

MUSKRAT FALLS INQUIRY

Final Submissions

made on behalf of the

Innu Nation

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Overview

1. The Muskrat Falls Project (the “Project”) is a hydroelectric generation and transmission facility currently under construction on the lower Churchill River. It is located on the territory of the Innu of Labrador.

 2. The Commission of Inquiry Respecting the Muskrat Falls Project (the “Commission” or “Inquiry”) was struck in the fall of 2017 pursuant to an Order in Council dated November 20, 2017 (the “Order in Council”). The Commission’s overarching purposes, outlined in this Order in Council’s Terms of Reference, are to inquire into:
 - (a) whether the Project was an appropriate means by which to address Newfoundland and Labrador’s Island interconnected system needs;
 - (b) why the Project’s costs to date are significantly different from the estimated costs at the time of sanction;
 - (c) whether it was reasonable to exempt the Project from the Board of Commissioners of Public Utilities’ oversight; and
 - (d) whether the government was fully informed and made aware of risks anticipated with the Project, and whether the government appropriately oversaw the Project.
- Reference** Newfoundland and Labrador Regulation 101/17 at article 4 [Order in Council].
3. The Inquiry’s Commissioner, the Honourable Richard D. LeBlanc (the “Commissioner”), released an Interpretation of the Terms of Reference dated March 14, 2018 (the “Interpretation”). In his Interpretation, the Commissioner found that, while there was no reference in the Terms of Reference (article 4 of the Order in Council) to impacts on

Indigenous people, the Considerations for the Commissioner outlined at article 5 of the Order in Council permitted the Inquiry to investigate issues relating to consultation with Indigenous people.

Reference Interpretation of the Terms of Reference for the Muskrat Falls Inquiry dated March 14, 2018 at para. 47 [Interpretation].

4. Innu Nation sought full standing to participate in the Inquiry, and was granted limited standing with respect to:

- (a) Article 4(b) of the Terms of Reference;
- (b) The following four areas:
 - (i) Consultation that occurred between the established leadership of Indigenous people and Nalcor Energy (“Nalcor”) as well as the Government of Newfoundland and Labrador (“GNL”);
 - (ii) The risk assessments and reports done as regards the concerns of Indigenous people;
 - (iii) Whether these assessments and reports were appropriately and reasonably considered by Nalcor and the GNL;
 - (iv) Whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the [settled] or asserted rights of the Indigenous people both at the time of and post sanction of the Project; and
- (c) Evidence dealing with environmental analysis, risk assessments and mitigation measures.

Reference List of Parties with Standing (Revised May 30, 2019), online: <https://www.muskratfallsinquiry.ca/parties-with-standing/> Standing Application for the Innu Nation for the Muskrat Falls Inquiry Decision dated April 16, 2018.

The Innu Nation

5. The Innu of Labrador have lived in the lands affected by the Project from time immemorial. There is archaeological evidence of the presence of the Innu on the lands now called Labrador going back at least 8,000 years.

6. Innu Nation represents the Innu of Labrador, who belong to two separate communities: the Mushuau Innu First Nation, who now live primarily in the community of Natuashish, and the Sheshatshiu Innu First Nation, who now live primarily in the community of Sheshatshiu.
7. The Muskrat Falls Project has been built predominantly on the traditional territory of the Innu of Labrador. Mista-Shipu – the Churchill River – has always been and remains an important area for Innu land use. The Innu of Labrador have constitutionally protected rights in the area.
8. The Innu of Labrador are the Indigenous people with rights recognized, protected and affirmed by section 35 of the *Constitution Act, 1982* in the Project area. While the Innu of Labrador do not yet have a comprehensive land claims agreement with the Crown, an Agreement in Principle between the parties was signed in 2011. The Innu Nation is the only group whose land claim to the Project area has been recognized by both the federal and provincial Crowns and that is currently actively negotiating with the federal and provincial governments for a final settlement of those rights.

Reference

Testimony of Gilbert Bennett, Hearing Transcript, November 29, 2018 at pp. 16-17.
Testimony of Prote Poker, Hearing Transcript, October 3, 2018, p 77.

9. The Commission heard testimony from members of Innu Nation regarding the Innu's longstanding occupation and use of the land surrounding the Project. Elder Sebastian Penunsi told the Commission that "... the elders, they respected Muskrat. They respected the land and they used it for travelling back and forth to go to the country... the elders respected the land and [it] was spiritual for them." Mr. Penunsi also explained to the Commission that "... the river was used by many Innu people [for] going in and out of the country... They go up river and ... come back again spring time when the ice is ...

breaking... And that's what it's used for... Mantutsheu [Manitu-utshu] was very useful and people really depended on that river." Testimony from the GNL and Nalcor witnesses confirmed the Crown's understanding of the importance of the Churchill River to the Innu.

