S.C.C. Court File No. 37441

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF
AND THE MEMBERS OF THE MIKISEW CREE FIRST NATION

Appellants

and

THE GOVERNOR GENERAL IN COUNCIL, MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, MINISTER OF FINANCE, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND MINISTER OF NATURAL RESOURCES

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PART I—OVERVIEW AND STATEMENT OF FACTS

1. Advocates for the Rule of Law ("**ARL**") intervenes on the question of whether a justiciable duty to consult Aboriginal groups can arise in the legislative process. ARL submits that the answer is no, regardless of the law-making stage at issue.

2. The duty to consult is a constitutional imperative grounded in the Honour of the Crown and relates to asserted and established Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*. Section 35 rights are not absolute and, like other constitutional provisions, arise within and are informed by a broader internal architecture that includes underlying principles incorporated by the preamble to the *Constitution Act, 1867*. These principles are central to the meaning of express constitutional guarantees. They offer assistance in interpreting the Constitution's written text, and fill gaps in hard cases like this one that are not covered by the clear terms of the Constitution or existing precedent.

3. The underlying principles relevant to this appeal are parliamentary sovereignty and the separation of powers. Both counsel strongly against judicial intervention in the legislative process through the duty to consult. This is manifested in several legal doctrines, including parliamentary privilege, justiciability and the lack of any analogous duty of procedural fairness by law-makers.

4. The practical concerns which animate these principles are also present here. A justiciable duty to consult, even if limited to the earliest stages of the legislative process, would extend a frequently litigated doctrine to the legislative process. Based on the hundreds of duty to consult cases that have been considered by the courts since 2004, this would lead to substantial and repeated judicial intervention in the law making process which is anathema to the Westminster system of government.

5. It is important to underscore that this appeal is not about whether governments should as a matter of policy and practice consult with Aboriginal groups in some manner when developing legislation that could adversely affect their rights and interests. It is whether they must do so as a matter of constitutional law and whether a justiciable duty to consult in the legislative process can be reconciled with underlying and fundamental principles of the Constitution. As this Court stated in *Van der Peet*:

> In assessing a claim for the existence of an ***aboriginal right***, a court must take into account the perspective of the aboriginal people claiming the right. … It must also be recognized, however, that that perspective ***must be framed in terms cognizable to the Canadian legal and constitutional structure***. …[O]ne of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. ***Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada***. …"[A] morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, ***if it is truly to reconcile*** the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, ***take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.***[1]

PART II—POSITION RESPECTING QUESTIONS IN THE APPEAL

6. ARL's position is that no justiciable duty to consult arises during the law-making process.

PART III—STATEMENT OF ARGUMENT

1. The Underlying Principles of the Constitution Inform the Duty to Consult

7. The Crown owes a duty to consult Aboriginal groups that is "triggered when the Crown has knowledge, whether real or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it".[2] The duty is not just a legal one, but a "constitutional imperative" that is grounded in the honour of the Crown, which in turn is a "corollary" to and enshrined in s. 35(1) of the *Constitution Act, 1982*.[3] A three-part test determines when the duty will arise:

> …(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[4]

8. This appeal engages the second part of the test, i.e., "Crown conduct". None of the previous duty to consult cases heard by this Court raised the issue of whether Crown

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[1] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, ¶49, *emphasis added*.
[2] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, ¶81. **See also** *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶25.
[3] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, ¶20; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶19 and 24; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, ¶78.
[4] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, ¶31.

conduct may include the ***legislative process***. Instead, they involved land and resource use decisions by Ministers and statutory delegates including regulatory tribunals, such as the transfer of tree farm licences, environmental assessments and/or regulatory approvals for mining, pipeline, and oil exploration projects, an agricultural land grant, an approval for a ski resort development, or the exercising of treaty take-up rights for a winter road.[5] In *Rio Tinto*, this Court recognized that the duty to consult can also extend to "strategic, higher level decisions" but specifically refused to decide whether "government conduct includes legislative action", which it left open for another day.[6]

9. This day has now come and, in answering this question, this Court should pay close regard to the underlying principles of the Constitution. These principles from the structure of the Constitution and the preamble to the *Constitution Act, 1867* – the "grand entrance hall to the castle of the Constitution"[7] – which provides that Canada is to have "a Constitution similar in Principle to that of the United Kingdom". They inform the Constitution's interpretation, fill gaps within it, and can impose substantive obligations upon the state.[8] As this Court explained in the *Secession Reference*:

> … ***The Constitution also "embraces unwritten, as well as written rules"*** … ***These supporting principles and rules***, which ***include*** constitutional conventions and ***the workings of Parliament,*** are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text…
> …
> … ***These principles inform and sustain the constitutional text***: they are the vital unstated assumptions upon which the text is based. …
>
> ***Our Constitution has an internal architecture,*** or… a "basic constitutional structure". ***The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole***.
> …
> ***The principles assist in the interpretation of the text and the delineation of***

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[5] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650; *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103; *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

[6] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, ¶42-44. **See also** *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶25-29.

