Which animals will be affected? How will this affect the narwhal, the beluga whale, the bowhead? What's your plan for compensation if something goes wrong? And each time they were given a variation of, "We don't know, we're not the marine biologists, we will get that sent up to you or you can look it up yourself."

Now, the ineptitude in answering these questions, as problematic as it is, it's not the key point I want to focus on.

MADAM JUSTICE ABELLA: But I just want to get back and ask you how comfortable you are saying that nothing was changed as a result of consultation with Aboriginal groups when on page 15:

> "The Board notes that MKI has implemented actions and made commitments as a result of its consultation with Aboriginal groups. For example..."

And it lists a bunch.

So I'm still floundering, Mr. Hasan, on what

the procedural, substantive barriers are that you say exist to our concluding that a proper consultation took place. No federal Crown person was there and no hearing took place, is that really what it comes down to?

MR. HASAN: The Crown -- no one with the authority to actually engage in consultation was there and there were inadequate -- grossly inadequate procedural rights. This is a decision that could undermine Inuit food security and we don't even have a proper -- proper expert evidence, proper expert report. We have a process where the NEB is relying entirely on a paper record and articles submitted by proponents and that in of itself is problematic.

And these consultations -- now let's say this Court were willing to overrule *Haida Nation* where *Haida Nation* says that you can rely on the industry proponents to do certain things but you cannot delegate responsibility to industry proponents because the honour of the Crown cannot be delegated. Let's say there's some erosion of that principle, that would be deeply, deeply problematic. And I think what happened in these question-and-answer sessions and what happened subsequently in this process is a good example why. At these so-called consultations the proponents could not answer these very --

MADAM JUSTICE CÔTÉ: But there were -- they

could not answer, but is it not in that context that the Board issued various IRs, information requests, 1, 2, 3, 4, which were responded to by the proponent?

MR. HASAN: I think that's an important clarification, Justice Côté, and I was just going to come to that.

It's true that the Board said after these sessions, "Proponents, you haven't answered these questions. These are fundamental questions, you have to answer them." And the proponents responded by delivering a 3,926 page document which was a compilation of various reports, only 10 pages of which were translated into Inuktitut, and then there was a brief period for written comment on these additional submissions.

After those additional submissions that lengthy the document was submitted, there were no other public sessions held, no other meetings with regional HTOs, no other meetings with Hamlet councils and no other open house Q&A's, whatever you want to call it. Once this information was provided that should have marked the beginning of meaningful consultation on this information.

MR. JUSTICE BROWN: Mr. Hasan, I have a question about that.

I have read the transcripts from Pond Inlet and from Qikiqtarjuaq, I haven't read Clyde River, but I was

looking in there for some indication of what the people being consulted understood the process in which they were engaged to be. Is there anything on the record that helps me understand what they thought they were engaged in by way of a process? I mean did they understand -- is there anything that indicates whether they understood this to be, you know, "consultation" or something different.

MR. HASAN: Well, I think at the outset the Inuit -- and this may have been naïve on their part, they thought they might have a say in the outcome of these proceedings.

In terms of what they understood from the process, I can't say with any certainty what individual Inuit organizations understood, but there is an NEB description of the process in the record. It's not in our condensed book, but at the appellant's record at Volume 3, Tab 24 the NEB sets out what its process will be and again that document makes it clear that the opportunity to comment is going to be written comments and possibly oral comments.

MR. JUSTICE BROWN: But this is in a letter to RPS Energy? Maybe I'm not looking at the right.

MR. HASAN: It's not in the compendium I'm referring to.

MR. JUSTICE BROWN: No, I know that. I have Volume 3, Tab 24. Is that where you directed me to?

--- Pause

MR. HASAN: I'm sorry I had the wrong tab.

MR. JUSTICE BROWN: Okay.

MR. HASAN: It's Tab 28. That is one of the notices of a public meeting and that is the extent of the outreach to advise people what the process would be, bearing in mind that these are communities where many people do not speak English. Sometimes there was a notice in both Inuktitut and English, but that wasn't consistent throughout.

You know, this process does contrast in significant ways with other NEB processes. I have made this point before where in some of the more -- in some of the pipeline projects where the NEB goes out into communities for months on end to advise people as to the process taking place and what their rights are in the proceeding and tells people about the opportunities to apply for funding, to apply as an intervener, to apply to make oral submissions. You don't have any of that in this particular case.

In terms of what took place in this case, it is quite analogous, respectfully, to what occurred in the *Mikisew* decision. That was of course a case where the duty to consult was owed at the low end of the spectrum and in that case the Crown was attempting to rely on a public consultation process that looked pretty similar to what was

occurring in this particular case and what this Court held unanimously in that case is it's not good enough to rely on that public forum process, it's not good enough to rely on the public comment process, it's not good enough for the Crown to retroactively label something as consultation.

There is no acknowledgment by the NEB or the Crown, or anyone wearing a government hat, that a duty to consult was owed or that these were Aboriginal rightsholders. The first time that terminology is used by my friends is in their Court of Appeal factum. There's none of that acknowledgment until -- until the litigation process and it's just not appropriate for the Crown to retroactively now -- where they hadn't given any thought to what its obligations were, to now say this regulatory process is consultation.

I see that my time is up. Barring further questions, those are my submissions.

(1501) MADAM CHIEF JUSTICE: Thank you, Mr. Hasan.

Ms Nouvet...?

ARGUMENT FOR THE INTERVENER (36692)

NUNAVUT TUNNGAVIK INCORPORATED

(1502) MS NOUVET: It's in everyone's interests to ensure that the duty to consult and accommodate is satisfied prior to NEB decision-making. We need to minimize this kind of litigation, it is time-consuming, it is expensive and,

quite frankly, most Aboriginal peoples do not even have the financial option of bringing this kind of case.

The challenge is that we have an NEB statutory decision that triggers the duty, but both the NEB and the rest of government, which we have called in our factum "the Crown" for short, have the ability to contribute to consultation and accommodation in different ways, and this situation creates a real risk of the duty or part of the duty falling through the cracks. Who does what?

NTI in the bulk of its factum proposes a practical and efficient approach that would avoid consultation gaps, that would ensure that the NEB and, as needed, the Crown, engage on relevant issues in a timely way. I'm just going to give the bare-bones summary of that approach.

First of all, the NEB directly notifies the potentially affected Aboriginal group of the project application, then the Aboriginal group engages in good faith and brings forth information, concerns and often most importantly accommodation proposals in relation to the project.

Then the NEB notifies the Aboriginal group, and ideally the Crown, the rest of the government, if it does not intend to deal with a particular issue, either because it lacks jurisdiction or because it chooses not to. Our

factum at paragraph 11 gives examples of these kinds of situations. The most recent one is one evidenced in the *Gitxaala* case referenced by my friends already from the Federal Court of Appeal found at Tab 3 three of our book of authorities. In that case the NEB did not assess strength of claim. It was a relevant issue in that case. I don't think it always is, but it was in that case. The NEB failed to assess strength of claim and then the further Crown consultation that happened in that case under a different provision of the *NEB Act* also failed to assess strength of claim. There is a gap and it was one that the Crown as opposed to the NEB should have filled and didn't.