Reference Testimony of Sebastian Penunsi, Hearing Transcript, September 18, 2018 at pp. 15-22, 25.
 Testimony of Gilbert Bennett, Hearing Transcript, November 27, 2018 at p. 6.
 Testimony of Kathy Dunderdale, Hearing Transcript, December 20, 2018 at p. 36.

10. The Commission heard how the Innu's rights were violated in the development of the Churchill Falls hydroelectric generation station, and what the impacts of that project's development were on Innu. The Commission heard that the creation of the Smallwood Reservoir, done without consultation, let alone consent, of the Innu, flooded a vast portion of the Innu's territory, inundating the land and all that that land provided to the Innu.

Reference Testimony of Prote Poker, Hearing Transcript, October 3, 2018 at pp. 76-77.
 Innu Nation Submission on Consultation and Mitigation Measures dated August 7, 2018, Exhibit P-00266 at p. 1.
 Testimony of Kathy Dunderdale, Hearing Transcript, December 20, 2018 at p. 36

11. It was a priority for Innu Nation that the Muskrat Falls Project should not visit the same destruction upon them as the Upper Churchill project had done. Innu Nation fully participated in consultation about the project including through their participation in the environmental assessment of the Muskrat Falls and Gull Island projects, and succeeded in securing changes to it that would lessen its impact. Moreover, Innu Nation and Nalcor concluded an Impacts and Benefits Agreement ("IBA") in relation to the Project that gave the Innu a share of the Project's benefits. Hundreds of Innu workers have been engaged at the Project construction sites, and contracts worth hundreds of millions of dollars have been concluded with Innu contractors.

Reference Innu Nation Submission on Consultation and Mitigation Measures dated August 7, 2018, Exhibit P-00266.
Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at pp. 53-54.
Chart 3 – Innu Employed by Position, Exhibit P-02110 at pp. 39-43.
Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at p. 53.

Statutory Framework and Terms of Reference

12. The Commission of Inquiry is a creature of statute, created pursuant to section 3 of the *Public Inquiries Act, 2006*. Its jurisdiction is established by, and limited to, the Terms of Reference.

Reference SNL 2006, c P-38.1, s. 3(2)(b) [*Inquiries Act*].
See e.g. *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33 at para. 23.

13. The Lieutenant-Governor in Council outlined the Terms of Reference in article 4 of Newfoundland and Labrador Regulation 101/17 (referred to throughout as the Order in Council). Article 6 states that the Commission shall make findings and recommendations that it considers necessary and advisable related to article 4.

Reference Order in Council, articles 4 and 6.

14. The Considerations for the Commissioner outlined at article 5 of the Order in Council state that the Commission shall consider participation in the Inquiry by the established leadership of Indigenous people, whose settled or asserted Aboriginal or treaty rights to areas in Labrador may have been adversely affected by the Project.

Reference Order in Council at article 5(a).

15. The Commissioner released an Interpretation of the Terms of Reference dated March 14, 2018. In the Interpretation, the Commissioner states that:

Generally speaking, it is clear to me that the Order in Council, and specifically section 4, is geared to focus the Commission's work and mandate, primarily at the least, on the business case put forward by Nalcor leading to the official sanction of the Muskrat Falls Project by Government in December 2012 as well as the

reasons why the costs of construction of the Project have escalated from the initial estimates made.

Reference Interpretation of the Terms of Reference for the Muskrat Falls Inquiry dated March 14, 2018 at para. 29 [Interpretation].

16. The Commissioner further states that:

... the Government's focus in drafting and approving the Terms of Reference found in the Order in Council is very much based upon the Project's viability, risks, costs and benefits and the consideration of these by Nalcor and the Government at the time of sanction and thereafter.

Reference Interpretation at para. 32.

17. While the Commissioner found that the Terms of Reference directed him to focus primarily on the business case for the Project prior to sanction and on the reasons for which the Project's costs have exceeded the initial estimates made, he also found that issues relating to the role of Indigenous people should be considered by the Inquiry. Based on a contextual and purposive review of the Order in Council, the Commissioner stated that the Inquiry was permitted to investigate:

- (a) what consultation occurred between the established leadership of the Indigenous people and Nalcor as well as the Government prior to sanction;
- (b) what risk assessments and reports were done as regards the concerns of the Indigenous people;
- (c) whether these assessments were appropriately and reasonably considered by Nalcor and the Government; and
- (d) whether appropriate measures were taken to mitigate against reasonably potential adverse effects to the settled or asserted rights of the Indigenous people both at the time of and post sanction.