[7] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***,** [1997] 3 S.C.R. 3, ¶109.

[8] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***,** [1997] 3 S.C.R. 3, ¶95; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, ¶60.

> ***spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions.*** Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development…
>
> …[T]he recognition of these constitutional principles… could not be taken as an invitation to dispense with the written text of the Constitution. … However… ***the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference***… [T]he preamble "invites the courts to ***turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".***
>
> … ***The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.*** …[9]

10. Accordingly, the duty to consult must be consistent with the underlying principles of the Constitution that comprise its internal architecture. The passage from the *Secession Reference* quoted above makes clear that these principles include those relating to the "workings of Parliament", i.e., parliamentary sovereignty and the separation of powers.[10]

11. The principle of parliamentary sovereignty recognizes not only the substantive power of Parliament to declare the law, but also the autonomy of the government when developing legislation to do so.[11] Indeed, this Court has repeatedly emphasized "Parliament's sovereignty as a legislative and deliberative assembly",[12] stating that "Parliament's sovereignty when engaged in the performance of its legislative duties is undoubted".[13] Accordingly, "[t]he formulation and introduction of a bill are part of the legislative process with which the courts will not meddle".[14]

12. The related principle of the separation of powers ensures that "[t]he courts… are careful not to interfere with the workings of Parliament".[15] It is well-established that there

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[9] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, ¶32, 49-50 and 52-54, *emphasis added*. **See also:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island***,** [1997] 3 S.C.R. 3, ¶82-109; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789, ¶16; *Reference re Senate Reform*, [2014] 1 S.C.R. 704, ¶25-26; *Trial Lawyers Association of British Columbia v. British Columbia (A.G.)*, [2014] 3 S.C.R. 31, ¶24-27.

[10] *Babcock v. Canada (A.G.)*, [2002] 3 S.C.R. 3, ¶54-56.

[11] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 at 785; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 87-89, 91-92 and 103-104; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 548, 553, 560 and 562-565; *Authorson v. Canada (A.G.)*, [2003] 2 S.C.R. 40, ¶36-41.

[12] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶72.

[13] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶45.

[14] *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 559 (and 560).

[15] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶20 (and ¶21 and 24), *emphasis added*. **See also:** *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389 (and 367-368); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, ¶138-141; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, ¶33-34; *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3, ¶27-31.

exists a clear "need for its legislative activities to proceed unimpeded by any external body or institution, including the courts".[16]

13. These two principles are reflected in numerous doctrines, such as parliamentary privilege[17] and justiciability.[18] Another example is the rule that "legislative decision making is not subject to any known duty of fairness".[19] That "[d]ue process protections cannot interfere with the right of the legislative branch to determine its own procedure" flows directly from "the preamble to the *Constitution Act, 1867*".[20] Thus, *Canada Assistance Plan* rejected any "right to be consulted" during the legislative process:

> Moreover, ***the rules governing procedural fairness do not apply to a body exercising purely legislative functions***. … In *Martineau*… Dickson J… wrote…:
>
> > …[P]ublic bodies exercising ***legislative functions may not be amenable to judicial supervision.***
>
> These three cases were considered in *Penikett*… and the court concluded…:
>
> > In these circumstances, the issues sought to be raised in paras. 12 and 12(a) ***[right to be consulted and duty of fairness] are not justiciable because they seek to challenge the process of legislation.***[21]

14. While the duty to consult Aboriginal groups is not the same as the administrative law duty of fairness, this Court recognized the link between them in *Beckman*:

> The LSCFN invited us to draw a bright line between the duty to consult (which it labelled constitutional) and administrative law principles such as procedural fairness (which it labelled unsuitable). … However… ***"aboriginal rights exist within the general legal system of Canada"***…
>
> ***The link between constitutional doctrine and administrative law remedies was already noted in Haida Nation***, at the outset of our Court's duty to consult jurisprudence:
>
> > In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, ***regard may be had to the procedural safeguards of natural justice mandated by administrative law***. …[22]

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[16] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶20.
[17] *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 at 88; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶21.
[18] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, ¶34.
[19] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶59 (and ¶60-61). **See also** *Green v. Law Society of Manitoba*, [2017] 1 S.C.R. 360, ¶54.
[20] *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, ¶41.
[21] *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 558, *emphasis added*.
[22] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, ¶45-46, *underlining in original, bolding and italics added*.

