Federal Court of Appeal | Cour d'appel fédérale

Date: 20151020

Docket: A-358-14

Citation: 2015 FCA 222

CORAM: **RYER J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

CHIPPEWAS OF THE THAMES FIRST NATION

Appellant

and

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

Respondents

Heard at Toronto, Ontario, on June 16, 2015.

Judgment delivered at Ottawa, Ontario, on October 20, 2015.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: WEBB J.A.

DISSENTING REASONS BY: RENNIE J.A.

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REASONS FOR JUDGMENT

RYER J.A.

[1] This is an appeal by the Chippewas of the Thames First Nation (the "Appellant") from a decision of the National Energy Board (the "Board") approving an application by Enbridge Pipelines Inc. ("Enbridge") for the Line 9B Reversal and Line 9 Capacity Expansion Project (the "Project"). The reasons for the Board's decision were issued on March 6, 2014 and may be cited as OH-002-2013.

[2] The Appellant asks the Court to quash the Board's approval of the Project "… because the Board was without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate the Appellant".

[3] For the reasons that follow, I would dismiss the appeal.

I. RELEVANT STATUTORY PROVISIONS

[4] The statutory provisions that are relevant to this appeal are subsections 21(1), 22(1), 52 and 58 of *the National Energy Board Act*, R.S.C., 1985, c. N-7 (the "*NEB Act*") and subsection 35(1) of the *Constitution Act*, R.S.C. 1985, App. II, No. 44, Schedule B (the "*Constitution Act*").

II. BACKGROUND

[5] In 1976, Line 9 began transporting oil eastward from Sarnia, Ontario to Montreal, Quebec. In 1999, the Board approved a reversal of the flow of oil. In July of 2012, the Board approved the re-reversal of the flow of oil in a segment of Line 9 from a location near Sarnia to a location near Hamilton, Ontario ("North Westover").

[6] The application with respect to the Project was made pursuant to section 58 of the *NEB Act*. In the application, Enbridge requested approval for:

a) a reversal of the direction of the flow of oil between North Westover and Montreal;

b) an increase in Line 9's capacity from 240,000 barrels per day to 300,000 barrels per day; and

c) the transportation of heavy oil.

[7] The application stipulated that almost all of the work to implement the Project would take place within the existing pipeline right of way or upon property belonging to Enbridge.

[8] The Board determined that a public hearing in respect of the Project would be held and issued a Hearing Order to that effect. The Hearing Order was served upon the representatives of the federal Crown (the "Crown") and the Crown in right of each of Ontario and Quebec. The Appellant was granted intervener status and received funding from Enbridge in respect of its participation in the hearing.

[9] Enbridge engaged in discussions with the Appellant and other Aboriginal groups that were within 50 kilometres of Line 9. The Appellant acknowledged the consultation efforts by Enbridge but submitted that these efforts did not meaningfully address their concerns.

[10] On September 27, 2013, the Appellant and another First Nation sent a letter (the "Request for Consultation Letter") to several ministers of the Crown, including the Minister of Natural Resources. The signatories noted their concerns with respect to the effect of the Project upon their Aboriginal and treaty rights and requested that the Crown immediately initiate a consultation process. They also requested that the Crown inform the Board that no consultation had taken place, and as a result, procedural steps involving the Crown and the Appellant would need to be taken.

[11] The signatories stipulated that Crown consultation was required because the *NEB Act* does not provide the Board with the power to engage in *Haida* duty consultations on behalf of

the Crown and to do so would be "wholly inappropriate" given the Board's role as "an independent, quasi-judicial body". In addition, the signatories stipulated that the Board does not have the jurisdiction to:

- protect other parts of our land bases to ensure that there continue to be areas in our traditional territories where we are able to exercise our rights;
- address cumulative impacts caused by changes to other Enbridge pipelines (such as Lines 5 and 6B) and facilities (Sarnia Tank Terminal) that are required to enable Enbridge to ship 300,000 bpd of crude oil on Line 9;
- address cumulate impacts caused by changing the type of crude oil that will be used as feedstock by petrochemical and chemical refineries in Sarnia;
- provide AFN and COTTFN with economic accommodation for potential impacts to our rights;
- conduct the public hearing and make a decision under s. 58 in a way which ensures that, if the Project is approved, accommodation provided to AFN and COTTFN is commensurate with potential adverse impacts on our respective rights and interests; and
- address historic and ongoing infringement of our rights caused by the construction and operation of Line 9.

[12] No reply to the Request for Consultation Letter was made by the Crown prior to the conclusion of the hearing before the Board.

[13] The hearing process began on October 8, 2013 in Montreal and ended on October 18, 2013, in Toronto, Ontario. The Crown did not participate in the hearing.

[14] At the hearing, the Appellant described its treaty and Aboriginal rights through written evidence, including a preliminary Traditional Land Use study outlining the use of land adjacent to the Line 9 right of way, and oral representations. The evidence contained expressions of the

Appellant's deep spiritual connection to its traditional land and resources and its concerns with respect to potential threats to its treaty and Aboriginal rights that could arise from the approval of the Project. In addition, the Appellant's Chief's affidavit stated that the Appellant was entitled to share in the revenues that were being generated by the transportation of oil through Line 9.

[15] During final argument at the hearing, the Appellant asserted that the Board was required to decline to grant the Project approvals requested by Enbridge until Crown consultation had occurred.

[16] By letter dated January 30, 2014 (the "Crown Response Letter"), the Minister of Natural Resources replied to the Request for Consultation Letter. The Minister stated that:

a) the Crown was committed to meeting its legal duty to consult whenever it contemplates conduct that could adversely affect an established or potential Aboriginal or treaty right;

b) in support of that commitment, the Government had introduced a Responsible Resources Plan, which in part addressed Aboriginal consultation issues in respect of major projects; and

c) the Government relies on Board processes to address potential impacts to Aboriginal and treaty rights stemming from projects under the Board's mandate.