Another I think really important example of where the NEB has limits to its jurisdiction on accommodation, yes, NEB imposes project mitigation measures, it is the expert at that, there is no question, but accommodation can be more than project mitigation measures. It can include, for example, economic accommodation or it could for example include a proposal to protect a different part of the Aboriginal groups' territory to ensure that they can at least continue to exercise rights fruitfully in a different part of their territory. That is something that the NEB cannot do or provide; that would be something for the Crown to consider doing as an accommodation.

So what this implies is that the Crown, once it

is on notice that the NEB is not going to deal with a particular issue, the Crown promptly steps in and consults about that issue, it fills in the gaps as needed. And this what we have called in our factum "direct Crown Aboriginal consultation" must occur prior to NEB decision-making.

MR. JUSTICE BROWN: Do you need to assess strength of the claim where it's a treaty right that's affected?

MS NOUVET: I do not think -- in the case of treaty rights, I think the issue that might be controversial would be more the scope of the treaty right. In my experience that's where there can be disagreement. The right is filled out --

MR. JUSTICE BROWN: So it's not so much the strength of the claim but what's affected.

MS NOUVET: But the scope -- or the scope. What does the right actually include.

MR. JUSTICE BROWN: Okay.

MS NOUVET: A slightly different question that could come up in the case of treaty rights.

MR. JUSTICE BROWN: That's helpful; thank you.

MS NOUVET: And there was a question this morning about what happens if the Crown gets involved and, you know, they see a problem. They see -- their view becomes that they can't accommodate. Well, then what

happens?

And I'm glad this has been raised because this Court has yet to say that accommodation in cases where a deep duty is owed may in some cases require a project to be rejected. The B.C. Court of Appeal has said it, it said it in the *West Moberly* case, it said it in an earlier *Homalco* case, they are both in NTI's book of authorities, it would be very valuable for this Court to confirm that possibility, particularly since on my review I have never seen an NEB decision that rejected a project on account of impacts on Aboriginal peoples.

But in any case, if we come to that point where the Crown is thinking we can't accommodate the way we need to here, in my submission, they would inform the NEB of this fact. The NEB is the statutory decision maker, they decide under the legislation whether the project proceeds. They will presumably take the Crown's views on this matter into account and there is at that point, if the NEB proceeds with hat the decision, a real chance of a judicial review, but we are doing everything else under this framework proposed here to minimize that occurrence. So judicial review is the last resort.

MADAM JUSTICE ABELLA: Can I ask you just a notice question because you raised the question of notice?

MS NOUVET: Yes.

MADAM JUSTICE ABELLA: Who is supposed to give notice? Should there be an obligation on the part of a party who thinks the honour of the Crown may be engaged in a particular way, to inform the Crown or should the Crown assume that in every single case it's honour is being engaged?

MS NOUVET: Well, the best practice, and it's generally what we see nowadays with the federal government, is that when they think there's potential for Aboriginal impacts the decision-maker puts out the notice to the Aboriginal group, a direct notification, so the NEB for example will notify groups that it deems may be potentially affected.

From the Aboriginal group's perspective it doesn't matter whether the notice comes from the NEB or from the Crown, but we know from the case law that Aboriginal groups are required to participate in a process like the NEB as much is possible to have their concerns addressed, it would be logical for the NEB to provide that notice. If an Aboriginal group is left out, you know, then as a practical matter they need to step forward and signal that they need to be included, but really the obligation I think lies with the NEB to identify potentially affected Aboriginal groups and give them an opportunity to become involved in the process.

MADAM JUSTICE ABELLA: Okay. No, I see that, but then is it up to the NEB to notify the Crown or the Aboriginal groups who are participating to say to the Crown, "We think that your honour is engaged here"?

MS NOUVET: Oh, okay. I see what you mean.

Well, it could be either. I mean as a practical -- if the NEB is deciding that it won't address an issue or it can't address an issue that the Aboriginal group has raised, I would say it's up to the NEB to let the Aboriginal group and the Crown now that. If the NEB doesn't realize that there is a gap and it's the Aboriginal group that is perceiving a gap I think the onus is on the Aboriginal group to reach out and contact other potentially appropriate government agencies. But ideally the steps are that the Aboriginal group raises their issues, the NEB responds, what do we do, what do we not do, and shares that with other government agencies who might be involved and they step in.

MADAM JUSTICE ABELLA: Or not.

MS NOUVET: Pardon me?

MADAM JUSTICE ABELLA: Or not.

MS NOUVET: Now, when an Aboriginal group -- and we say, what the NEB -- if there is direct Crown engagement happening it can only make a decision on whether to approve the project once it has determined that

consultation is complete. I mean the gatekeeper function is essential in this case where there is potential for more than one entity responsible for consultation. That's why we need a clear decision -- a clear consideration, an explicit consideration with reasons by the NEB of whether the duty was satisfied, but particularly where the duty, as in this case, is deep.

And I would like to stress that an EA decision is not the same thing as a decision about adequacy of consultation and accommodation. Justice Abella, I think you were asking about this earlier.

First of all, what is relevant to an EA decision will not always overlap perfectly with what is captured by consultation and, secondly, I think the duty to give reasons is going to be -- in the case of deep consultation, you need that real dialogue. Paragraph 327 of the *Gitxaala* case says:

> "In order to comply with the law, Canada’s officials needed to be empowered to dialogue on all subjects of genuine interest ... exchange information freely and candidly, to provide explanations..."

And I would suggest that that passage should be looked at in contrast to the NEB decision in this case because there is an assumption in that -- there is a

conclusion in the NEB decision that mitigation would be effective. It is not explained. It is not explained to Inuit why they can count on the mitigation measures.

And I know I'm not supposed to speak to the merits of this case, but I represent an Inuit agency and this issue affects their livelihoods and their culture, we need to look at whether reconciliation has been fostered here. Have Inuit been given an explanation in the NEB decision for why they can count on this mitigation? They are not going to be reviewing an NEB record in English over, you now, dodgy or nonexistent Internet connections to figure that out.

The standards that may apply in a regular administrative law decision for adequate reasons are not the same that apply where there is a deep duty to consult for the Aboriginal rights and the Treaty rights of our first peoples of this country.

MADAM CHIEF JUSTICE: Thank you.

MS NOUVET: Thank you.

(1512) MADAM CHIEF JUSTICE: Ms Darling...?

ARGUMENT FOR THE INTERVENER (36692)
INUVIALUIT REGIONAL CORPORATION

(1512) MS DARLING: (Aboriginal language spoken), Chief Justice, Justices. I have the privilege of representing Inuvialuit Regional Corporation here today and

I would like to acknowledge our Chair Duane Smith who made the trip all the way from Inuvik to be here.

We submit that the principle of free, prior and informed consent clarifies the scope of the duty of deep consultation and constitutes a flexible and reasonable evolution of that duty. I will focus first on why it is timely and appropriate to consider the epic framework, then I will look at three key elements of that framework, the objective of consent, procedural consensus, and meaningful participation.

This is the right time to consider a framework for the duty of deep consultation. This Court has confirmed the need for deep consultation in various cases, but there remains uncertainty about its context, contents or predictable benchmarks for measuring whether it has occurred.

IRC is concerned that inadequate consultation is eroding negotiated treaty rights and this is wearing at the edges of the Inuit to Crown relationships. There is a pressing need for both flexibility and guidance on how to fulfil the duty of deep consultation and preserve the integrity of treaty rights.

