Date: 20091023

Docket: A-537-08, A-541-08,
A-542-08, A-475-08

Citation: 2009 FCA 308

CORAM: **NOËL J.A.**
LAYDEN-STEVENSON J.A.
RYER J.A.

Docket A-537-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

ENBRIDGE PIPELINES INC., CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS and
NATIONAL ENERGY BOARD

Respondents

and

ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL OF CANADA

Interveners

Docket A-541-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

ENBRIDGE SOUTHERN LIGHTS GP INC. on behalf of
ENBRIDGE SOUTHERN LIGHTS LP and
ENBRIDGE PIPELINES INC.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS

Respondents

and

ATTORNEY GENERAL OF CANADA

Intervener

Docket A-542-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

**TRANSCANADA KEYSTONE PIPELINE GP LTD.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Docket A-475-08

BETWEEN

**THE SWEETGRASS FIRST NATION, and
THE MOOSOMIN FIRST NATION**

Appellants

and

**THE NATIONAL ENERGY BOARD, ENBRIDGE PIPELINES INC.,
ATTORNEY GENERAL OF CANADA, and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

**THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL FOR SASKATCHEWAN**

Interveners

Heard at Ottawa, Ontario, on October 13, 2009.

Judgment delivered at Ottawa, Ontario, on October 23, 2009.

REASONS FOR JUDGMENT BY: RYER J.A.

CONCURRED IN BY: NOËL J.A.
LAYDEN-STEVENSON J.A.

Date: 20091023

Dockets: A-537-08, A-541-08,
A-542-08, A-475-08

Citation: 2009 FCA 308

CORAM: **NOËL J.A.**
LAYDEN-STEVENSON J.A.
RYER J.A.

Docket A-537-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

ENBRIDGE PIPELINES INC., CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS and
NATIONAL ENERGY BOARD

Respondents

and

ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL OF CANADA

Interveners

Docket A-541-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

ENBRIDGE SOUTHERN LIGHTS GP INC. on behalf of
ENBRIDGE SOUTHERN LIGHTS LP and
ENBRIDGE PIPELINES INC.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS

Respondents

and

ATTORNEY GENERAL OF SASKATCHEWAN

Intervener

Docket A-542-08

BETWEEN:

STANDING BUFFALO DAKOTA FIRST NATION,
and CHIEF RODGER REDMAN, COUNCILLOR WAYNE GOODWILL,
COUNCILLOR DION YUZICAPPI, COUNCILLOR VERGIL BEAR,
COUNCILLOR HERMAN GOODPIPE, COUNCILLOR STELLA ISNANA,
and COUNCILLOR CONRAD TAWIYAKA
as representatives of
THE MEMBERS OF STANDING BUFFALO DAKOTA FIRST NATION

Appellants

and

**TRANSCANADA KEYSTONE PIPELINE GP LTD.,
NATIONAL ENERGY BOARD, and CANADIAN
ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

THE ATTORNEY GENERAL OF CANADA

Intervener

Docket A-475-08

BETWEEN

**THE SWEETGRASS FIRST NATION , and
THE MOOSOMIN FIRST NATION**

Appellants

and

**THE NATIONAL ENERGY BOARD, ENBRIDGE PIPELINES INC.,
ATTORNEY GENERAL OF CANADA, and
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS**

Respondents

and

**THE ATTORNEY GENERAL OF ALBERTA and
THE ATTORNEY GENERAL FOR SASKATCHEWAN**

Interveners

REASONS FOR JUDGMENT

RYER J.A.

[1] In the four appeals that were before the Court, the appellants seek to set aside three decisions of the National Energy Board (the "NEB") that granted applications for approvals in respect of three western Canadian pipeline projects following hearings in which those applications were considered.

[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.

[3] The four appeals were heard together by order of this Court. These reasons dispose of each of the appeals and will be filed as reasons for judgment in Court files A-537-08, A-541-08, A-542-08 and A-475-08.