III. THE BOARD'S DECISION

[17] The Board acknowledged the potential threat that the Project could pose to the Appellant's Traditional Land Use but was satisfied by Enbridge's representations as to the safe operation of Line 9 and contingency operations in case of a pipeline rupture. As a result, the Board stated that any impacts on the Appellant's rights would be minimal and appropriately mitigated. The Board concluded that its approval of the Project was in the public interest and

consistent with the requirements of Parts III and IV of the *NEB Act*. Nonetheless, the Board's approval was subject to a number of conditions that, according to the Board, would "… enhance [the] current and ongoing pipeline integrity, safety and environmental protection measures to which Line 9 is already subject."

[18] The Appellant was granted leave to appeal the Board's decision, as required under subsection 22(1) of the *NEB Act*, on June 4, 2014.

IV. ISSUES

[19] The underlying issues in this appeal relate to the duty (if any) of the Crown, as enunciated by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*], to consult with and accommodate the concerns of the Appellant relating to potential effects of the Project on their Aboriginal and treaty rights (the "*Haida* duty").

[20] More particularly, there are two issues:

a) Whether the Board itself has been delegated the power to undertake the fulfilment of the *Haida* duty on behalf of the Crown in relation to the Project; and

b) Whether the Board was required to determine, as a condition of undertaking its mandate with respect to Enbridge's application for approval of the Project, if the Crown, which was not a party to the application, was under a *Haida* duty and, if so, whether the Crown had discharged that duty.

I will deal first with the latter of the two issues.

V. ANALYSIS

A. Was the Board required to determine, as a condition of undertaking its mandate with respect to Enbridge's application for approval of the Project, if the Crown, which was not a party to the application, was under a *Haida* duty and, if so, whether the Crown had discharged that duty?

Standard of Review

[21] The issue of whether the Board was required to determine, as a condition of undertaking its mandate with respect to Enbridge's application for approval of the Project, if the Crown, which was not a party to the application, was under a *Haida* duty and, if so, whether it had discharged that duty, is a question of law that is reviewable on the standard of correctness (*Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 at paragraphs 23-24, [2010] 4 F.C.R. 500 [*Standing Buffalo*]; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at paragraphs 64-67, [2010] 2 S.C.R. 650 [*Carrier Sekani*]).

Standing Buffalo Governs

[22] In paragraph 2 of *Standing Buffalo*, the Court stated:

> [2] The appellants raise the novel question of whether, before making its decisions in relation to those applications, the NEB was required to determine whether by virtue of the decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, the Crown, which was not a party to those applications or a participant in the hearings, was under a duty to consult the appellants with respect to potential adverse impacts of the proposed projects on the appellants and if it was, whether that duty had been adequately discharged.

[23] The Court answered this question in the negative and held that the Board was not precluded from exercising its jurisdiction to hear the applications that were before it. The Court did not decide that the Board lacked the power to determine whether the Crown was under a

Haida duty and, if so, whether it met that duty (the "*Haida* Determinations"). Leave to appeal to the Supreme Court in *Standing Buffalo* was denied (33480 (December 2, 2010)).

[24] Subsequent to *Standing Buffalo*, there have been no amendments to the *NEB Act* that negate the continuing applicability of that decision.

Carrier Sekani

[25] In late October of 2010, the Supreme Court of Canada released its decision in *Carrier Sekani*. In that case, the Crown in right of British Columbia (the "BC Crown"), acting through the British Columbia Hydro and Power Authority ("BC Hydro") sought approval from the British Columbia Utilities Commission ("BCUC"), under the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, to purchase electrical power under a contract with Rio Tinto Alcan Inc. ("RTA").

[26] BCUC allowed BC Hydro's application. It determined that the *Haida* duty had not been triggered because the First Nation failed to establish that the proposed power purchase contract would adversely affect any asserted Aboriginal rights. As such, a complete consideration of the adequacy of consultations was not required.

[27] On appeal, the British Columbia Court of Appeal (the "BCCA") found that a more fulsome inquiry with respect to the *Haida* Determinations was required and remitted the matter to BCUC on that basis.

[28] Before the Supreme Court of Canada, BC Hydro and RTA argued that the BCCA took too wide a view of BCUC's role in deciding consultation issues and that BCUC had correctly concluded that the *Haida* duty had not been triggered. For its part, the Carrier Sekani Tribal Council supported the BCCA's decision to remit the consultation issue back to BCUC for more fulsome submissions on the consultation issue.

[29] In allowing the appeal, the Supreme Court determined that BCUC was correct in finding that it had the power to make the *Haida* Determinations and that its conclusion, that the *Haida* duty had not been triggered, was reasonable. In doing so, the Supreme Court stated that the role of each particular tribunal in relation to the *Haida* Determinations depends on the duties and powers that the legislature has conferred upon it.

[30] Specifically, the Supreme Court stated, at paragraph 69, as follows:

> [69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6. [Emphasis added]

[31] In addition, at paragraph 70, the Supreme Court referred to paragraph 71(2)(e) of the *Utilities Commission Act* that required BCUC to consider "any other factor that [it] considers relevant to the public interest". Thus, the Supreme Court concluded that BCUC was empowered

by the *Utilities Commission Act* to make the *Haida* Determinations in respect of the BC Hydro's application for approval of the power purchase contract.

[32] The Supreme Court also found that a tribunal having the power to make the *Haida* Determinations may nonetheless lack effective remedial powers. At paragraphs 61 and 63, the Supreme Court stated:

> [61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.
>
> […]
>
> [63] As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at paragraph 51.

[33] The decision in *Carrier Sekani* does not refer to the decision in *Standing Buffalo* and contains no analysis of the role of a tribunal in relation to *Haida* Determinations when the Crown is not a participant in the proceeding before that tribunal. In *Carrier Sekani*, the Crown was before BCUC, and BCUC made the initial *Haida* Determination, namely that the Crown was not under a *Haida* duty in the circumstances. In my view, *Carrier Sekani* does not go so far as to establish that before undertaking its consideration of the matter at issue in the proceedings before it, a tribunal must make the *Haida* Determinations irrespective of whether the Crown is a participant in those proceedings.

Does Carrier Sekani Overrule Standing Buffalo?

[34] The Appellant submitted that *Standing Buffalo* has been overtaken by *Carrier Sekani*. I am not persuaded that this is the case.

[35] The circumstances in *Carrier Sekani* differed significantly from those in *Standing Buffalo*.