IRC has decades of experience engaging with proponents and Crown over oil and gas reserves. Based on this experience we submit the principle of FPIC contained in

the *UN Declaration on the Rights of Indigenous Peoples* provides a flexible framework capable of guiding parties through deep consultation. The Declaration embodies international human rights principles and is broadly endorsed by the international community. Inuit and Canada participated extensively in the decades long work to strike the right balance between Aboriginal peoples and the Crown. Even industry has acknowledged that obtaining FPIC reduces risk and improves certainty. The Court can use the Declaration as an interpretive guide without making a determination on whether it is binding.

Through the line of cases since the *Alberta Reference* this Court has looked to international instruments to interpret constitutional rights. The FPIC framework also aligns with the canon of consultation jurisprudence that advocates flexibility in this duty.

FPIC is not a checklist, but a flexible framework composed of six elements: freedom from coercion or threat; procedural consensus; timely and robust engagement; information and understanding; meaningful participation; and the objective of consent. What this framework adds to the work that this Court has already done on the duty is a focus on the diligence required to produce effective deep consultation.

I will focus on three of the six elements of

FPIC discussed in our factum.

First is the objective of consent that provides the foundation for an enduring relationship between Aboriginal peoples and the Crown. It is in fact the parties' failure to pursue consent that often results in ineffective consultation and litigation. This means diminished certainty for Aboriginal groups about the integrity of their treaty rights on the one hand and diminished certainty for proponents about whether their project will proceed on the other. The duty of deep consultation cannot be approached clinically ignorant of what motivates its parties to engage. IRC submits that the goal of both parties of getting to yes modifies behaviour and drives parties to find the common ground that may exist.

Whether consent was properly withheld is assessed on a standard of reasonableness. If the Crown diligently conducts deep consultation in accordance with the FPIC framework, the Aboriginal party -- and the Aboriginal party withholds consent unreasonably, the project may proceed. If, in contrast, the Aboriginal party withholds consent reasonably the Crown may either accept the decision or justify its infringement of the original interest under the framework set out in *Sparrow* and in light of this Court's decision in *Tsilhqot'in*.

I would like to talk now about procedural

consensus elements, starting with a quick story.

Early this fall I had promised to make my boys an akpete(ph) or cloudberry tart. I spent days picking akpete(ph) just outside of Inuvik. I brought the berries home and I proudly set them on the table. As my sons tried the pungent sweet-sour flavor disappointment came over their face. I was reminded that even the most gleaming bowl of akpete(ph) does not an akpete(ph) tart make. Similarly, even years of meetings and correspondence does not necessarily amount to effective consultation. The process outlined in a statutory or land claim regime may very well provide a reasonably acceptable process for deep consultation; in other cases a process may need to be developed or modified in order to allow for deep consultation to occur. Prior agreement on the process would improve predictability, help manage expectations and reduce instances of litigation.

Finally, I will turn to meaningful participation. As Justice Iacobucci recently explained, project proponents and Aboriginal peoples ought to approach each other in the spirit of partnership.

My time is up.

MADAM CHIEF JUSTICE: Thank you very much.

MS DARLING: Okay. Thank you.

(1517) **MADAM CHIEF JUSTICE:** The Court is going to

take a 10-minute break. We will be back here at 3:30 to continue the hearing.

Thank you.

--- Upon recessing at 3:17 p.m.

--- Upon resuming at 3:31 p.m.

MADAM CHIEF JUSTICE: Mr. Carpenter...?

ARGUMENT FOR THE RESPONDENTS (36692)

PETROLEUM GEO-SERVICES INC. (PGS), ET AL.

(1531) MR. CARPENTER: Good afternoon, Justices. I apologize for being a little croaky, I happen to have come down with the worst cold that I have had for years at the same time as I'm appearing in front of you for the first time. I'm assuming that's pure coincidence.

My consolidated book should be in front of you. I would like to start by spending a little bit of time on the facts and I will do that in two stages. The first is to make sure that it's clear the statutory scheme that the National Energy Board was operating under in the *Clyde River* case and then I want to respond to some of the comments on the facts that my friend Mr. Hasan made, and then I will make, I think, some relatively brief submissions on the law.

You have heard already about the *National Energy Board Act* and that has been the focus of a number of the submissions here and the idea that this is a tribunal and that as a result it should be treated specially in some

way and it may not be able to satisfy the duty to consult.

It's important to keep in mind what the specific circumstances are as this Court has said over and over and over again in these cases.

In this case the National Energy Board was responsible for making a decision, but they were responsible for making a decision under what is known as the *Canada Oil and Gas Operations Act*, so not specifically the *NEB Act*. That decision also at the time that the application was made for the proposed activity triggered a requirement for a federal environmental assessment under what was then the *Canadian Environmental Assessment Act* and I just want to go briefly to those provisions because in my respectful submission when you take what this Court said in *Carrier Sekani*, that the ability to carry out the duty to consult is either expressly applied in the statute or is a matter of implication from the statute, both in terms of the powers of the Board at issue and its remedial powers. I submit that there's no question that the Board in this particular circumstance had the power to carry out the duty to consult.

So the *Canada Oil and Gas Operations Act* is at Tab 2. I just briefly want to point you to the "Purpose" at 2.1. And as it was pointed out this morning, the purpose of the act is both safety in this case and the protection of the environment. There is a prohibition under section 4

that no activity can take place unless it's authorized, and then the requirement for an authorization under, in this case, section 5(1)(b).

As my friend has pointed out, the activity that was proposed in this case was the carrying out of a marine seismic operation in Baffin Bay and Davis Inlet.

MADAM CHIEF JUSTICE: Does the fact that this is under an Act that is aimed at safety and protection of the environment impact in any way on the ability of the process to relate to Aboriginal concerns?

MR. CARPENTER: I think that it does. I mean it clearly directs the NEB in the direction of those issues that have the potential to impact the Aboriginal rights here and it's not surprising that in many instances -- I won't say all, but in many instances what the primary concern is is the environmental impact.

MADAM CHIEF JUSTICE: Well, what I'm thinking about is maybe there are other interests that surpass safety and protection of environment such as economic participation that I'm wondering -- you can close it off for me if you have a positive answer -- whether the fact that this is under the Act that's aimed at environment and safety, whether some of those other considerations might not get the full consideration that they would otherwise?

MR. CARPENTER: Well, there is a requirement

under what is more commonly known as COGOA for a benefits plan to be in place and the Minister has to approve a benefits plan before an activity can take place under COGOA so it directly does deal with those economic interests.

MR. JUSTICE ROWE: Yes, but --

MR. CARPENTER: As I indicated, this also triggered the *Canadian Environmental Assessment Act*.

MR. JUSTICE ROWE: Yes, but before you go on, you said, "Well, environmental interests". You seemed to imply that coincided with Aboriginal interests. Let me give you a -- I don't know if that's what you meant to say or perhaps you meant to say something different, but if that's what you meant to say let me give you a hypothetical.

You have a certain number of whales, walruses and seals in the Davis Strait, you carry out seismic work, at the end of the seismic work you still have the same number of whales, seals and walruses, so from an environmental perspective there's no impact. But if you have deflected them in their migratory patterns such that they cannot be harvested by coastal populations, you have directly and severely impacted on Aboriginal rights.

There is a difference is there not?

MR. CARPENTER: There is a difference and I wasn't meaning to say that there is a coincidence between the environmental impacts and the impacts on Aboriginal

rights. What I was meaning to say is that the topic, if you will, of environmental impacts is generally what gets engaged when those Aboriginal interests are raised.