Reference Interpretation at para. 47.

18. The Commissioner further stated in the Interpretation that he would not be determining any claims or treaty rights for any of the Indigenous people, as this was clearly beyond the scope of the Commission's mandate.

Reference Interpretation at para. 47.

Issues

19. These submissions will advance the following points:
- (a) The Inquiry may make findings regarding how witnesses experienced consultation about the Project, but it is outside of the scope of the Inquiry to make any findings as to the adequacy or reasonableness of consultation and accommodation;
 - (b) There is no evidence to support a finding that the IBA or the participation of Innu workers and Innu businesses as contractors led to cost escalation or overruns; and
 - (c) The Inquiry may make findings regarding how witnesses experienced the GNL and Nalcor's handling of the methylmercury issue, but it is outside of the scope of the Inquiry for it to determine the adequacy or reasonableness of the GNL's and Nalcor's consultation and mitigation measures.
20. Each of these points is outlined in detail below.

Consultation with Indigenous Groups

21. While the Commission has interpreted its mandate to include the consideration of what consultation occurred between the established leadership of the Indigenous people and Nalcor and the GNL prior to sanction, as well as how concerns raised by Indigenous people were addressed and whether appropriate measures were taken to mitigate potential adverse impacts on settled or asserted Aboriginal rights, the Commissioner has correctly stated that it is not this Commission's role to make findings as to asserted Aboriginal title or rights claims.

22. One consequence of the restriction on the Commission's jurisdiction is that the Inquiry is obliged to refrain from making findings regarding and related to, or that implicate, Aboriginal rights. As a result, the Inquiry must also avoid making findings about the adequacy of consultation and accommodation of those settled or asserted Aboriginal rights.
23. Rather, to the extent that it makes any comments on consultation issues, the Commission can only speak to witnesses' accounts of their respective group's experiences of the Crown's consultation efforts and the extent to which these reactions impacted on project sanctioning and project execution costs.

Commission's Jurisdiction

24. As outlined above, the Inquiry's jurisdiction derives solely from the Terms of Reference outlined in the Order in Council. These Terms of Reference do not provide that the Commission shall make inquiries into the Crown's efforts to discharge the duty to consult and accommodate ("DTCA").

Reference *Inquiries Act*, s. 3(2)(b).
Order in Council at article 4.

25. There is no ambiguity to be resolved in the Terms of Reference's language as to whether the Commission's jurisdiction includes assessing the adequacy of the consultation and accommodation measures undertaken with respect to the Project. The Terms of Reference make no mention of any inquiries into the discharge of the duty to consult and accommodate Indigenous people. This is unlike the *Ontario Provincial Police v. The Cornwall Public Inquiry* case cited in the Interpretation, in which the Order in Council's language was open to interpretation.

Reference *Ontario Provincial Police v. The Cornwall Public Inquiry*, 2008 ONCA 33 at paras. 26-27.

26. As the Commissioner correctly stated in his Interpretation, it would amount to a jurisdictional error to interpret the Terms of Reference too widely.

Reference Interpretation at para. 22.
Ontario Provincial Police v. The Cornwall Public Inquiry, 2008 ONCA 33 at para. 23.

27. The Commissioner has stated that it is not his intention to determine whether or not the consultation that has taken place with regards to the Project is the consultation that ought to have taken place pursuant to section 35 of the *Constitution Act, 1982*.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 2.

28. The Commissioner has also stated that it is not his intention to make findings as to the *prima facie* strength of the section 35 rights asserted, and the Project's potential impacts on these rights.

Reference Interpretation at para. 47.
See e.g. Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at pp. 14-16; 39; 41; 51.
Testimony of Danny Williams, Hearing Transcript, October 2, 2018, p. 67.

29. The Commissioner is correct to ensure that any consideration of consultations that have taken place with the Innu Nation, the Nunatsiavut Government ("Nunatsiavut"), the Nunatukavut Community Council ("NCC") and the Conseil des Innus de Ekuanitshit ("Ekuanitshit Innu") relating to the Project does not stray into a consideration of whether such consultations were adequate or reasonable, since, as outlined below, to do so would necessarily take the Commission into the realm of an Aboriginal rights assessment, including an assessment of whether these groups represent peoples with Aboriginal rights.