15. Accordingly, the underlying constitutional principles of parliamentary sovereignty and the separation of powers strongly suggest that the duty to consult does not apply to the legislative process. Otherwise, the duty would undermine the internal architecture that supports all constitutional rights – including those in s. 35 of the *Constitution Act, 1982* itself.

2. The Underlying Constitutional Principles Call for a Practical Approach

16. There is no dispute in this appeal that "it would be inappropriate to enjoin a Minister, who is a Member of Parliament, from 'formulating and introducing legislation'" into Parliament.[23] At issue is whether this can be distinguished from the prior "development of policy and recommendations leading up to the decision [of Cabinet] to formulate and introduce a bill", which is carried out "not by Members of Parliament or Ministers acting in their parliamentary roles, but by government officials… supervised by the Ministers".[24]

17. ARL submits that this compartmentalization of the legislative process into discrete, watertight stages to which different judicial standards are applied is impossible and inconsistent with the Constitution's underlying principles. As this Court observed in *Wells*, "***[t]he separation of powers is not a rigid and absolute structure***".[25] Rather than draw artificial lines between different organs of government, the *Wells* Court defined the legislative process in "practical" terms:

> ***On a practical level, it is recognized that the same individuals control both the executive and the legislative branches of government.*** … "***There is thus a considerable degree of integration between the Legislature and the Government***... ". Similarly, in… *Canada Assistance Plan*… Sopinka J. said:
>
> > ... the true executive power lies in the Cabinet. And since the Cabinet controls the government, there is in practice a degree of ***overlap among the terms "government", "Cabinet" and "executive"*** ... . ***In practice, the bulk of the new legislation is initiated by the government.***
>
> … ***The Court should not be blind to the reality of Canadian governance*** that, except in certain rare cases, ***the executive frequently and de facto controls the legislature.*** …[26]

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[23] Factum of the Appellants, ¶68.
[24] *Ibid*, ¶69 (and ¶77-79).
[25] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶54, *emphasis added*.
[26] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶53-54, *emphasis added*.

18. Similarly, in the *Canada Assistance Plan* case cited in *Wells*, this Court held that parliamentary sovereignty prevents a requirement of consultation (in this case to consult provincial governments) from being imposed upon the executive in formulating and introducing a bill:

> ***The respondent seeks to avoid this proposition by pointing to the dichotomy of the executive on the one hand and Parliament on the other.*** He concedes that there is no legal impediment preventing Parliament from legislating but contends that the government is constrained by the doctrine of legitimate expectations from introducing the Bill to Parliament.
>
> ***This submission ignores the essential role of the executive in the legislative process of which it is an integral part***. The relationship was aptly described by W. Bagehot, *The English Constitution* (1872), at p. 14:
>
> > ***A cabinet is a combining committee -- a <u>hyphen</u> which joins, a <u>buckle</u> which fastens, the legislative part of the state to the executive part of the state***. [Emphasis in original.]
>
> ***Parliamentary government would be paralyzed*** if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. … ***The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts.*** …
>
> ***A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself.*** … ***If the Cabinet is restrained, then so is Parliament.*** … ***The recommendation and introduction of Bill C-69 has no effect per se***, rather it is its impact on the legislative process that will affect those obligations. ***It is therefore the legislative process that is, in fact, impugned***.[27]

19. For this purpose, the "executive" includes not just Cabinet, but also government officials acting under the supervision of Ministers. As this Court stated in *OPSEU*:

> In *Fraser, supra*, Dickson C.J., speaking for the full Court [said]:
>
> > There is in Canada a ***separation of powers*** among the three branches of government -- the legislature, the executive and the judiciary. …
> >
> > ***The federal public service in Canada is part of the executive branch of Government***. As such, its fundamental task is to administer and implement policy. …
>
> It can similarly be said that the public service in Ontario is a ***part of the executive*** branch of the government of Ontario. ***The ministers and the executive council of Ontario would be powerless and quite incapable of administering the province if they were deprived of the public service and left to their own device.*** The government of a large modern state is impossible to manage without a relatively