So, as you say, if it deflects those marine mammals so that the harvesting can't take place, then clearly that's both a concern that gets raised in the context of the exercise of those rights and a concern that gets examined from the point of view of the environmental impacts.

In this case -- and I can't go through word-for-word the NEB's decision and environmental assessment, but you will see when you do go through it where the Inuit undertake their rights is in those coastal waters close to their communities. So one of the things that the NEB did was said, "Because this activity will take place in the offshore area, and in fact outside of the 12 mile limit, there will not be any direct interference with that." It also said that because certain marine mammals and other species of interest go to other places during the time of the year that the activities take place we don't need to worry about those, and then it looked at the remaining species that were of concern and assessed the potential impact on those.

So that provides a little more detail in terms of what they looked at in terms of environmental assessment

and then what the potential was for impact on the rights.

Very briefly on the *Canadian Environmental Assessment Act*. You will see a definition of "environmental effects" over in the definition section. Both impacts on the environment and, under (b)(iii) "the current use of lands and resources for traditional purposes" by Aboriginal persons.

You will also see, if you flip over to the next page under section 4 the purposes of the act in terms of ensuring the projects "are considered in a careful and precautionary manner".

And I submit importantly over on the next page under item (b)(iii), to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment.

So I won't go through a full analysis, but in terms of the subject matter that the NEB was dealing with, in terms of the powers, it's responsibilities under those Acts and the powers that it had under a combination of the *National Energy Board Act*, the *Canada Oil and Gas Operations Act* and the *Canadian Environmental Assessment Act*, it had a broad, broad range of remedial powers, both in terms of being able to respond during the course of the process that took place and being able to respond in terms of what additional, if you will, mitigation measures that it might

impose at the end of its decision-making process.

MADAM JUSTICE ABELLA: Did those remedial powers include the ability to arrange for funding for those groups who needed it in order to participate meaningfully?

MR. CARPENTER: My understanding is that the National Energy Board feels that it's the master of its own procedure, as we generally know that administrative tribunals are. If that was something that had been requested I don't know what they would have done with it, but going back to some of the questions that were asked previously one of the things that we have to deal with in this case is that most of the appellants' complaints about what the NEB did and their complaints about the lack of involvement of the Crown, weren't complaints that were raised at the time.

MADAM JUSTICE KARAKATSANIS: But is the duty to consult confined to what's requested?

MR. CARPENTER: In this case I think you have to go to the fact that there was clearly a process that was started here. And I want to take you to one of my friend's letters that he referred to, it was at Tab 8 of his consolidated materials, and that's the letter dated June 13, 2011 from the Qikiqtani Inuit Association. This is very, very early on in the process at this stage. At this stage the proponents have had one round of meetings in the various

communities, they met with various groups.

Over on what is the appeal record page 841, the part that's highlighted, it talks about:

> "A higher onus is placed upon the Crown to consult Aboriginals when a project has the potential to affect Aboriginal rights. In this instance an Aboriginal right is already recognized through the Nunavut Land Claims Agreement and protected under section 35." (As read)

So the issue has been raised, but you then go to recommendations and you look at what was recommended.

> "The proponent should hold public meetings in all six affected communities.
>
> The proponent should develop a process to address community concerns.
>
> The proponent should clearly present a plan to the communities where they feel that their concerns are not being addressed." (As read)

What the NEB did in this instance was it turned around and said, "Okay, proponent, here is Information Request No. 1, you tell us how you propose to respond to these requests from the communities.

So from that perspective, in my respectful

submission, consultation is intended to be an exchange between the parties, it's intended to be a back-and-forth that takes place.

MADAM CHIEF JUSTICE: The question I guess that your friends are putting is whether that real back-and-forth took place, particularly in view of the fact that in the late stages a response was given, 3,000 some pages not translated into their language and things moved, as I understand it from their submission, very rapidly after that. And I wondered if you would like to comment on whether that was a real opportunity for back-and-forth exchange.

MR. CARPENTER: Well, I will respond to it in two ways.

First of all, my friend went to that process which was at the end, as you point out, of the process. That opportunity in fact took place after there had already been three rounds of community meetings, engagement, consultation, whatever you want to call it, between the proponents and the communities on Baffin Island.

The National Energy Board again, in my respectful submission, showing the type of flexibility that we want an administrative tribunal -- ironically, if you want to mix and match here, an administrative tribunal carrying out a statutory decision very similar to what a

whole bunch of statutory decision-makers do, said, "We want to go up and see for ourselves what's going on there. We want to have our own public sessions." And so that's what they did. They put together their discussion paper of what they saw as being the issues, they put together their discussion paper that talked about the potential impacts and what they have heard to that date, and then they held those public meetings.

As my friend pointed out, the National Energy Board itself was not satisfied with the answers that some -- that the proponents gave to some of the questions, they didn't simply say, "Fine, we won't worry about that", they said, "Go away and answer those questions and, by the way, in the meantime we are putting your application on hold because we don't feel like you have provided us with satisfactory information."

There was a lot of pages of information that was provided back. As you will see in the facts, some of that information was in fact translated into Inuktituk.

There was then the further opportunity to provide additional responses back to that. One of the parties who was involved said, "We can't do it in the amount of time that we have" so the National Energy Board gave them more time. They have provided their responses and the National Energy Board considered the matter and then it

wasn't until eight months later, in 2014, that they actually issued their decision.

And there was no complaints that were brought about the consultation process until that letter, that again my friend Mr. Hasan brought the Court's attention to, to the Minister saying, "We are concerned about the adequacy of consultation here" and the Minister writing back and saying, "I am confident that the National Energy Board is able to assess this" and that's what they did.

MR. JUSTICE ROWE: Did people in Pond -- or Clyde River rather, have the capacity to adequately assess the scientific and technical information that was provided to them?

MR. CARPENTER: I believe when you look at the record and when you look at the NEB's decision the answer to that question is yes. We can talk about 3,000 pages worth of information, but at the end of the day it boils down to, as lots of these cases boil down to, relatively simple concepts like the one that you put forward, Justice Rowe. What -- where will be the interaction between the potential environmental effects of this proposed activity and the rights that are at issue.

MADAM JUSTICE KARAKATSANIS: In fact I read the environmental assessment report looking for a mention of Aboriginal rights. Unless I have missed something I see

mention of Aboriginal issues and concerns of Aboriginal views, I don't see the words "Aboriginal rights" mentioned anywhere, unless I have missed it.

MR. CARPENTER: No, I don't think that you will find a specific mention of Aboriginal rights in the NEB's decision. At the same time, and as the Court of Appeal dealt with in very short order, there was simply no question that Aboriginal rights were involved here. And it would go back to that letter from the Qikiqtani Inuit Association in the very beginning saying, "We have rights under the Nunavut Land Claims Agreement, those rights are protected under section 35". That wasn't lost on anybody here.

What was lost, if you will, as I think my friend fairly candidly admitted, was everybody was comfortable to a degree with the process that was going on. Everybody is not always going to agree on everything, but everybody was reasonably comfortable until you get to the point close to the end and then again, like in some of these cases, concerns start to get raised.

So the parties very much proceeded simply along through the process, there wasn't requests made for, "You have to specifically acknowledge our Aboriginal rights, you have to specifically undertake a *Haida* analysis."

MR. JUSTICE BROWN: Is it your submission that these people with whom you were -- with whom the NEB was

consulting understood that this was the consultation process to which they were constitutionally entitled being carried out?