Adequacy of Consultation and Accommodation – Outside Scope

30. Adequacy of Crown consultation and accommodation of Indigenous peoples with respect to a decision, such as the decision to sanction the Project, is a complex legal concept

developed through an extensive body of case law. Mitigation of impacts is an accommodation measure and a factor considered by the courts in assessing adequacy of consultation and accommodation. Adequacy of consultation and accommodation is assessed on a standard of reasonableness, which means that a finding of reasonable efforts having been made will suffice to discharge the Crown's DTCA.

Reference See e.g. *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at paras. 50-51 [*Chippewas of the Thames*].
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, paras. 22, 27, 50, 61-62 [*Haida Nation*].

31. In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada (the "SCC") set out the doctrine of the Crown's DTCA for the first time. The DTCA 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." The SCC explained in *Haida* that the content of the DTCA exists on a spectrum. It varies in accordance with the *prima facie* strength and breadth of the Aboriginal or treaty right claimed, and the potential for infringement on the right claimed.

Reference *Haida Nation*, at paras. 35-38, 43-45.
See also *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 at para. 20 [*Clyde River*].
See also *Chippewas of the Thames*, at para. 38.

32. Where a strong *prima facie* case exists for the claim being made, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the concern may require accommodation to avoid irreparable harm or to minimize infringement.

Reference *Haida Nation*, at para. 47.
Clyde River, at paras. 42-43.

33. Where a the *prima facie* case is weak, or the Aboriginal right is limited, or the potential for infringement is minor, the content of the Crown's DTCA may be limited to providing notice, disclosing information and discussing issues raised in response to the notice.

Reference *Haida Nation*, at para. 43.
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54, at para. 80.

34. As the principles from *Haida Nation* outlined above demonstrate, determining the adequacy of consultation and accommodation is a complex analysis that takes into account, *inter alia*, the strength of the right claimed. The assessment can only be made once the *prima facie* strength of claims has been decided. The finding of whether consultation has been adequate or inadequate is a legal determination based on findings of fact on a full record. In the case of the Lower Churchill Project, it is notable that Nalcor's consultation log alone, which only sets out Nalcor's perspective on the facts, is a 3,000 page document. These matters only occupied a small slice of the Commission's hearing time.

Reference Nalcor Indigenous Consultation Report dated August 21, 2018, Exhibit P-00271 (including Appendices).
Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018, p. 27-28.

35. On the other hand, it is known that certain key documents going to Nalcor's efforts at consultation and accommodation are missing from the Inquiry's record. For instance, Nalcor entered into a Community Benefits Agreement ("CBA") with NCC which arose because of the Project. However this CBA is not before the Commission. Although counsel to Innu Nation suggested that this document be put into evidence for the Commissioner's consideration, neither NCC nor Nalcor produced the document and the Commission declined to order its disclosure. This is one example of key evidence going to sufficiency of consultation and accommodation that is missing from the record.

Reference Testimony of Todd Russell, Hearing Transcript, October 4, 2019 at p. 10.

36. As the Commission analyzes the evidence it has heard in order to arrive at findings, the Innu Nation submits that the Commission must remain within its jurisdiction as set out in

the Terms of Reference. It must avoid making any findings that would exceed this jurisdiction, which include findings that depend on conclusions about the strength of Aboriginal rights and title claims. A finding about the reasonableness or adequacy of consultation, mitigation, or accommodation must necessarily implicate a finding about the strength of a group's claims, and an assessment of the seriousness of the impact of a project on those claimed rights. Such a finding would necessarily exceed the Commission's jurisdiction.

37. As recognized in the Interpretation, the focus of the Inquiry is on “the business case put forward by Nalcor” leading to sanction, as well as “the reasons why the costs of construction of the Project have escalated from the initial estimates made.” To the extent that some groups may have had negative consultation experiences, it may have led them to protest in a way that escalated project execution costs. In our submission, how some groups experienced GNL and Nalcor's consultation efforts can be relevant only for this reason. While it is open to the Inquiry to make findings about these groups' experiences, the Inquiry must remain conscious of its jurisdictional limits and must refrain from making any findings about the adequacy of consultation and accommodation.

Reference Interpretation, para 29.

Funding

38. The provision of funding to Indigenous groups to engage in the consultation and accommodation process is germane to whether the consultation process was adequate. The adequacy of funding in turn depends on the specifics of the case and the information that the Indigenous group seeks to gather or the particular government process in which the Indigenous group must participate. It is always context dependent.