RELEVANT STATUTORY PROVISIONS

[4] The statutory provisions that are relevant to the appeals are subsections 21(1), 22(1) and section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (the “NEB Act”) and subsection 35(1) of the *Constitution Act, 1982* (the "Constitution"). These provisions are reproduced in the appendix to these reasons.

BACKGROUND

[5] The NEB held hearings with respect to applications for approvals in respect of three proposed pipeline projects (the "Keystone Project", the "Southern Lights Project" and the "Alberta Clipper Project", collectively, the "Projects"). The Standing Buffalo First Nation ("SBFN"), a

Dakota band, participated as an intervener in the hearings with respect to all of the Projects. The Sweetgrass First Nation and the Moosomin First Nation ("SFN/MFN") participated in the hearing with respect to the Alberta Clipper Project through Battleford Agency Tribal Chiefs Inc. ("BATC"), which intervened in that hearing on their behalf.

[6] In the Keystone hearing, SBFN gave evidence that it had been in negotiations with Canada, through the auspices of the Office of the Treaty Commissioner, from 1997 to 2006, with respect to asserted claims in respect of unextinguished Aboriginal title to lands, self-government rights and *ochechea* (its status as an ally of the Crown). According to SBFN, the Crown broke off these negotiations in 2006 and for that reason, SBFN decided to intervene in the Keystone hearing to advance its interests. To that end, SBFN informed the Crown of its decision to intervene in the proceedings and reiterated its desire to resume the negotiations that had broken off.

[7] In the Alberta Clipper hearing, the applicant introduced a without prejudice letter, dated July 25, 2007, in which the Crown took the position that the Dakota First Nations, including SBFN, "do not have Aboriginal rights in Canada".

[8] In the Alberta Clipper hearing, BATC expressed concerns on behalf of SFN/MFN about potentially adverse effects that the Alberta Clipper Project would have on sacred sites and plant gathering for traditional and medicinal purposes. In this Court, counsel for SFN/MFN raised the concern that the SFN/MFN have interests in land that will be affected by the Alberta Clipper Project. More particularly, SFN/MFN asserted that the possibility that their claims to land under the

Treaty Land Entitlement Process might be satisfied by lands affected by this Project formed part of the basis of their right to *Haida* consultation.

[9] The NEB made three separate decisions (the "Decisions") with respect to the Projects. In particular:

a. in Hearing Order OH-1-2007 (the "Keystone Decision"), dated September 20, 2007, the NEB granted approvals that were requested by TransCanada Keystone Pipeline GP ("Keystone") in relation to the Keystone Project, including a Certificate of Public Convenience and Necessity (a "Section 52 Certificate") under section 52 of the NEB Act;

b. in Hearing Order OH-3-2007 (the "Southern Lights Decision"), dated February 19, 2008, the NEB granted approvals that were requested by Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc. (collectively "Enbridge Southern Lights") in relation to the Southern Lights Project, including a Section 52 Certificate; and

c. in Hearing Order OH-4-2007 (the "Alberta Clipper Decision"), dated February 22, 2008, the NEB granted approvals that were requested by Enbridge Pipelines Inc. ("Enbridge") in relation to the Alberta Clipper Project, including a Section 52 Certificate.

[10] The issue referred to at the beginning of these reasons was squarely raised in motions that were made by SBFN in the hearings with respect to the Southern Lights and Alberta Clipper

Projects. The motion made in the Southern Lights hearing is summarized at page 6 of the Southern Lights Decision as follows:

> The Notice of Motion … requested the following decision of the Board
>
> (a) a decision that the Board has no jurisdiction to consider the Southern Lights Application on its merits without first determining whether Standing Buffalo has a credible claim within the meaning of the Supreme Court's decision in *Haida Nation*…;
>
> (b) a decision that the duty of fairness requires that the Crown be required to attend and respond to Standing Buffalo's claim, and that, in absence of any such response from the Crown, Standing Buffalo's claim should be accepted as uncontradicted and the Board should then determine that it is without jurisdiction to determine the substantive merits of the Southern Lights applications.

[11] This motion also raises the collateral issues of the requirement for Crown participation in the hearing process and the consequences in the event that the Crown does not participate in that process.