[36] In *Carrier Sekani*, the BC Crown, in the form of BC Hydro, was a party to an application to BCUC, seeking approval to enter into a power purchase agreement with RTA. Thus, there was a specific Crown action – entering into and performing the electricity purchase contract – that was subject to the approval of BCUC and that same action was alleged by the First Nation to constitute Crown conduct that engaged BC Hydro's duty to consult. In those circumstances, the question of whether the BC Crown was under, and, if so, had discharged, a *Haida* duty was squarely before BCUC. Indeed, BCUC itself was of the view that it was empowered to make the requisite legal and factual determinations. If BC Hydro had a *Haida* duty and it was not discharged, then BCUC had the ability to prevent BC Hydro from taking the action that allegedly had an adverse impact upon an asserted interest of the First Nation.

[37] In *Standing Buffalo*, the Standing Buffalo First Nation ("SBFN") had been engaged in a consultation process with the federal Crown with respect to asserted claims of Aboriginal title to lands and other matters for a period of time extending from 1997 to 2006. The Crown ultimately determined that it had no *Haida* duty and that it was no longer prepared to continue the consultations. That prompted SBFN to intervene in the hearing before the Board with respect to

Enbridge's application, pursuant to section 52 of the *NEB Act*, for permission to construct the Saskatchewan leg of the Keystone Pipeline. SBFN requested the Board to compel the Crown to participate in the hearing so that the Board could determine whether the Crown had met any applicable *Haida* duty. If the Crown did not participate, SBFN asserted that its evidence should be accepted by the Board and, as a result, the Board should determine that it was without jurisdiction to consider the substantive merits of Enbridge's application before it.

[38] In *Carrier Sekani*, the party seeking an approval from BCUC was the Crown itself. In contrast, the Crown did not participate in the approval proceedings before the Board in *Standing Buffalo*. Instead, the party seeking approval from the Board was Enbridge, a private-sector corporation that was unrelated to the Crown.

[39] The non-participation of the Crown in the hearing process in *Standing Buffalo* is significant.

[40] While it is clear that the Board has the power to decide questions of law, it is important to note that the *Haida* Determinations also include factual findings. As stated by the Supreme Court in *Haida Nation*, at paragraph 61:

> [61] …The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. …

Similarly the question of whether an existing *Haida* duty has been met is largely factual.

[41] Because the Crown participated in the proceedings in *Carrier Sekani*, BCUC was in a position to make the factual findings required by the *Haida* Determinations in the normal adversarial context. If the Board had decided to make the *Haida* Determinations in *Standing Buffalo*, it would have had to make the requisite factual findings outside of that adversarial context.

[42] Moreover, it is noteworthy that the implied power of a tribunal to undertake the *Haida* Determinations, which is stipulated in paragraph 69 of *Carrier Sekani*, refers to "constitutional issues that are properly before" the tribunal. Because the Crown was not a party to the Project approval proceedings, it is not clear that the *Haida* Determinations were "properly before" the Board in these proceedings.

[43] The contrast between *Carrier Sekani* and *Standing Buffalo* is also marked in terms of the remedial capacity of the respective tribunals in those cases.

[44] In *Carrier Sekani*, BCUC was in a position to deny the approval requested by BC Hydro if it determined that BC Hydro had a *Haida* duty but had not fulfilled it.

[45] In *Standing Buffalo*, the Board had no remedial power over the Crown. It was unable to deny a request from the Crown because the Crown had not requested anything from it. If the Board had decided to make the *Haida* Determinations (in the absence of evidence or argument from the Crown) and had concluded that the Crown has not fulfilled an applicable *Haida* duty, the Board's only recourse – as asserted by SBFN – would have been to decline to adjudicate

upon Enbridge's pipeline construction application. Thus, the Board's remedy would have been to effectively deny Enbridge's approval request because of a failure on the part of the Crown.

[46] As stipulated by the Supreme Court in paragraph 61 of *Carrier Sekani* (reproduced above), a tribunal's remedial powers, which are directed towards the promotion of the reconciliation of interests, are limited to those conferred upon it by statute. Holding the pipeline approval application under consideration in *Standing Buffalo* in abeyance as some sort of leverage over the Crown, so as to force it to become a participant in the hearing before the Board, would not, in my view, have been an appropriate way to promote the reconciliation of interests called for in *Haida Nation*.

[47] As is apparent from paragraph 63 of *Carrier Sekani* (reproduced above), the Supreme Court acknowledged that tribunals may lack practical and effective remedial powers to deal with failures on the part of the Crown to comply with applicable *Haida* duties. In such circumstances, the Supreme Court states that the appropriate remedies must be sought in the courts.

[48] This Court's decision in *Standing Buffalo* validated the fulfillment of the Board's regulatory mandate with respect to Enbridge's application for pipeline construction approval. However, that decision did not leave SBFN without any ability to have the Crown's *Haida* duty adjudicated. In that case, SBFN could have sought judicial review of the Crown's decision to terminate the consultations with SBFN in 2006.

[49] In conclusion, it is my view that *Carrier Sekani* has not overruled *Standing Buffalo* because the Supreme Court did not address the issue of whether a tribunal is obligated to make the *Haida* Determinations in a proceeding before it in which the Crown does not participate as a party. Accordingly, in my view, the principle established in *Standing Buffalo* continues to apply.

Is Standing Buffalo Distinguishable?

[50] The circumstances in *Standing Buffalo* are substantially the same as those in this appeal. In both instances, the Board was asked by Enbridge, a private-sector corporation, for an approval in respect of a pipeline project. In both instances, the Crown had no direct involvement with the proposed activities. In both instances, the First Nation stipulated that the Crown was under, but had not fulfilled, a *Haida* duty. In both instances, the First Nation asked the Board to hold the application before it in abeyance unless and until the Board was satisfied that the Crown's asserted *Haida* duty has been met.

[51] Notwithstanding these similarities, the Appellant argues that *Standing Buffalo* is distinguishable on the basis that the application before the Board in that case was brought under section 52 of the *NEB Act* while the application in respect of the Project was brought under section 58 of the *NEB Act*.