MR. CARPENTER: I think that the letter from the Qikiqtani Inuit Association makes that point baldly. Again, Tab 8 of my friend's authorities:

> "A higher onus is placed upon the Crown to consult Aboriginals when a project has the potential to affect Aboriginal rights." (As read)

MR. JUSTICE BROWN: Okay.

MR. CARPENTER: And then what do they translate that into, requests for what the proponents should do and requests for what the National Energy Board should do.

You then have the letter that they address to the Minister in 2014 which again raises those issues.

MR. JUSTICE BROWN: Right.

MR. CARPENTER: It doesn't raise any concerns with the National Energy Board actually carrying out that process, and in fact seems on its face:

> "Before issuing an authorization the NEB, as a Board with a statutory mandate to decide questions of law ... is responsible to assess the adequacy of Crown consultation." (As read)

MR. JUSTICE BROWN: Because this is how the NEB opens the meeting in Pond Inlet. I'm looking at page 524 of the record, Volume 3. So this is having spent a while introducing everyone and then Member Hamilton, Member of the NEB Hamilton says:

> "So in part what we have done in assessing the environmental assessment we prepared a discussion paper which is available here." (As read)

And then a few lines down:

> "And this is the document that we are looking for comment on from various people." (As read)

And then over to paragraph 25 on the next page:

> "So this is probably a funny thing to say, this is your last chance..." (As read)

I think it was their first chance, too:

> "... to try and give us -- give me comments so that I can consider your comments and whether I should approve the application by MKI." (As read)

It all seems a little bit generic to me.

MR. CARPENTER: I don't think, to be fair, that this was their first chance.

MR. JUSTICE BROWN: Okay.

MR. CARPENTER: When you go to the record you will see that there were three rounds of consultation by the proponents that had already taken place in the communities --

MR. JUSTICE BROWN: Okay.

MR. CARPENTER: -- and what the National Energy Board required the proponents to do was to actually prepare -- to create transcripts of those and to prepare consultation reports back on them. So the NEB was aware throughout that what happened over basically the first two years of the process of what was going on, what the communities were saying, what concerns that they were expressing and then they were also carrying on this information request process.

MR. JUSTICE BROWN: So when the Inuit in those letters mentioned "Aboriginal rights", was there any acknowledgment of those rights by the NEB in the responses?

MR. CARPENTER: Not to the best of my knowledge, other than in their ultimate assessment report where they clearly addressed the fact that there are Aboriginal groups interests at issue, addressed the potential impact on those rights, and addressed both the consultation process that took place and then the mitigation aspect, if you will, the accommodation aspect.

So the NEB may not have issued a perfect

decision here.

MR. JUSTICE BROWN: Just to go back to those earlier meetings, were those actually org meetings organized by the NEB or was this meeting the only meeting in Pond Inlet organized by the NEB?

MR. CARPENTER: These meetings -- the earlier meetings were meetings that the Board effectively required the proponents to undertake in the North.

MR. JUSTICE BROWN: Okay.

MR. CARPENTER: So, as I said in response to the initial letter from the Qikiqtani Inuit Association --

MR. JUSTICE BROWN: The proponents were sent --

MR. CARPENTER: -- the NEB said, "Respond to this. What's your proposal?" They put together a consultation plan, the actually went out and hired specialists in Aboriginal consultation, they engaged in those processes, the NEB made them report on them and, if you will, then what the NEB did was said, "We're going to pull this together in a format that we think works here."

And Mr. Hamilton clearly wanted to go up and let people have that face-to-face opportunity that my friend talks about and, not to belabour the point, but it's one thing for rights to exist in the Nunavut Land Claims Agreement, it's another thing to sit and hear people talk about them in a session. And again, from my perspective

that highlights that the NEB was alive to the significance of the rights that were at issue. It was adaptive and its processes and sometimes it responded to requests that were made, but other times it was proactive in what it did.

And so it had those sessions, it said, "We think this will be your last opportunity" and then, as it turned out, it wasn't their last opportunity because they weren't satisfied with how that process took place.

MR. JUSTICE MOLDAVER: I'm sorry, were proactive apart from -- with the proponents? Where was the Board proactive except with the proponents. From what I can make out mostly they are reacting, but if you say they were proactive, i.e. they thought of things themselves like maybe we're dealing with people that really need to have legal advice and funding for counsel because they just may not understand all of this, what's going on. Where is anything like that?

MR. CARPENTER: Well, there isn't anything like that because, as I said, ultimately those requests weren't made.

MR. JUSTICE MOLDAVER: Well, that's the question (off microphone). Is it for the Aboriginal people who have these rights to come forward and say we need XYZ, you know, and so on, or is it for you to kind of take a look at the situation and say, "We are dealing with probably a

lot of people that are relatively unsophisticated, may not speak English and we should be doing something proactive in these circumstances", especially where you're into deep consultation.

MR. CARPENTER: And the NEB did take proactive steps. It removed the Chief Conservation Officer's powers under COGOA and put in place an individual member of the NEB to actually go and listen and make recommendations here.

When *CEAA* was repealed the NEB went to the proponents and said, "We would like to carry on doing what we were doing before, but we can't because *CEAA* has been repealed. So will you help us out here? Will you waive the provisions of confidentiality?" And the proponents agreed to. And then the NEB carried on and did exactly the same thing that they would have done under the *Environmental Assessment Act*.

So, yes, I think that they were proactive, but I agree that that is the issue and the issue is whether when you're going through a consultation process how that exchange takes place.

It's like my friend who wanted to have a full adversarial process take place here, was it for the NEB to say we're going to have full adversarial process or, if somebody hasn't said even that they want to lead their own expert evidence -- there was nothing preventing them from

doing that -- that that takes place.

So from my perspective what we want to be doing here under the duty to consult is encouraging the parties to talk to each other, encouraging the parties to raise concerns that they have, whether that be with the process or whether that be with the proposed mitigation, whatever it might be, and when that gets raised we expect a response back from the Crown, but if it's not raised do we really expect the Crown to come up with a laundry list of stuff and say, "We know you haven't asked for this, but how about all of these things" when it seems the process that's in place is something of the nature which they requested in the first place. Let's go to the committees, let's talk to the communities, let's have the NEB examine this.

I want to -- I won't spend any more time in detail on the NEB's decision, it both assesses, as you know, what the proponents consultation was, the NEB's consultation and then the NEB's assessment of those.

It also assesses this from a mitigation perspective and my friend said basically nothing was done here and, with all due respect, I don't think that when you go to the record that's a fair characterization. In fact, the proponents started by saying, "We will follow Department of Fisheries and Oceans Statement of Best Practices here and then we will do all of these other things", and then during

course of the process they added further things to that, and then in the course of the NEB's decision the NEB said, "Well, you have all of the proponents' commitments and now we're going to add a further list of those, including that you report back to the communities, for instance on marine mammal sightings. How many of you seen? How effective have your measures been, and you have meetings with the communities on those issues and you report to us on the outcome of those meetings."

So, in my respectful opinion, this is a Board undertaking a statutory decision that was doing exactly what we want it to do, it recognized that these rights were significant, it treated them with respect and it responded accordingly.

Very quickly on my other points. There has been various suggestions made that we should layer things into the duty to consult and I have argued strongly in my factum that the duty to consult is intended to be flexible and for good reason. It started in *Sparrow*, it then worked its way through the rights cases in the '90s, it then re-emerged in a new context in asserted rights in *Haida*, then it was able to be transported over to numbered treaty rights in *Mikisew*, then it could be used in a modern treaty in *Beckman*.