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[27] *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 559-560, *underlining in original, bolding and italics added.*

> large public service which effectively participates in the exercise of political power ***under the supervision of responsible ministers***…[28]

20. This is underscored by the many practical difficulties and impediments to law-making that would arise if a duty to consult were imposed at any point in the legislative process, including prior to final Cabinet approval of the bill. As cautioned against in the cases emphasizing parliamentary sovereignty and the separation of powers, a justiciable duty would invite court intervention into the legislative process and "inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable".[29]

21. ***First***, a justiciable duty could severely impede the federal government from passing laws of general application in a timely manner due to the low threshold to trigger the duty to consult, the significant conduct that could be required to meet the duty, and the substantial number of Aboriginal groups that may need to be consulted. The threshold to trigger the duty to consult is low and could be triggered by legislation of general application in many areas if a justiciable duty is recognized. All that is required is Crown knowledge of an asserted or established Aboriginal or treaty right that "***might***" be adversely affected by its conduct.[30] Moreover, if a duty was triggered, substantial time would be required to discharge it properly as, even at the lower end of the spectrum, the duty is not "a mere courtesy" but requires notice to each potentially affected Aboriginal group, a reasonable period of time for the Aboriginal groups to prepare their views, and full and fair consideration of them.[31] Where deep consultation is necessary, the Aboriginal groups may have rights to an oral hearing, formal participation, accommodation, and written reasons, among other things.[32]

22. Timely law-making processes are integral to the rule of law and "peace, order, and good government" in Canada. The potential for a justiciable duty to significantly delay or impede the law-making process is high in a country with over 630 *Indian Act* bands,[33] 53

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[28] *O.P.S.E.U. v. Ontario(A.G.)*, [1987] 2 S.C.R. 2 at 41-42, *emphasis added*.
[29] *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶20.
[30] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, ¶81.
[31] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, ¶57 and 73-75.
[32] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶47.
[33] Indigenous and Northern Affairs Canada, *First Nations*, December 22, 2016, online: https://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795.

Inuit communities in 4 regions,[34] five Métis organizations and numerous local councils,[35] each of whom has varying and sometimes conflicting interests. This would also be problematic for provincial law-making processes, particularly in provinces that have a significant number of First Nations, such as B.C. (with 198 *Indian Act* bands)[36] and Ontario (with 126 *Indian Act* bands).[37]

23. ***Second***, the justiciable duty to consult proposed by the Appellants would require courts to adjudicate the process used to develop laws and the content of those laws before these laws are even debated and passed. This is because the duty to consult is not just about providing a process to exchange information or allowing Aboriginal groups to "blow off steam".[38] Instead, the process must be "meaningful",[39] and requires "a balancing of interests, a process of give and take."[40] Good faith consultation may give rise to a duty to accommodate and cannot exclude the possibility of accommodation at the outset. [41] While the duty to consult does not dictate a particular outcome, this could require substantive changes the scope and content of legislation. Given the highly litigious nature of this area of law, it would also likely require courts to frequently assess the reasonableness of the "give and take" of governments in making legislative decisions, all of which would impede upon parliamentary sovereignty and the separation of powers.

24. ***Third,*** a justiciable duty to consult could require the courts to restrain Ministers of the Crown from introducing legislation for debate due to the remedies that can be awarded for a breach of the duty to consult. This can include "injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct."[42] Such remedies could not only affect the timing of introduction of legislation, but also act as a direct "restraint on

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[34] Indigenous and Northern Affairs Canada, *Inuit*, August 3, 2017, online: https://www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191.
[35] Metis National Council, *Governments*, online: http://www.metisnation.ca/index.php/who-are-the-metis/governments.
[36] Indigenous and Northern Affairs Canada, *About British Columbia First Nations*, September 10, 2015, online: https://www.aadnc-aandc.gc.ca/eng/1100100021009/1314809450456
[37] Indigenous and Northern Affairs Canada, *Ontario Region*, June 21, 2017, online: https://www.aadnc-aandc.gc.ca/eng/1100100020284/1100100020288
[38] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, ¶54.
[39] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, ¶23.
[40] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, ¶80.
[41] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, ¶54; *Gitxaala Nation v. Canada*, [2016] 4 FCR 418, 2016 FCA 187 at para. 233.
[42] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, ¶37.