[52] The Appellant asserts that because a section 52 approval is subject to a review and final approval by the Governor-in-Council, it is unnecessary for the Board to undertake the *Haida* Determinations where the Crown does not participate in the section 52 proceeding. This is apparently so because the Governor-in-Council is in a position to overrule or suspend the section

52 approval decision, should it decide to engage in a *Haida* duty consultation process. This assertion is unpersuasive.

[53] First, this alleged rationale for the decision in *Standing Buffalo* appears nowhere in the reasons in that case. Secondly, the Crown that allegedly has not yet engaged in *Haida* duty consultations could well be the Crown in right of a province. In *Standing Buffalo*, Saskatchewan intervened and argued that the Board lacked jurisdiction to undertake a *Haida* duty analysis in respect of the Crown in right of Saskatchewan (see also *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2010 FC 948 at paragraphs 230-231, 377 F.T.R. 50; aff'd on narrower grounds 2012 FCA 73).

[54] Thirdly, a review of the *NEB Act*, including sections 52 and 58 of the *NEB Act*, reveals nothing that addresses the question of whether the Board has the power to make *Haida* Determinations. If that power exists it must be implicit in the Board's ability to decide questions of law. Equally, nothing in the *NEB Act* directs or requires the Board to exercise such an implicit power in respect of an application under either sections 52 or 58 of the *NEB Act* where the Crown is not a party to such an application. Indeed, subsection 52(2) of the *NEB Act* stipulates that the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and gives the Board a further discretion to consider the factors that are listed in paragraphs 52(2) (*a*) to (*e*) of the *NEB Act*. And, as this Court determined in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, 465 N.R. 152, at paragraph 69, in considering the section 58 application in respect of the Project, the Board must consider issues similar to those stipulated in subsection 52(2) of the *NEB Act* and that in doing

so, the Board is empowered to determine the issues that it will consider. In that case, the Court upheld the Board's determination that it was not required to consider affects associated with so-called "upstream" and "downstream" activities that were alleged to have been related to the Project.

[55] Fourthly, it is the case that a section 52 approval will be subject to a further order by the Governor-in-Council but a section 58 order will not. However, the apparent finality of a section 58 approval proceeding does nothing to assist the Board in making the *Haida* Determination when the Crown is not a participant in that proceeding. Such finality does not, in and of itself, establish that the constitutional issues embedded in the *Haida* Determinations are "properly before" (see *Carrier Sekani* at paragraph 69) the Board when the Crown itself is not a participant before the Board. Moreover, I find it difficult to understand how Parliament's intention, when it enacted section 58 of the *NEB Act* to allow the Board to make final decisions in respect of matters falling under that section, should be construed in light of the Crown's *Haida* duties when the date of enactment of that provision predates both the enactment of the *Constitution Act* and the enunciation of the Crown's *Haida* duties in *Haida Nation* by over 45 years.

[56] In my view, the essential factual context in *Standing Buffalo* is indistinguishable from the factual context in this appeal. For that reason, it is my view that the principle established in *Standing Buffalo* ought to be followed in this appeal. In that regard, I note that nowhere in any of the memoranda of law before this Court is there an argument that this Court should disavow its decision in *Standing Buffalo*, in accordance with the principles established in *Miller v. Canada*

(Attorney General), 2002 FCA 370, 220 D.L.R. (4th) 149 (see also *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 93 at paragraph 18, [2015] F.C.J. no. 455 (QL)).

The non-participation of the Crown

[57] The Crown decided not to participate in the Project approval proceedings before the Board and no comprehensive explanation was put forward for that decision. It is possible that the Crown was of the view that Enbridge's application entailed no Crown conduct that could engage the *Haida* duty. If the Crown had appeared before the Board, this and other issues could have been argued. But that did not occur.

[58] In the final analysis, the Board determined that it would entertain Enbridge's section 58 application without making the *Haida* Determinations. In doing so, in my view, it made no reviewable error.

Conclusion

[59] For the foregoing reasons, I conclude that the Board, in the absence of the Crown as a participant in the section 58 application in respect of the Project, was not required, as a precondition to its consideration of that application, to determine whether the Crown was under a *Haida* duty, and if so, had discharged that duty, in respect of the Project.

B. Was the Board under a *Haida Duty?*

Standard of Review

[60] The issue of whether the Board has the power to undertake and discharge a *Haida* duty on behalf of the Crown in respect of the Project is a question of law that is reviewable on the standard of correctness (*Carrier Sekani* at paragraph 67).

The Board's Constitutional Duty

[61] It is clear that the Board is obligated to carry out its mandate in a manner that respects the provisions of subsection 35(1) of the *Constitution Act*.

[62] The Board's mandate includes ensuring that the interests of Aboriginal groups in relation to the Project approval application are considered by it and by the Project proponent. In this regard, the Board required Enbridge to engage in extensive dialogue with the Appellant and other First Nations. In doing so, the Board ensured that it adhered to its constitutional obligations under subsection 35(1).

[63] It is important to note that the Board's duty to ensure appropriate levels of consultation with Aboriginal groups is not the same as the Crown's *Haida* duty. That said, as a practical matter, consultations with Aboriginal groups that arise in the Board's section 58 application process may very well deal with, and hopefully remediate if necessary, the same Aboriginal concerns that arise when the Crown engages in *Haida* duty consultations. In other words, it should not matter whether a problem is solved in the Board's consultation process or the Crown's *Haida* duty consultation process.

Did the Crown delegate its Haida duty to the Board?

[64] As informed by the Supreme Court in *Haida Nation*, and more recently in *Carrier Sekani*, the Crown's *Haida* duty can be delegated to a tribunal by appropriate legislation.

[65] None of the parties to this appeal argued that the *NEB Act* contained any provisions that gave rise to a delegation of the Crown's *Haida* duty to the Board, and I have been unable to discern any provision of that legislation that can be interpreted to produce such a delegation.

[66] While it is within the power of Parliament to require the Board to discharge the Crown's *Haida* duty, mandating the Board to perform such additional duties would require it to function outside its core areas of technical expertise. Moreover, it seems to me that requiring the Board to consult with First Nations on behalf of the Crown would make it very difficult, if not impossible, for the Board to then adjudicate – in its capacity as a quasi-judicial tribunal and a court of record – upon the issue of the adequacy of those consultations. Perhaps these observations explain why Parliament has not taken legislative steps to expand the jurisdiction of the Board by adding such additional duties.