[12] The NEB determined that the motion should not be decided as a preliminary matter because evidence in the hearing would provide a further factual basis that would be relevant to the motion and that completing the hearing without first deciding the motion would not prejudice the SBFN.

[13] In its reasons for the Southern Lights Decision, the NEB denied this motion and held that its mandate was to consider the application before it in accordance with the public interest. In doing so, the NEB stated that Aboriginal concerns were taken into account because the applicant was required to consult with affected Aboriginal groups and mitigative accommodations of Aboriginal concerns could be ordered. The NEB stated that requirements that may be imposed upon other governmental

authorities with respect to a proposed federal pipeline project are not relevant to the NEB decision making process in respect of that project. In addition, the NEB stated that recourse should be to the courts, and not the NEB, in relation to issues of whether other governmental authorities have met their legal obligations with respect to a project that also falls under NEB oversight. The NEB further stated that it had no jurisdiction to settle Aboriginal land claims. Finally, the NEB concluded that because it had the jurisdiction to deal with the applications before it, without having to adjudicate the existence of a credible claim within the meaning of *Haida*, it was not obligated to require the Crown to attend the hearing to participate in such an adjudication.

[14] The motion brought by SBFN in the Alberta Clipper hearing is essentially the same as the motion that it brought in the Southern Lights hearing and was dealt with by the NEB in a similar fashion.

[15] The issue raised in the motions brought by SBFN in the Southern Lights and Alberta Clipper hearings was not raised by way of a formal motion in the Keystone hearing. As a consequence, the Keystone Decision does not deal with that issue in the same way as it was dealt with in the Southern Lights and Alberta Clipper Decisions. However, the issue was raised in an application for a review of the Keystone Decision, in accordance with subsection 21(1) the NEB Act, that was made by SBFN on October 12, 2007. Paragraph 9.c. of that application reads as follows:

> … the NEB erred when, without having first satisfied itself that adequate Crown consultation had taken place, it implicitly concluded that it had jurisdiction to consider the application for the certificate of public convenience and necessity on its merits;

[16] By correspondence (the "Keystone Review Decision"), dated February 13, 2008, the NEB denied SBFN's request for a review of the Keystone Decision.

[17] The appellants obtained leave to appeal the Decisions as required by subsection 22(1) of the NEB Act.

ISSUES

[18] The issues in this appeal are as follows:

(a) before considering the applications for Project approvals, was the NEB required to determine

(i) whether the Crown had a duty to consult, and if appropriate, accommodate the appellants in relation to the Projects; and

(ii) if the Crown had such a duty, whether that duty had been discharged; and

(b) does section 52 of the NEB Act violate subsection 35(1) of the Constitution?

ANALYSIS

The *Haida* Duty

[19] The duty to consult that is at issue in these appeals is the Crown's duty to consult as described in *Haida*. Paragraph 35 of the Supreme Court of Canada's decision in that case stipulates that:

> … the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it …

[20] Guidance with respect to how to determine whether the Crown is subject to a *Haida* duty, and, if such a duty exists, how to determine the scope of that duty, is provided at paragraph 37 of that decision, which reads as follows:

> There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

[21] The final phase in the *Haida* analysis is whether the duty to consult, and if appropriate accommodate, has been discharged by the Crown.

[22] It is evident that the existence, scope and fulfillment of a *Haida* duty are matters that can be agreed upon by the Crown and the affected Aboriginal groups. However, where agreement on any or all of these matters cannot be reached, adjudication may be required. In addition to references to adjudication in paragraph 37 of *Haida*, at paragraph 60 of that decision, the Court states:

> … Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review.

The Jurisdictional Issue

[23] In the context of these appeals, the appellants assert that before the NEB could decide whether or not to grant the requested Project approvals, it was required to determine whether the Crown was subject to a *Haida* duty to consult the appellants in respect of the Projects. If such a duty was found to exist, the appellants assert that the NEB was then required to determine the scope of that duty and whether the Crown discharged it. Thus, the appellants assert that the NEB was required to undertake the full *Haida* analysis before it could make the Decisions.