the Executive in introducing legislation" which this Court recognized as a "fetter of the sovereignty of Parliament itself".[43]

25. ***Fourth,*** recognizing a justiciable duty to consult that must be discharged ***before*** legislation is introduced and passed by Parliament (either in the original or an amended form) will artificially ignore the remainder of the law-making process, including the notification and public consultation opportunities typically afforded before the final version of a bill is passed. This would be comparable to disregarding the Aboriginal consultation opportunities in regulatory processes for resource development projects as a viable means of discharging the duty to consult. It could also be extended to constrain the government's ability to accept amendments to legislation in the legislative process without engaging in further consultation with all affected Aboriginal groups across the country, or supporting certain private member's bills without first consulting with any potentially affected Aboriginal groups.

26. Finally, rejecting a justiciable duty to consult in the legislative process will not leave Aboriginal groups without other opportunities to raise concerns with legislative proposals. They can publicly raise concerns when legislation is introduced and advocate for legislative changes as they did effectively in this case, which resulted in extensive legislative reviews of the *Canadian Environmental Assessment Act, 2012,* the *Fisheries Act*, and the *Navigation Protection Act* for which new legislation is pending in each case. And if legislation is passed that infringes Aboriginal or treaty rights, an impacted group can bring an action that requires the court to consider consultation in determining if any infringement is justified.[44]

PART IV—SUBMISSIONS CONCERNING COSTS

27. ARL requests that no costs be awarded either for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2017.

Brandon Kain
Bryn Gray
Asher Honickman

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[43] *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 559-560.
[44] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, ¶77 and 125.

PART V—TABLE OF AUTHORITIES

Tab	Authority	Paragraph(s) Referenced in Memorandum of Argument
1.	*Authorson v. Canada (A.G.)*, [2003] 2 S.C.R. 40	11, 13
2.	*Babcock v. Canada (A.G.)*, [2002] 3 S.C.R. 3	10
3.	*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103	8, 14, 21
4.	*Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227	8
5.	*British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473	9
6.	*Canada (Auditor Gen.) v. Canada (Min. of Energy, Mines & Resources)*, [1989] S.C.R. 49	11, 13
7.	*Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667	11, 12, 13, 20
8.	*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41	8
9.	*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC No. 40	7, 8, 21, 23
10.	*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3	12, 13
11.	*Gitxaala Nation v. Canada*, [2016] 4 FCR 418, 2016 FCA 187	23
12.	*Green v. Law Society of Manitoba*, [2017] 1 S.C.R. 360	13
13.	*Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511	7, 8, 14
14.	*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54	7, 8, 21, 23
15.	*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388	8, 23
16.	*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319	12
17.	*Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3	12
18.	*O.P.S.E.U. v. Ontario(A.G.)*, [1987] 2 S.C.R. 2	19
19.	*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, [2004] 1 S.C.R. 789	9

Tab	Authority	Paragraph(s) Referenced in Memorandum of Argument
20.	*R. v. Van der Peet*, [1996] 2 S.C.R. 507	5
21.	*Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753	11
22.	*Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525	11, 13, 18, 24
23.	*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3	9, 12
24.	*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217	9
25.	*Reference re Senate Reform*, [2014] 1 S.C.R. 704	9
26.	*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650	7, 8, 24
27.	*Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550	8
28.	*Trial Lawyers Association of British Columbia v. British Columbia (A.G.)*, [2014] 3 S.C.R. 31	9
29.	*Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257	8, 26
30.	*Wells v. Newfoundland*, [1999] 3 S.C.R. 199	13, 17
	OTHER SOURCES	
31.	Indigenous and Northern Affairs Canada, *About British Columbia First Nations*, September 10, 2015, online: https://www.aadnc-aandc.gc.ca/eng/1100100021009/1314809450456	22
32.	Indigenous and Northern Affairs Canada, *First Nations*, December 22, 2016, online: https://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795	22
33.	Indigenous and Northern Affairs Canada, *Inuit*, August 3, 2017, online: https://www.aadnc-aandc.gc.ca/eng/1100100014187/1100100014191	22
34.	Indigenous and Northern Affairs Canada, *Ontario Region*, June 21, 2017, online: https://www.aadnc-aandc.gc.ca/eng/1100100020284/1100100020288	22
35.	Metis National Council, *Governments*, online: http://www.metisnation.ca/index.php/who-are-the-metis/governments	22

PART VI—LEGISLATION RELIED UPON

Authority	**Paragraph(s) Referenced in Memorandum of Argument**
N/A	