The Crown Response Letter

[67] In the present circumstances, the Crown did not participate as a party to the application for Project approval. However, in the Crown Response Letter, the Minister of Natural Resources stated as follows:

> In your letter, you reference the importance of Crown consultation with Aboriginal groups under section 35 of the *Constitution Act, 1982*. I can assure you that the Government of Canada is committed to meeting its legal duty to consult

> whenever it contemplates conduct that could adversely affect an established or potential Aboriginal or treaty right. Where a duty to consult exists, the federal Crown will meet its consultation obligations in an effective and meaningful manner.

Later in that letter, the Minister stated that:

> The National Energy Board's (NEB) regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate. The NEB provides an open, comprehensive and participatory venue for all affected parties to express their project-related concerns and interests.

[68] I do not accept that this latter passage constitutes an effective delegation to the Board of the Crown's responsibility for the performance of any portion of its *Haida* duty, if such a duty arose in relation to the Project. *Carrier Sekani* informs that the question of whether a tribunal has been given the power to carry out the Crown's *Haida* duties is to be determined from a review of the legislation that creates the tribunal. This implies that an effective delegation by the Crown of its *Haida* duties requires legislation to that effect. I leave open the question of whether some formal type of disposition other than legislation could be employed by the Crown to produce an effective delegation of its *Haida* duties. Suffice it to say that, in my view, the Crown Response Letter is insufficient to produce such a delegation, especially so when it is recalled that this letter was not sent until after the hearing before the Board ended.

[69] In my view, the existence of the Crown's *Haida* duty, if any, and the fulfillment of that duty, should it be found to exist, are issues that should not be taken to have been determined by the decision of the Board. It follows that the existence and fulfillment of any *Haida* duty on the part of the Crown in respect of the Project are matters in respect of which there has been no

judicial pronouncement. For greater certainty, it is my view that the question of whether Parliament's enactment of the *NEB Act*, over 20 years before the enactment of the *Constitution Act* and over 40 years before the decision in *Haida Nation*, could be said to constitute Crown conduct that is sufficient to trigger the *Haida* duty is not a matter that was decided by the Board. If the enactment of the *NEB Act* constitutes the impugned Crown conduct and that conduct occurred over 60 years before the Project application, one is presented with the logical impossibility that the *Haida* consultations in respect of the Project were required to have taken place prior to the enactment of that legislation.

[70] In the same vein, one would wonder whether it can realistically be suggested that in enacting of the *NEB Act*, – over 20 years before the enactment of the *Constitution Act* and over 40 years before the *Haida* duty to consult was enunciated by the Supreme Court – the federal government was attempting "to avoid its duty to consult" (see paragraph 62 of *Carrier Sekani)*.

[71] In contrast to the enactment of the *NEB Act* in the 1950's the Province of Alberta recently enacted the *Responsible Energy Development Act*, S.A. 2012, c. R – 17.3. Section 21 of that legislation specifically states that the Alberta Energy Regulator has no authority to make the *Haida* Determinations, seemingly indicating an intention on the part of that legislative body that such determinations must be made by the courts.

[72] At the hearing of this appeal, the Appellant acknowledged that the Crown Response Letter could have been regarded as a refusal by the Crown to engage in consultations and that an application for judicial review could have been brought with respect to that refusal.

[73] Once before a court, the *Haida* Determinations could be made in the context of the evidence and arguments presented by the parties and an appropriate remedy sought. The panoply of potential available judicial remedies was described by the Supreme Court at paragraph 37 of *Carrier Sekani*, as follows:

> [37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[74] The scope of the remedial powers of a court or judicial review would also extend to declaratory relief such as that which was proposed by the Yukon Court of Appeal in *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100. In that case, the Court recognized an acknowledgment from Crown counsel that the legislature of the Yukon might wish to make legislative amendments to address the consultation issues under consideration and, accordingly, it suspended the declarations that it was otherwise prepared to make. Such flexible relief can generally be provided by the Courts in judicial review proceedings.

[75] Indeed in the excerpt from the Request for Consultation Letter (reproduced in paragraph 11 above), the Appellant itself acknowledged a number of limitations on the jurisdiction of the Board to address all of their concerns about the impact of the project on them. However, it is not obvious to me that the consequence of the absence of provisions in the *NEB Act* (enacted over 50 years ago) that would enable the Board to meaningfully remediate any established breach by the Crown of its *Haida* duty ought to be that Enbridge's Project approval application must be held up indefinitely.

[76] An application for judicial review in relation to the existence and fulfillment of a *Haida* duty was heard by the Federal Court in *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, 345 F.T.R. 119 [*Brokenhead*].

[77] In that regard, the holding of Justice Barnes, at paragraph 37 of *Brokenhead*, is worthy of note:

> [37] The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the [Board] and not in a collateral discussion with either the [Governor-in-Council] or some arguably relevant Ministry.

[78] In other words, achieving practical solutions to project-related problems by recourse to the mainstream regulatory jurisdiction of the Board is a worthy objective that should be pursued.

Conclusion

[79] For the foregoing reasons, I conclude that there has been no delegation by the Crown to the Board, under the *NEB Act* or otherwise, of the power to undertake the fulfillment of any applicable *Haida* duty of the Crown in relation to the Project.

VI. DISPOSITION

[80] For the foregoing reasons, I would dismiss the appeal with costs to Enbridge. As neither the Crown nor the Board asked for costs, none will be awarded in their favour.

"C. Michael Ryer"
J.A.

"I agree
Wyman W. Webb J.A."

RENNIE J.A. (Dissenting Reasons)

I. Overview

[81] A point of divergence arises between my colleagues and I with respect to the effect of *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, 2010 SCC 43 on the responsibility of the Board to assess the adequacy of the *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 consultation. My colleagues have found that in the absence of the Crown as a party to the proceedings before the Board, it is not required to undertake the *Haida* analysis as a precondition to the exercise of its regulatory oversight jurisdiction. This result is predicated on the previous decision of this Court in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308.