Standard of Review

[24] In my view, this issue squarely raises a true question of the jurisdiction of the NEB, a question that is to be reviewed on the standard of correctness (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 59).

NEB did not undertake the Haida analysis

[25] Nowhere in the Decisions did the NEB make any finding that the Crown was or was not subject to a *Haida* duty. In other words, the NEB did not determine the existence of a *Haida* duty. It follows, in my view, that submissions with respect to the scope of such a duty, and whether or not the Crown has fulfilled it, need not be considered in these appeals. If I were to conclude that the NEB erred in not undertaking the initial step in the *Haida* analysis, I would remit the entire *Haida* analysis to the NEB for its consideration.

[26] I would also add that because the NEB did not undertake the *Haida* analysis prior to making the Decisions, in my view, it follows that the Decisions cannot be taken as encompassing any conclusions with respect to whether the consultations that were undertaken by the proponents of the Projects were, or were not, capable of discharging, or sufficient to discharge, any *Haida* consultation duty that the Crown may have in respect of the Projects.

The Paul and Kwikwetlem Decisions

[27] Counsel for SFM/MFN argued that the decisions in *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, and *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, [2009] 9 W.W.R. 92, authoritatively determine this jurisdictional question. I disagree.

[28] In *Paul*, the B.C. Forest Appeals Commission found that Mr. Paul, an Aboriginal, had contravened section 96 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, by cutting down four trees that he intended to use to build a deck on his home. The question in the case was whether the British Columbia legislature had validly conferred on that Commission the power to decide questions relating to Aboriginal rights and title in the course of adjudicating whether Mr. Paul had contravened section 96 of the Code, including the question of whether in cutting down the trees Mr. Paul was engaged in the exercise of the Aboriginal rights.

[29] The Supreme Court of Canada answered these questions in the affirmative and at paragraph 47 of its decision, Bastarache J. added an illuminating observation:

> My conclusions mean that the Commission has jurisdiction to continue hearing all aspects of the matter of Mr. Paul's four seized logs. Unless he moves in the Supreme Court of British Columbia for a declaration respecting his aboriginal rights, Mr. Paul must present evidence of his ancestral right to the Commission. As yet he has merely asserted his defence. If he is unsatisfied with the Commission's determination of the relationship between his s. 35 rights and the prohibition against cutting trees in s. 96 of the Code, he can move for judicial review in the Supreme Court of British Columbia. The standard of review for the Commission's determinations concerning aboriginal law will be correctness.

[30] In my respectful view, *Paul* provides no authoritative support for the proposition that the NEB was required to undertake the *Haida* analysis before considering the merits of the Project approval applications. If anything, paragraph 47 of *Paul* appears to me to indicate that the courts are the appropriate venue for the adjudication of Aboriginal issues.

[31] In *Kwikwetlem First Nation*, the British Columbia Utilities Commission considered an application for an approval of an electrical transmission project by the British Columbia Transmission Corporation. In that case, the Commission accepted that it was under a *Haida* duty and negotiations were undertaken by the parties on that basis. The question before the Court was whether the Commission could issue an approval without first having decided whether the duty to consult had been discharged to that point in the proceedings. It is noteworthy that all parties accepted that British Columbia Transmission Corporation was the Crown or a Crown agent for the purposes of the *Haida* analysis and that the consultations undertaken by it took place in furtherance of its *Haida* duty. Thus, the question of whether or not the British Columbia Utilities Commission was required to undertake the entire *Haida* analysis to determine whether the applicant before it was

under a duty to consult was not before the Commission. The existence of the *Haida* duty was not contested.

[32] In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.

[33] I note as well that the applicant before the British Columbia Utilities Commission in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* 2009 BCCA 67, [2009] 4 W.W.R. 381, 89 B.C.L.R. (4th) 298, was accepted by the parties as being the Crown or its agent. Accordingly, I am of the view that this case provides no support for SFN/MFN's argument on this issue.