Reference See e.g. *Saugeen First Nation v. Ontario (MNR)*, 2017 ONSC 3456 (Div. Ct.) at paras. 27-28.
See also *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069 at paras. 47, 49.

39. The Inquiry heard some evidence on the views of certain witnesses regarding the adequacy of funding for consultation efforts. The evidence that the Inquiry heard was limited and insufficient as a basis on which to make a determination as to the adequacy of funding. The adequacy of funding in any consultation process necessarily turns on the strength of the claim to Aboriginal rights and on an assessment of the potential impact on those rights. As such, it would be beyond the jurisdiction of the Inquiry to make findings as to the adequacy of funding as such a finding would go to the adequacy of consultation and accommodation under section 35(1) of the *Constitution Act, 1982*. The Commission is restricted to findings about the experience that groups may have had regarding the adequacy of their funding.

Reference See e.g. Testimony of Todd Russell, Hearing Transcript, February 27, 2019 at pp. 93-94.
Testimony of Carl McLean and Rodd Laing, Hearing Transcript, February 28, 2019 at p. 21.

Impacts Have Already Been Determined by Joint Review Panel

40. Another reason for the Commission to decline to undertake an analysis of the adequacy of consultation and accommodation is that it would necessarily depend on an analysis of the impacts of the Project on Aboriginal and Treaty Rights. An analysis of impacts on current Aboriginal land and resource use for traditional purposes has already been undertaken by the Joint Review Panel.

Reference Report of the Joint Review Panel dated August 2011, Exhibit P-00041, section 9, pp. 186-203.

41. The Joint Review Panel's process spanned over two years, and its comprehensive report is almost 400 pages long. It would be neither advisable nor realistic for this Commission to seek to make its own determinations on the matters already dealt with by the Joint

Review Panel. Moreover, as noted below, the Joint Review Panel's findings have already been challenged, unsuccessfully, by parties to this Inquiry.

Reference Report of the Joint Review Panel dated August 2011, Exhibit P-00041.

42. The Joint Review Panel, following a lengthy environmental assessment process, made the following determination as to impacts on current Aboriginal land and resource use for traditional purposes:

- (a) adverse but not significant impacts on NCC;
- (b) adverse but not significant impacts on Ekuanitshit Innu;
- (c) a contingent significant adverse impact finding with respect impacts on Nunatsiavut; and
- (d) permanent impacts on Innu Nation, with satisfactory mitigation measures.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 2.
Report of the Joint Review Panel dated August 2011, Exhibit P-00041 at pp. 180, 185, 198-203

43. This Commission ought not to engage in reconsiderations of the extensive work already undertaken by the Joint Review Panel, and therefore should not re-evaluate the Project's potential impacts on current Aboriginal land and resource use for traditional purposes.

44. It follows from the analysis above that while the Commissioner has heard testimony from witnesses concerning historical use and occupation of land, such testimony may demonstrate the views of these witnesses. However, this is not properly evidence within the scope of the Commission's mandate and cannot be used as a basis on which to determine the scope or strength of asserted rights, or the parameters of the duty to consult and accommodate flowing from those asserted rights.

Reference See e.g. Testimony of Chief Jean-Charles Piétacho, Hearing Transcript, February 18, 2019, at pp. 8, 12, 16-17, 21-22, 28.
Testimony of Ron Power, Hearing Transcript, May 22, 2019, at p. 74.

Courts Have Already Made Findings

45. Parties wishing to challenge the adequacy or reasonableness of the Crown's consultation and accommodation with respect to the Muskrat Falls project have had the chance to do so, and have availed themselves of the opportunity. It would not be efficient or appropriate for this Commission to duplicate their efforts, and potentially reach inconsistent findings, by revisiting the question of consultation adequacy now.
46. For example, NCC has repeatedly, and unsuccessfully, sought relief from the courts relating to alleged inadequacy in the discharge of the duty to consult with their organization.

Reference See e.g. *NunatuKavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLSCTD 44.
Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General), 2012 FC 1520.
NunatuKavut Community Council Inc. v. Canada (Attorney General), 2015 FC 981.
Indigenous Consultation Regarding the LCP Prepared by the GNL, Exhibit P-00268.

47. In 2011, NCC sought an injunction to halt the environmental assessment that was being conducted at that time by the Joint Review Panel on the Project. NCC alleged that it had not been appropriately consulted. The court considered this allegation and the consultation requirements outlined in *Haida Nation*, and rejected NCC's argument that consultation had been inadequate.