And when you hear my friends talk about how all

Aboriginal groups are different, and you hear the Attorney General for Ontario and Saskatchewan talking about there are 50 tribunals that engage in this area and that Saskatchewan deals with these things in a completely different way, the idea that we can foresee layering something into the duty to consult as a prescriptive matter that's required by law, that if you don't do it is a fatal flaw, I think that's something that you need to keep in mind as you consider.

Again, this Court has found that it is open to governments to rely on existing statutory processes and from my perspective the corollary to that is, in a case where you can rely on an existing statutory process the Crown does not need to be involved as a separate entity.

That's not what happened here. What happened here was the NEB is proceeding along as part of its statutory process and, as you have had referred to you, the Inuit did reach out very late in the process, just before the NEB was about to make its decision and said, "Minister, would you hold a strategic environmental assessment?"

And the Minister did not just reject that out of hand. When you look at the Minister's letter, this is not the type of letter that we have seen in numerous cases where either the Crown doesn't respond or the Crown doesn't respond appropriately. The Minister responded, he respectfully said, "No, I don't think that needs to happen",

he gave reasons for it which I think is at the heart of a reasonable response and that decision has not been challenged before this Court. It's the NEB's decision that was challenged.

And, finally, regardless of any of what you find on the duty to consult, at the end of the day what this Court has found over and over again is that the duty to consult can be satisfied depending on what was done, even if there might have been imperfection in that.

And I think, first of all, there is no resemblance here to what happened in *Mikisew Cree* when you go through the record of what was done.

There is a strong resemblance between what was done in this case and *Taku*, where a provincial environmental assessment process was capable of satisfying the duty to consult. Ironically, in *Taku* the British Columbia government denied that there was even a duty in the first place. They said, "We don't have duty to consult on asserted rights." Notwithstanding that, this Court said that the duty was satisfied.

The same situation came up in *Beckman*, the Yukon government denied any responsibility to consult under the modern treaty. Notwithstanding that, this Court said that adequate consultation had taken place and in this case I submit that adequate consultation took place.

(1606) **MADAM CHIEF JUSTICE:** Thank you very much.

Mr. Kindrachuck...?

ARGUMENT ON BEHALF OF THE RESPONDENT (36692)

ATTORNEY GENERAL OF CANADA

(1607) **MR. KINDRACHUK, Q.C.:** Chief Justice, Justices, I have three points.

First, in my submission the Board is required by section 35 of the *Constitution Act* and by the honour of the Crown to ensure that its decisions respect established or asserted Aboriginal rights. So when it makes a decision, as it did here under the *Oil and Gas Operations Act*, it must consider those rights and take them into account.

Secondly, the Crown may rely on the Board's process -- and as to the question between reliance and delegation I'm firmly submitting to you that the situation here is reliance -- the Crown may reline on the Board's process and the consultation that's carried out under it to satisfy even a deep duty of consultation.

And, thirdly, that the consultation that was carried out here, as you have heard, satisfied the duty to consult, the Board was able to identify Aboriginal concerns, it was able to accommodate them both in the process that it adopted and in the conditions that it imposed on the authorization. So in those circumstances the Crown may properly rely on the result.

Now, as to reliance, as I said, in our submission there is not a delegation of the duty to consult, there is certainly no express delegation in the statute and in the circumstances one would expect that if Parliament intended something as significant as the duty, the Crown's duty to consult to be delegated there would be express provision for that.

But what there is here is clearly reliance, reliance by the Crown on the processes of an expert, independent, transparent agency established by Parliament, and that reliance is not ad hoc, if you like, it's inherent in the structure of the scheme that Parliament has established for these decisions.

I would add that of course in addition to being an expert, independent, transparent tribunal the decisions of the Board are reviewable by the courts and, just as was mentioned this morning in relation to the section 52 decisions -- pardon me, the section 58 decisions, this authorization is an authorization that the Board may choose to vary. The provision for that is in section 28.3 of the *National Energy Board Act*. And so again it's an ongoing process.

In the case here, the Board has issued an authorization, it's subject to conditions, those conditions carry obligations forward into the future, the

monitoring, the assessment will continue and it's entirely open to the Board to adjust, revisit, vary the authorization that it's given.

MADAM JUSTICE KARAKATSANIS: Can I ask you this: Does reliance on the Board process mean that the Crown has to make an assessment of whether what it has relied on is sufficient to have discharged its duty to consult? Does some part of government have to sit down at some point and review the process the Board has adopted, review the accommodation that the Board has implemented? What is the obligation on the Crown that is just relying on this process?

MR. KINDRACHUK, Q.C.: Reliance in my submission, does not require a case-by-case examination, it does not require an express review of the process. What it does entail in my submission -- and here of course in a sense the question doesn't arise strictly, because as -- what happened here is the Minister was engaged, he was asked to step in and look at this and he did give a response. So there is an express affirmation, if you like, of reliance in this case.

But it's entirely, in my submission, inconsistent essentially what the scheme that Parliament has created to impose a further requirement of reliance. I say that because Parliament has expressly provided that these

decisions, like the section 58 decisions, can be made by the Board and that the Board is the final approving authority. Parliament has done that for a number of policy reasons, independence, as I said, expertise, transparency, efficiency as well but that's not the most important.

The purpose of the entire scheme is to put these decisions in the hands of an expert tribunal and not have them made by Cabinet, by Ministers, have them made in a process that's accessible to the public and reviewable by the courts.

MADAM JUSTICE KARAKATSANIS: If, as you say, it's implicit in the scheme that the Board has a full range of powers necessary to consult and to accommodate, why do you also say, then, that the duty has not been delegated.

MR. KINDRACHUK, Q.C.: Because it has not expressly been delegated.

MADAM JUSTICE KARAKATSANIS: Implicitly been delegated.

MR. KINDRACHUK, Q.C.: A duty of the importance that must be ascribed to the duty to consult, in my submission, should not be taken to be delegated implicitly.

MADAM JUSTICE KARAKATSANIS: But if that's so why doesn't the Crown have to review it? If in fact -- I guess I'm having some difficulty with this concept that they are merely relying on something and that therefore it hasn't

been actually carried out by the Board, the Board hasn't conducted the -- hasn't discharge the duty to consult, but the government has to do nothing further than rely on what the Board has done.

There is a disconnect where the final decision has been in effect delegated through statute to a government Board. I'm having some difficulty -- and that is the conduct, everybody agrees that's the Crown conduct with the potential to interfere with an Aboriginal right. I'm having some difficulty understanding why that doesn't mean they are in effect discharging the duty to consult.

MR. KINDRACHUK, Q.C.: Well, they are satisfying the duty clearly by putting in place measures that achieve appropriate consultation and, where necessary, appropriate accommodation. But the duty remains with the Crown.

So in cases where -- in the inverse case, if you like, where there is something missing -- and we haven't really put our finger, in my submission, on exactly what kind of case that would be -- but in the hypothetical case where what the Board can provide or offer or chooses to consider appropriate doesn't satisfy the requirements of consultation or accommodation, then in those cases the Crown still has the duty.

MADAM JUSTICE KARAKATSANIS: Well, the ultimate

accommodation is to refuse to authorize the project.

MR. KINDRACHUK, Q.C.: Yes. To either postpone or refuse, defer, yes.