[34] Finally, I would add that the NEB itself is not under a *Haida* duty and, indeed, the appellants made no argument that it was. The NEB is a quasi-judicial body (see *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at page 184, and, in my view, when it functions as such, the NEB is not the Crown or its agent.

Failure to undertake Haida analysis infringes subsection 35(1) of the Constitution

[35] Subsection 35 of the Constitution reads as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35(1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

[36] In asserting that the NEB erred in failing to undertake the *Haida* analysis before reaching its Decisions, the appellants state that the NEB must exercise its decision-making function in accordance with the dictates of the Constitution, including subsection 35(1) thereof. I agree with that statement, which is supported by the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)*, at page 185.

[37] The appellants then contend that while the NEB's mandated consultation by the Project proponents may have addressed potential infringements of Aboriginal rights <u>by those proponents</u>, the failure of the NEB to undertake the *Haida* analysis means that potential infringements of those rights <u>by the Crown</u> would not be addressed. Thus, the argument goes, by failing to undertake the *Haida* analysis, the NEB could be sanctioning potential infringements of Aboriginal rights by the Crown, thereby breaching subsection 35(1) of the Constitution.

[38] The appellants further argue that in the context of an application for a Section 52 Certificate, the NEB must "have regard to all considerations that appear to it to be relevant", as specifically stated in section 52 of the NEB Act. And, according to the appellants, whether the Crown has, and has satisfied, a *Haida* duty, are matters that are relevant to, and therefore must be addressed by, the NEB. A failure to do so, their argument continues, would result in breach by the NEB of its obligation to make its decisions in accordance with the dictates of the Constitution.

[39] For several reasons, I cannot accede to these arguments.

[40] First, as noted above, the decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision-making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable Project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision-making function in accordance with the dictates of subsection 35(1) of the Constitution.

[41] Secondly, the appellants were unable to point to any provision of the NEB Act or any other legislation that prevents it from issuing a Section 52 Certificate without first undertaking a *Haida* analysis or that empowers it to order the Crown to undertake *Haida* consultations.

[42] Thirdly, the Province of Saskatchewan argued that the NEB lacks jurisdiction to undertake a *Haida* analysis where the Crown that is alleged to have a *Haida* duty is the Crown in right of a province. The appellants did not contest this limitation on the ability of the NEB to conduct a *Haida* analysis in relation to the Crown in right of a province.

[43] Fourthly, a determination that the NEB was not required to determine whether the Crown was under, and had discharged, a *Haida* duty before making the Decisions does not preclude the adjudication of those matters by a court of competent jurisdiction. Indeed, the quotations from paragraphs 37 and 60 of *Haida* and paragraph 47 of *Paul* point towards recourse to the courts in such circumstances.

[44] I would add that the ability of an Aboriginal group to have recourse to the courts to adjudicate matters relating to the existence, scope and fulfillment of a *Haida* duty in respect of the subject matter of an application for a Section 52 Certificate should not be taken as suggesting that the Aboriginal group should decline to participate in the NEB process with respect to such an application. As previously stated, the NEB process focuses on the duty of the applicant for a Section 52 Certificate. That process provides a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it. While the Aboriginal group is free to determine the course of action it wishes to pursue, it would be unfortunate if the opportunity afforded by the NEB process to have Aboriginal concerns dealt with in a direct and non-abstract matter was not exploited.

THE CONSTITUTIONAL QUESTION

[45] The SFN/MFN argue that the NEB Act or portions thereof are invalid on the basis that they violate subsection 35(1) of the Constitution. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the validity of a regulation that prescribed limits on the length of fishing nets was impugned by an Aboriginal person on the basis that the particular regulation was inconsistent with subsection 35(1) of the Constitution. In that case, the Supreme Court of Canada held that the party impugning a piece of legislation has the onus of establishing that the legislation has the effect of interfering with an existing Aboriginal right. If that onus has been satisfied, the onus then shifts to the Crown to establish that the interference is justified.

[46] In the present circumstances, the assertions of SFN/MFN fall well short of what is required of them to meet their burden of establishing that the NEB Act or any portion of it has the effect of interfering with any Aboriginal or treaty rights they may possess. The assertion that the entire NEB Act infringes an existing Aboriginal or treaty right of the SFN/MFN is entirely unsubstantiated.