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

II. The factual context

[83] On April 8, 1975, the Government of Canada entered into an agreement with Interprovincial Pipe Line Inc. (IPL) to construct a pipeline from Sarnia to Montréal (the Montréal Extension) in order to transport crude oil from western sources to eastern refineries. The Montréal Extension, now known as Line 9, was opened on June 4, 1976; Line 9 was built

without the Crown having consulted with the Chippewas of the Thames First Nation (the Chippewa).

[84] IPL reached an agreement with the Government of Canada on June 4, 1996, whereby IPL would continue to own and operate Line 9, and Canada was released from its rights and obligations under previous agreements.

[85] On November 29, 2012, Enbridge Pipelines Inc. (Enbridge), as the current owner and operator of Line 9, filed its application to the Board seeking approval to reverse the direction of flow for the 639 kilometer segment of Line 9 from North Westover, Ontario to Montréal (Line 9B), Québec, and to increase the annual capacity of Line 9 from the current 240,000 barrels of diluted bitumen per day to 300,000 barrels of heavy crude per day.

[86] Line 9 is located in the traditional territory of the Chippewa and crosses the Thames River, from which the Chippewa and their ancestors have harvested resources. The Chippewa have Aboriginal and treaty rights in the Thames watershed, and assert an undetermined claim of title over the bed of the Thames River and its resources.

[87] On September 27, 2013, in advance of the Board's public hearings in regards to Enbridge's application, Chief Joe Miskokomon of the Chippewa and Chief Christopher Plain of the Aamjiwnaang First Nation (AFN) sent a letter to the Prime Minister, the Minister of Aboriginal Affairs and Northern Development Canada, and the Minister of Natural Resources. The letter listed concerns relating to a breach of their Aboriginal and treaty rights, and

specifically raised the issue of the Crown's failure to consult the respective First Nations about the proposed project:

> Despite being clearly subject to this constitutional duty, the federal Crown has failed to consult us about the Project.
>
> Unless you take the actions requested of you in this letter, there will be no opportunity in the future for the Crown to consult with AFN and [the Chippewa] about the Project. […] The [Board] has the authority under s. 58 of the [*Act*] to make orders granting the exemptions without consulting you or the Governor-in-Council, meaning that there will be no further opportunities in the current regulatory approvals process for the Project for the federal Crown to consult with AFN and [the Chippewa].

[88] The Chippewa fully participated in the hearings before the Board and received generous funding in support. The Board's hearing process closed on October 18, 2013. It was not until January 30, 2014 that the Minister of Natural Resources (the Minister) replied to the Chiefs' letter. The Minister wrote:

> I can assure you that the Government of Canada is committed to meeting its legal duty to consult whenever it contemplates conduct that could adversely affect an established or potential Aboriginal or treaty right. Where a duty to consult exists, the federal Crown will meet its consultation obligations in an effective and meaningful manner.
>
> […]
>
> The National Energy Board's (NEB) regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate.

[89] Before the Board, the appellant repeated its request that the Minister attend the hearings so as to engage in consultations. The requests were not answered. Unlike *Standing Buffalo* where there had been many years of unproductive discussions between the First Nation and the Crown, here there have been none.

[90] It is important, in my view, not to conflate the substantive legal questions which underlie this appeal with the degree to which aboriginal title and treaty interests may be affected by Line 9. In order for the duty to consult to be engaged, the action must have an appreciable, adverse effect on the ability to exercise aboriginal rights; *Carrier Sekani*, para. 46. Here, the effects may in fact, be minimal. The Board found as much. Enbridge's section 58 application is to reverse the flow of the pipeline to its original direction and to change the content and volume of the line. But that is not the point. What is in issue is the question of the duty to consult where a tribunal is the final decision maker.

III. The legislative context

[91] The appeal in *Standing Buffalo* arose from three decisions of the Board that granted applications for approvals in respect of three pipeline projects pursuant to section 52 of the *NEB Act*. A company is not permitted to operate a pipeline unless the Board has issued a certificate under section 52 of the *NEB Act*.

[92] Decisions made pursuant to section 52 are not final. Rather, section 52 approval is a stop en route to the Governor in Council, the ultimate decision maker. Section 54 of the *NEB Act* allows the Governor in Council to either direct the Board to issue a certificate or to dismiss the application for a certificate. Thus, in *Standing Buffalo*, the role of the Board as a final decision maker with respect to the duty to consult was not engaged. A Crown decision or Crown action, in the form of the Governor in Council decision pursuant to section 54 awaited, clearly triggering the duty to consult.

[93] This appeal, however, arises from a decision of the Board to approve an application by the respondent under section 58 of the *NEB Act*. Section 58 enables the Board to exempt a proposed expansion or extension to an existing pipeline from the requirement of obtaining a new certificate. Additions or modifications to existing physical facilities qualify for a section 58 exemption where they involve 40 kilometers or less of existing pipeline.

[94] Importantly, subject to appeal to this Court with leave, the decision of the Board is final. The Minister has no power to direct the Board to revise or amend its decision. This is apparent on the face of the legislation, and was confirmed by counsel at the hearing of this appeal.

[95] The legislative framework which underlies this appeal is, therefore, markedly different than that of *Standing Buffalo*. In *Standing Buffalo*, final decision making powers remained with the Governor in Council, and therefore there was no question of Crown action or conduct. Here, in a section 58 proceeding, the Board is the ultimate decision maker.

IV. Tribunals and the duty to consult

A. *The duty to consult*

[96] In order to situate the issue in this appeal a brief re-capitulation of the role of tribunals in relation to the duty to consult is in order.

[97] The question was first considered in 1994 by the Supreme Court of Canada in *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159. In that case, the affected First Nation relied on the duty to consult as a basis for arguing that the NEB was subject

to a heightened level of procedural fairness. Justice Iacobucci, delivering the judgment of the Court, rejected this argument and held that the duty to consult did not attach to quasi-judicial tribunals such as the NEB, as the duty to consult was based on the fiduciary duties owed to Aboriginal peoples as part of the honour of the Crown. Therefore, an imposition of such a duty on an independent tribunal would be inconsistent with the requirement of neutrality towards the parties to proceedings.