MADAM JUSTICE KARAKATSANIS: I guess I'm having some -- perhaps you can help me. Why is it that given the fact that it's the Board's decision, that is the Crown conduct complained of, and the fact that this decision has been delegated by Parliament to this government agency, why is it that we can't consider this Board really effectively the instrument of the Crown for these purposes? What is the difficulty?

MR. KINDRACHUK, Q.C.: I think it's clearly the instrument of the Crown but where I --

MADAM JUSTICE KARAKATSANIS: It represents the Crown for these purposes. I guess I'm having some difficulty figuring out what you mean or what Mr. Southey meant when he said it's the manifestation of the Crown, but it's not the Crown, so help me.

MR. KINDRACHUK, Q.C.: Well, the Court is the Crown's Court, but it's not the Crown. It's not that dissimilar. The Board is an independent agency created by statute, it has powers and jurisdiction, including the powers of a court of record, but it is not the Crown. And one reason of course is that the Crown may have projects that it itself will require submission to the Board and

consideration by the Board. So it's paradoxical.

MADAM JUSTICE KARAKATSANIS: I wasn't suggesting it is the Crown, but for the purposes of the duty to consult it seems to me to make some sense to think of it as discharging that duty if in fact it's the Board's decision, but I'm struggling with this area and that's why I'm asking the question.

MR. JUSTICE BROWN: Another way to look at it is: Is there any legal significance to whether the NEB is the Crown's delegate or simply the instrument upon which the Crown relies?

MR. KINDRACHUK, Q.C.: There may not be any strictly legal significance. There is I think perhaps an important, if you like, symbolic significance in the sense that the relationship -- the relationship that gives rise to this duty is a relationship of Aboriginal peoples and the Crown. It's the honour of the Crown, not the honour of the Board that's at stake here as we are told.

MADAM JUSTICE ABELLA: Is there another way to look at it that avoids what's a very confusing Russian doll of responsibilities and language. What's been delegated to the Board is a duty -- a duty to consult. Whether that consultation meets the section 35 constitutional requirements is a decision the Crown is free to make in each case to which it is invited to make it on notice by an

affected party. The government may then choose to say, "We rely on it" or it can say, "We think the Board should reconsider the decision because we're not satisfied that the duty has been met." It's less than an all or nothing, it's not really a case-by-case but it reserves to the Crown the right to rely on it because they have assigned to the Board a requirement to consult before they make a decision about what its mandate -- whether it's own mandate is satisfied and then you are free to decide on notice whether or not it meets the constitutional demands that are put on you as the Crown.

MR. KINDRACHUK, Q.C.: There is a great deal in that to which I would simply answer yes. I have a quibble or two about some of the -- the way that the situation is described.

First of all, again of course I must insist it's not a delegation of the duty to the Board.

MADAM JUSTICE ABELLA: No, no, I'm not -- I'm saying it isn't. I'm saying what has been assigned to the Board by the legislation is a consultation requirement. You can't --

MR. KINDRACHUK, Q.C.: Well, it's been imposed by the Constitution.

MADAM JUSTICE ABELLA: I'm not talking about the duty to consult here.

MR. KINDRACHUK, Q.C.: You're talking about the expression of --

MADAM JUSTICE ABELLA: I'm talking about the way the Board exercises its mandate.

MR. KINDRACHUK, Q.C.: So the practical --

MADAM JUSTICE ABELLA: It doesn't do it without consulting.

MR. KINDRACHUK, Q.C.: No.

MADAM JUSTICE ABELLA: One of the groups it's going to consult with where Aboriginal lands are involved is the Aboriginal community, but it doesn't have a duty to consult in accordance with the honour of the Crown, it just has a consultation requirement as part of its procedural mandate.

MR. KINDRACHUK, Q.C.: And it has an obligation to ensure that its decisions don't infringe constitutional rights, Charter rights --

MADAM JUSTICE ABELLA: Exactly.

MR. KINDRACHUK, Q.C.: -- don't transgress the division of powers, all of that.

MADAM JUSTICE ABELLA: Exactly. Which is separate from -- it leaves intact though the Crown's duty to ensure that there is in fact constitutional compliance in a particular case, which leaves it free to rely or not on a particular constitutional process undertaken by the Board.

MR. KINDRACHUK, Q.C.: Yes, I agree. And here I say the baseline is that it should be presumed or expected that the Crown does so rely, especially as the Crown has said that it does and the Board has acknowledged that the Crown does, and I would add that conceivably not only in cases where some complaint is made or where something is raised and brought to the attention of the executive, although that of course is always helpful, but even of its own motion conceivably representatives of the Crown may raise concerns if matters come to their attention.

MADAM JUSTICE CÔTÉ: And regarding that, Mr. Kindrachuck, in your factum you say that, "various federal government departments did participate in the Board's environmental assessment process". Those departments, they were I presume Environment Canada?

MR. KINDRACHUK, Q.C.: Environment, Fisheries, Indian and Northern Affairs, and I believe Parks Canada. Now, they participated by furnishing information, notably that statement of practice in relation to seismic surveys which is appended to the environmental assessment. That's a document that came from Fisheries and Oceans Canada.

MADAM JUSTICE CÔTÉ: Okay.

MR. KINDRACHUK, Q.C.: So they did participate to that extent, but there were no, if you like, representations or submissions made beyond the submission of

information by those departments to assist the Board.

MADAM JUSTICE CÔTÉ: Okay.

MR. JUSTICE ROWE: Following up on what Justice Karakatsanis said, I find myself in a logical kind of conundrum here which you may be able to get me out of, or perhaps I have just trapped myself, but if you say, "Okay, the NEB or a comparable agency is not delegated the authority to consult and accommodate, that always rests with the Crown, the Crown will rely upon it, but the Crown does not make an assessment as to the adequacy", aren't you effectively saying to indigenous peoples, if you believe your 35(1) rights have not been properly dealt with in terms of the duty to accommodate -- consult and accommodate, go to court.

Is it as blunt as that?

MR. KINDRACHUK, Q.C.: I don't think it is. Certainly in this case -- I mean that's always an option, in defining rights ultimately through litigation is perhaps the final answer, but in this case they approached the Minister, the Minister considered their concerns, responded to those concerns as we have seen.

Obviously in discretion a different decision might have come from that request, it's not simply limited to court proceedings.

MADAM JUSTICE KARAKATSANIS: Is there a

variation on that model there that the honour of the Crown requires a case-specific notice that in fact the processes are going to be relied on to discharge the duty to consult?

MR. KINDRACHUK, Q.C.: Well, again, it may be helpful if there were some scheme of that kind, that's not embedded in the scheme that's currently established.

MADAM JUSTICE KARAKATSANIS: But in terms of when we talk about the honour of the Crown, both in terms of giving notice to the First Nations that this is the process and that whatever they have to say they should be saying it, but also in terms of saying to the Board that this is explicitly something you need to consider and give reasons for and all of that deals -- provides better clarity and better transparency, and I think goes to the honour of the Crown.

MR. KINDRACHUK, Q.C.: It would certainly provide clarity and transparency. It's again, I can only say, not something that is in the legislation as it exists. Obviously there are as well requirements in various statutes for various decision-makers to give notice to the Crown of their decisions. Again, that's not what has --

MADAM JUSTICE KARAKATSANIS: So my question was where it's not in the statue would it require a case-specific notice to the First Nations that the Crown is seeking -- will be relying on the processes of the agency?