[47] SFN/MFN make reference to a single provision of the NEB Act, section 52, and argue that it is invalid because it does not include a specific provision stating that, in making decisions required of it under that legislation, the NEB must adhere to the protection afforded to existing Aboriginal and treaty rights of Aboriginal peoples of Canada. I am unable to accept this argument.

[48] It is clear from the decision of the Supreme Court of Canada in *Quebec (Attorney General) v. Canada (National Energy Board)* that the NEB is required to conduct its decision-making process

in a manner that respects the provisions of subsection 35(1) of the Constitution. In my view, the failure of the NEB Act to specifically refer to this requirement in section 52, or elsewhere in the NEB Act, is insufficient to invalidate that provision.

The A-542-08 Appeal

[49] Keystone argued that SBFN's appeal should be limited to an appeal from the Keystone Review Decision alone and not from the Keystone Decision itself. And, since SBFN's memorandum of fact and law says nothing about the Keystone Review Decision, Keystone contends that SBFN's appeal must be dismissed. In view of my proposed disposition of the jurisdictional and constitutional issues, I do not propose to deal with this issue.

DISPOSITION

[50] For the foregoing reasons, I would dismiss each of the appeals, with costs to the respondent Enbridge Pipelines Inc. in Court files A-537-08 and A-475-08, the respondent Enbridge Southern Lights GP Inc. in Court file A-541-08 and the respondent TransCanada Keystone Pipeline GP Ltd. in A-542-08.

"C. Michael Ryer"
J.A.

"I agree.
Marc Noël J.A."

"I agree
Carolyn Layden-Stevenson J.A."

APPENDIX

National Energy Board Act, R.S.C. 1985, c. N-7, subsections 21(1) and 22(1) and section 52

21(1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

21(1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

22. (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

52. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline if the Board is satisfied that the pipeline is and will be required by the present and future public convenience and necessity and, in considering an application for a certificate, the Board shall have regard to all considerations that appear to it to be relevant, and may have regard to the following:

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

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

(c) the economic feasibility of the pipeline;

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

52. Sous réserve de l'agrément du gouverneur en conseil, l'Office peut, s'il est convaincu de son caractère d'utilité publique, tant pour le présent que pour le futur, délivrer un certificat à l'égard d'un pipeline; ce faisant, il tient compte de tous les facteurs qu'il estime pertinents, et notamment de ce qui suit :

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

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

c) la faisabilité économique du pipeline;

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

e) les conséquences sur l'intérêt

pipeline; and
(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

public que peut, à son avis, avoir sa décision.

Constitution Act, 1982, subsection 35(1)

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

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-537-08
STYLE OF CAUSE:	*Standing Buffalo Dakota First Nation et al v. Enbridge Pipelines Inc. et al.*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 13, 2009
REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	NOËL J.A. LAYDEN-STEVENSON J.A.
DATED:	OCTOBER 23, 2009

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-541-08
STYLE OF CAUSE:	*Standing Buffalo Dakota First Nation et al v. Enbridge Southern Lights GP Inc. et al.*
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR JUDGMENT BY:	RYER J.A.
CONCURRED IN BY:	NOËL J.A. LAYDEN-STEVENSON J.A.
DATED:	OCTOBER 23, 2009

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-542-08
STYLE OF CAUSE:	*Standing Buffalo Dakota First Nation et al v. TransCanada Keystone Pipeline GP Ltd. et al.*
PLACE OF HEARING:	Ottawa, Ontario
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CONCURRED IN BY:	NOËL J.A. LAYDEN-STEVENSON J.A.
DATED:	OCTOBER 23, 2009

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-475-08
STYLE OF CAUSE:	*The Sweetgrass First Nation et al. v. The National Energy Board et al.*
PLACE OF HEARING:	Ottawa, Ontario
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CONCURRED IN BY:	NOËL J.A. LAYDEN-STEVENSON J.A.
DATED:	OCTOBER 23, 2009

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