[98] A decade later, in 2004, the Supreme Court of Canada re-characterized the nature of the duty to consult. In *Haida*, the Court held that the duty arose from the honour of the Crown, and was not subsumed within the various fiduciary obligations owed by the Crown. It was, rather, an independent element of the honour of the Crown: *Haida* at paras. 18-20. This conclusion, and other indicators within the judgment, led academics to opine that the "particular theory on which the Court had based its rejection of the First Nation's argument in the 1994 National Energy Board case no longer held." That is, the concept of independence "was no longer an impediment to the imposition of the duty to consult on judicial and quasi-judicial tribunals" (see David Mullan, *The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?* (2011) 24 CJALP 233 at 251-252).

[99] In 2009 this Court, in *Standing Buffalo*, relied on the 1994 *National Energy Board* case for the finding that as a "quasi-judicial body", the NEB was not itself under a *Haida* duty. The Court also held that the NEB had no statutory obligation to analyze and determine whether the Crown's duty to consult had been triggered and discharged in respect of project applications: *Standing Buffalo* at paras. 34 and 39.

B. *Carrier Sekani*

[100] The ultimate legal responsibility for consultation and accommodation will always remain with the Crown. However, procedural aspects of the duty to consult may be delegated: *Haida* at para. 53. Thus, in *Carrier Sekani*, the Court held that whether a tribunal has the jurisdiction to consider the adequacy of consultation, or to carry out consultation itself, depends on the mandate conferred by the legislation that establishes the tribunal. On this basis alone, *Carrier Sekani* mandates re-visiting the conclusion reached in *Standing Buffalo*.

[101] The Court saw a clear demarcation between two duties – the jurisdiction to inquire as to the existence of a duty to consult and whether the consultations between the Crown and the respective First Nation were adequate, and the separate ability of the tribunal to conduct the consultations itself.

[102] The former can be implied from the ability to decide questions of law. That is, in determining whether a tribunal has the power to make a determination regarding adequacy of consultation, the Court in *Carrier Sekani* held that "[t]he power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power": *Carrier Sekani* at para. 69. This holding is inconsistent with *Standing Buffalo* which held that a tribunal must be explicitly conferred the power to undertake a *Haida* analysis.

[103] In sum, the language of *Carrier Sekani* is unequivocal; the Board was required to consider whether consultation was required and whether it had taken place.

[104] The majority places considerable weight on the limited engagement of the Crown in the proceedings in respect of Line 9. In my view, *Carrier Sekani* changes the question from being whether the Crown is seeking relief or permission from the Board (as was BC Hydro), to one that focuses on the legislative mandate given the Board by Parliament. Whether or not the Crown shows up at regulatory proceedings cannot alter the responsibilities of the Board with respect to the Crown's duty of consultation (see Promislow, J., *Irreconcilable? The Duty to Consult and Administrative Decision Makers* Constitutional Forum Volume 22, Number 1, 2013). The Board's jurisdiction to assess consultation does not vary according to project proponent. This conclusion makes sense because at a practical level, the section 58 process culminates with a final decision, and any Aboriginal or treaty rights that might be affected by the proposed project are affected in the same way, regardless of the project proponent.

[105] Further, in *Carrier Sekani*, the Supreme Court of Canada "left for another day" the question as to whether a legislative action itself triggers the duty to consult or offends section 35 of the *Constitution Act*. In the particular circumstances of this case, the requirement of Crown conduct is satisfied by the regulatory regime which makes the Board the final decision maker. The duty to consult is rooted in section 35 of the *Constitution Act*, and it cannot be avoided by the Crown refusing to engage until it is too late in the decision making process or by delegating the final decision making to a tribunal. The duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet.

C. *The application of Carrier Sekani to the NEB*

[106] The Board must have, and exercise, the power to assess whether the duty to consult has been fulfilled, and to refuse to grant an approval if there is an unfulfilled duty to consult; otherwise the section 58 regime allows for the approval of projects which may adversely affect Aboriginal rights without the Crown ever consulting with the Aboriginal group in question. A project proponent can apply, go through the NEB's hearing process, and receive approval. The Crown can remain silent, on the sidelines. No consultation with the Crown need occur at any point. Indeed, the Crown lacks the statutory authority to prevent an application from being approved by the Board, even if it should want to.

[107] This may be contrasted with the regime under section 52, where (pursuant to section 54) the Governor in Council has the final say. This moment of Crown involvement is crucial, because it is obvious in the section 52 and 54 scenario that it would violate the Crown's *Haida* obligations for the Governor in Council to grant final approval without consulting. In the present case, however, Parliament has set up a scheme where infringing projects may be approved without Crown consultation.

[108] In *Ross River Dena Council v. Government of Yukon, 2012 YKCA 14*, the Yukon Court of Appeal considered an analogous situation. Under the *Quartz Mining Act*, SY 2003, c 14 (*Quartz Mining Act*), an individual acquires mineral rights by physically staking a claim and then recording it with the Mining Recorder. The Mining Recorder had no discretion to refuse to record a claim that complied with the statutory requirements. The Government of Yukon argued

that the recording of a mineral claim was not "contemplated Crown conduct" and therefore there was no duty to consult.

[109] The Court of Appeal rejected this argument, and held at paragraph 37 that "[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist." The Court of Appeal issued declarations that the Government of Yukon has a duty to consult; however it also noted that the Government of Yukon "may well wish to make statutory and regulatory changes in order to provide for appropriate consultation." The Court suspended its declarations for one year to allow for amendments to the *Quartz Mining Act*. Leave to appeal was refused (Docket: 35236, September 19, 2013).

[110] The Mining Recorder, whose duties were essentially clerical, had no statutory authority to decide questions of law, including the question of whether a *Haida* duty existed. There was thus no way to close the loophole. If the Board is found to be similarly lacking in competence, then section 58 would be similarly infirm. This, however, is not the case; the Board had the power to consider the issue of *Haida* duties. The NEB legislation avoids the problems of the *Quartz Mining Act* because the NEB can check to make sure the duty to consult has been fulfilled.

[111] Applying this reasoning, the Board should have considered whether there was a duty to consult, and if so whether it had been fulfilled, and granted approval only if there were no unfulfilled duty to consult. If the board had understood that it had this power, and exercised it, it

would have been consistent with the duty to consult, which, it must be remembered, is derived from section 35 of the *Constitution Act*.