MR. KINDRACHUK, Q.C.: Well, that information is in Information for Aboriginal People document which is referenced in this case and it's in -- I won't turn up the document, but it's -- paragraph 12 of our factum sites it, it's in the respondent's record.

So groups, people who are dealing with the Board are furnished with information about the Board's processes. Among the things that they are provided is that statement on how the Board deals with rights and concerns of Aboriginal people and that statement says that the Crown has stated it will rely on the Board processes to the extent possible.

MADAM CHIEF JUSTICE: Do you think the Crown needs to give explicit guidance and what form would that take?

In para. 51 of *Haida* we talk about the ability of the Crown to address reconciliation through administrative processes and reducing recourse to the court through those administrative processes and then there's this phrase from Adams:

> "... the government 'may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights'..."

I'm asking you -- I wrote that, but I didn't

write Adams.

--- Laughter

MADAM CHIEF JUSTICE: But I would be interested in your submissions on how much structure the government needs to give when it's adopting a regulatory process in substantial reliance -- reliance of its duty.

The explicit guidance I would have thought would have to do with the reconciliation project and not just the environment and get this environmental study done and have a few meetings, but in this case we don't really have any guidance.

So it's just an open-ended concern and I thought you might have some comments on it.

MR. KINDRACHUK, Q.C.: Well, I only say that where we're dealing, as we are here, with a sophisticated expert Board with the powers of a court of record with the ability to make rules of procedure, a Board that has made rules of procedure of course, that it may be fair for Parliament to presume that the Board itself, cognizant as it is of the importance of constitutionally protected rights, will take cognizance of that and adopt a scheme.

I mean, I don't think the Board needs to be told section 35 rights have to be respected and you have to make sure you do that.

MADAM CHIEF JUSTICE: That's sort of what's

worrying me. You take a scheme that's really designed to look after the environment and production and then you say, without ever mentioning the word, section 35, reconciliation, anything, but that existing -- pre-existing scheme, we can assume that those people who are running that scheme without some further guidance will actually do their job. I'm not talking about the merits of the case here, but I'm talking about how this thing -- how we can give guidance as to how this should be structured.

MR. KINDRACHUK, Q.C.: Well, certainly more explicit reasons for example here, I mean the strength of claim analysis point I think has been made by several parties, it seems to me what happened here is that everybody knew they were dealing with rights recently recognized under a land claims agreement, everybody accepted that, the focus of the debate and the discussion came down to whether there was significant risk of adverse effects and what measures needed to be taken to mitigate that risk, so that's what people got on with.

So there wasn't an express mention of rights in the reasons, there wasn't an express analysis of the strength of the claim, the strength of the claim was presumed, and in the result here what was provided satisfied, in our submission, a deep duty of consultation.

So it got to the right results, but along the

way certainly there are those concerns about the analysis, there are concerns that have been raised about the sufficiency of the reasons and, yes, those things -- clearly reconciliation would be facilitated if those things had been done better. I can only say that.

MADAM JUSTICE ABELLA: would you say under the framework that you're suggesting exists or should exist, that it's open to the Crown to say in a particular case, even though we said presumptively that we would rely on it that we're not prepared to in this case?

MR. KINDRACHUK, Q.C.: I think it is, I think it's always open to the Crown to engage directly with indigenous people, it's always open to the Crown to offer other avenues of discussion, of information-sharing, reconciliation, so certainly that initiative is available.

MADAM JUSTICE ABELLA: And that's not in conflict with your previous argument that this is intended by the legislature to be a final decision.

MR. KINDRACHUK, Q.C.: Well, it wouldn't be open to the Crown to -- to a Minister of the Crown to countermand the decision, but it clearly would be -- I mean various avenues present themselves, and again they may be far-fetched, but a variation of the licence is something that could be requested, a proceeding for judicial review could be commenced and in that proceeding if the Crown was

dissatisfied with what had gone on the Crown would take a position, the Attorney General would make submissions accordingly.

So there are ways to, in my submission, deal with it. They may not be the most elegant, but they are workable.

MADAM JUSTICE ABELLA: Thank you.

MR. KINDRACHUK, Q.C.: Really I have, I think, come to the end of what I came here to say.

As I say, the duty to consult is the Crown's obligation and it remains always the Crown's obligation, but the Crown can rely on tribunal processes to satisfy it and in this case did so and did so properly, so the process and the result achieve deep consultation and satisfy the honour of the Crown in the circumstances.

MADAM CHIEF JUSTICE: Thank you

MR. KINDRACHUK, Q.C.: Thank you.

(1632) **MADAM CHIEF JUSTICE:** Reply?

REPLY ARGUMENT FOR THE APPELLANTS (36692)
HAMLET OF CLYDE RIVER, ET AL.

(1632) **MR. HASAN:** Thank you, Chief Justice.

I will be very brief, I want to make two points.

The first is, the comparison to *Taku River* is a deeply unfair comparison. Firstly, in *Taku River* the Crown

was very much involved in the process, the federal Crown directly, but even more importantly, the affected First Nations were sitting on the Project Committee that the court considered to be the driving process of the environmental assessment that wrote the environmental assessment report. If Inuit had got to sit on the committee writing this environmental assessment report, (a) I think it would look very different; and (b) I don't think we would be here.

With respect to the process in this case -- and my friend Mr. Carpenter, he did a very able job at trying to paint a positive picture of what happened here, but it's just not accurate. The notion that everyone was happy enough with the process until the end is just not true.

I'm not going to take you again, but there was the letter that was written to the NEB at the beginning of the process saying, "Hey, we are indigenous rightsholders, section 35 treaty rights holders, we are entitled to a duty to consult by the Crown".

Now, it's true, they did participate, they did make a good-faith effort to engage with the proponents who were coming there to do the seismic testing in their homes, they did attend the information sessions, they went and they asked questions and their questions were not being answered. The record indicates that they were frustrated by the process. The Natanine affidavit at Tab 5 and the Ilkoo

affidavit at Tab 6 indicate that at no point in this process did we feel like we were being genuinely consulted. To put it more bluntly, one handwritten letter of comment that was sent to the NEB described the process as a joke.

Now, yes, they participated in that process despite their frustrations and it was only at the end -- yes, at the end -- when the process had seemingly run its course that they again reminded the NEB and the Crown, "Hey, we don't feel like our concerns are being addressed, please engage with us." And the response at that point is what we got in the Minister's letter.

My friend and I read that letter very differently. He suggests it's a genuine intention to engage with their concerns, I would say it's grossly inadequate -- grossly inadequate in light of the concerns and the stakes here, but nevertheless I would make the point that never before in our duty to consult case law has so little been deemed to satisfy so much at the deep level and, respectfully, it would represent a new low watermark for the duty to consult at the deep level if the Court of Appeal's decision were to be affirmed here.

Barring any questions, those are my submissions.

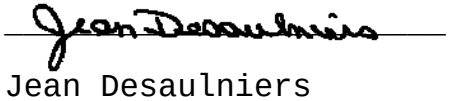
(1635) **MADAM CHIEF JUSTICE:** Thank you. Thank you all.

The court will reserve its judgment in this appeal and we stand adjourned.

--- Whereupon the hearing adjourned at 4:35 p.m.

CERTIFICATION

I HEREBY CERTIFY that I have accurately transcribed the foregoing to the best of my skill and ability from the audio provided.



Jean Desaulniers

Verbatim Court Reporter