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

[113] The majority view this result as unfair to a proponent, who should not be caught in the middle of a ministerial refusal to consult and an inchoate and perhaps unreasonable expectation by the band as to the fruits of that consultation.

[114] There are several answers to this. First, it is important to recall what is in issue. The duty to consult with Aboriginal peoples and accommodate their interests is a constitutional duty invoking the honour of the Crown, which requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstance: *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, 2014 SCC 44; *Carrier Sekani*; *Haida* at para. 41. The inconvenience to the proponent pales when measured against that principle.

[115] Second, from a practical standpoint, the courts are available to determine whether the duty to consult has been discharged. This is routine business.

[116] Third, the problem could have been avoided had the Minister followed the direction of this Court and the Supreme Court. Recall that it was on January 30, 2014, three and on half months after the hearing concluded, and a month before the Board decision was publically released (March 6, 2014), that the Minister stated his position.

[117] The consultation process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2009 FC 484, at para. 42 citing *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212 at paras. 52-53. Consultation itself is a distinct constitutional process "requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests": *Carrier Sekani* at para. 74. The "common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns as they are raised' through a meaningful process of consultation": *Haida* at para. 42 citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 168. Responsiveness is key and the Crown, even where a duty to consult is at the low end of the spectrum, is required to engage directly with the affected First Nation: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, at para. 25; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69, at para. 64.

[118] Fourth, on the majority understanding of *Carrier Sekani*, consultation in this context becomes an afterthought, precisely what the Supreme Court criticized in *Mikisew Cree*, at para. 64 per Binnie J. The substantive content of consultations and the options available to both parties

would also be constrained to monetary compensation - an outcome inconsistent with the objective of reconciliation which underlies the duty to consult.

[119] Finally, public policy interests are better served if consultation moves in parallel with established regulatory proceedings. As Kirk N. Lambrecht, Q.C. wrote in *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013), the identification of aboriginal interests and engagement of communities early in the decision making process enhances positive and respectful relationships and dialogue, by elements of reconciliation. In my respectful view, the result proposed in this case creates a disincentive to timely, good faith and pragmatic consultations, and undermines the overarching objective of reconciliation.

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

D. *Remedies*

[121] As noted at the outset, this case raises novel issues with respect to the duty to consult where a tribunal is the final decision maker. This is equally so with respect to remedy. Again, we are sailing in uncharted waters. The Board was required, by *Carrier Sekani*, to ask whether the

duty to consult had been triggered and if so, whether the consultation had been adequate. Had it asked those questions it would have found that, as a final decision maker of the project which would affect aboriginal interests, the duty was triggered. As the Minister did not engage, it could not answer the second in the affirmative.

(1) Judicial review

[122] The majority concluded that the Minister's response letter dated January 30, 2014, can be taken as a refusal by the Crown to engage in *Haida* consultations. At the hearing of this appeal, the Minister agreed that judicial review of the letter, as a Crown decision, is open to the appellant (presumably declaratory, injunctive or other relief under section18.1 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) or Rule 372 and following of the *Federal Courts Rules*). In such a proceeding, however, the Minister stated that he would assert that the Board proceeding "entirely discharges" the duty to consult.

[123] Judicial review of the Minister's letter, in the circumstances, is an empty remedy. The Minister ultimately has no power in respect of the section 58 order. The decision of the Board is final. A final decision in respect of the section 58 application was made by the Board on March 6, 2014. The Minister does not propose to do anything and has no power in respect of the decision. There is nothing to be enjoined, quashed or compelled.

[124] Substantively, any consultation or accommodation which might flow from a successful judicial review would be too late. The direction from the Supreme Court is that if consultation is to be meaningful it must take place at the stage of the grant or renewal of the licence or permit in

question. That is, consultation must be timely: see *Carrier Sekani* at para. 35; *Haida* at para. 76; *Sambaa K'e Dene First Nation v. Duncan*, 2012 FC 204 at para. 165; *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 at paras. 74-75; and *Gitxaala Nation v. Canada (Transport, Infrastructure and Communities)*, 2012 FC 1336 at para. 40.

[125] The suggestion that the only remedy lies in an after-the-fact judicial review of a Minister's letter is inconsistent with the Supreme Court in *Tsilhqot'in* at paragraph 78 where the Court reiterated that the duty to consult "must be discharged prior to carrying out the action that could adversely affect the right." According to the jurisprudence, the duty to consult should have been discharged prior to the issuance of a section 58 order. This can be achieved by requiring the Board to ask the questions required by *Carrier Sekani*.

(2) Declaratory relief

[126] There is a gap in the regulatory scheme and the section 58 approvals process which allows the duty to consult, by design or otherwise, to fall through the cracks. The appellant was attuned to this as evidenced by the September 27, 2013 letter sent from Chief Miskokomon and Chief Plain to the Prime Minister, the Minister of Aboriginal Affairs and Northern Development Canada and the Minister of Natural Resources Canada:

> There is a gap in the current approvals process for the Project which has resulted in the Crown failing to consult with AFN, COTTFN, and other Aboriginal peoples whose rights may be severely impacted by the Project. It is incumbent on you to act immediately and honourably fill that gap by initiating consultation with each of AFN and COTTFN now.

[127] The mischief foreshadowed by the Supreme Court at paragraph 62 in *Carrier Sekani* has thus, in this case, materialized:

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

[128] Declaratory relief similar to that obtained in *Ross River* was not sought in this Court, nor was the point argued. It would be inappropriate to resort to it in these circumstances. Indeed, it is unnecessary, as the Board has the legislative mandate to ask the questions mandated by *Carrier Sekani* and ensure that consultation is discharged before it makes a final decision.

[129] I would therefore allow the appeal with costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-358-14
APPEAL FROM A DECISION OF THE NATIONAL ENERGY BOARD DATED MARCH 6, 2014 (DOCKET NUMBER OH-002-2013)	
STYLE OF CAUSE:	CHIPPEWAS OF THE THAMES FIRST NATION v. ENBRIDGE PIPELINES INC., AND THE NATIONAL ENERGY BOARD AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 16, 2015
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	WEBB J.A.
DISSENTING REASONS BY:	RENNIE J.A.
DATED:	OCTOBER 20, 2015

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