Reference *NunatuKavut Community Council Inc. v. Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLSCTD 44 at paras. 34-41.

48. In 2015, NCC sought to judicially review the issuance of an Authorization to Nalcor permitting impacts to fish and fish habitat arising from the Project's construction. The review was sought on the basis, in part, that NCC had not been adequately consulted or accommodated, and that insufficient funding to enable participation in the consultation and accommodation process had been provided.

Reference *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 at paras. 113-127, 151-214, 232.

49. The court considered this allegation and the consultation requirements outlined in *Haida Nation*. It considered the status and strength of NCC's claim, noting that the Canadian Environmental Assessment Agency's *Aboriginal Consultation Report* outlined this history: NCC's claim had previously been twice rejected by the federal government on the basis that NCC's members were not members of an Inuit Aboriginal group with rights protected under section 35 of the *Constitution Act, 1982*, and the claim was being reassessed at the time the report was being written. The court provided extensive reasons for its decision, concluding that NCC's claim was at least strong enough to trigger a lower level duty to consult, and that this duty had been adequately discharged.

Reference *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 at paras. 113-121, 232, 309-318.

50. These cases are only two examples of the litigation that has taken place before the courts of Newfoundland and Labrador concerning adequacy of the consultation and accommodation of Indigenous groups relating to the Project.
51. It would be inappropriate for this Commission to now revisit questions that have been litigated before, and determined by, the courts, based on a fuller record than what was adduced before the Commission. To do so would raise all the issues associated with the doctrine of *res judicata*, such as the risk of inconsistent findings.

IBAs

52. Agreements such as Impact Benefit Agreements are accommodation measures intended to avoid, mitigate and compensate for impacts on Indigenous lands and exercise of rights on these lands. As such, IBAs are inextricably linked to Aboriginal rights and title.

53. Innu Nation has entered into an IBA with Nalcor with respect to the Lower Churchill Project in order to address the impact of the Project on Innu rights and title. Through the IBA, the Innu Nation consented to the Project.

Reference Impacts and Benefits Agreement dated November 18, 2011, Exhibits P-00300; P-02122; P-02123. Innu Nation Submission on Consultation and Mitigation Measures dated August 7, 2018, Exhibit P-00266.

54. In his testimony before the Commission, Professor Flyvbjerg stated that it can be more expensive to deal with concerned stakeholders later in the mega-project development process, as opposed to earlier on.

Reference Testimony of Professor Bent Flyvbjerg, September 17, 2018 at pp. 22-23.

55. The Commission has stated that it will not make any determinations as to whether agreements like the Innu Nation's IBA with Nalcor ought to have been entered into by Nalcor or the GNL with other Indigenous rights holders and claimants, organizations or interest groups as a cost control measure.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at pp. 16, 41.

56. Innu Nation agrees that no such determinations ought to be made by this Commission. There is a fundamental difference between undertaking appropriate consultation with and accommodation of an Aboriginal rights-holder, as opposed to entering into agreements to lessen stakeholder opposition to a proposed project for cost purposes. The first is a constitutional duty recognized by the Supreme Court of Canada, and a requirement of the honour of the Crown. The second is a tactical choice meant to satisfy stakeholders and reduce risks to the project or in order to seek to save money.

57. The IBA between Innu Nation and Nalcor is an accommodation measure linked directly to the Innu's constitutionally protected Aboriginal rights in the Project area. The appropriateness of such agreements is contingent on the strength and scope of the Aboriginal right at issue. Based on an Aboriginal and Treaty Rights analysis, Nalcor had determined that it was not appropriate to negotiate an IBA with any group except for Innu Nation. For the reasons outlined above, and as this Commission has recognized, such rights determinations are outside the scope of this Inquiry, and this Commission should refrain from making any such determination. Whether Nalcor ought to have entered into IBAs or similar agreements with other groups representing Aboriginal peoples is similarly out of scope of this Inquiry, since this question can only be answered following a rights assessment.

Reference

Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at pp. 16, 22.
Testimony of Gilbert Bennett, Hearing Transcript, November 27, 2018 at p. 7.

58. The appropriateness of an IBA is linked with whether there is a settled or asserted Aboriginal rights and title claim, and the Crown's assessment of that claim's strength and scope. Whether an IBA should have been entered into with any other group necessarily involves findings about the reasonableness of the Crown's assessment of that claim's strength and scope. This involves engaging in a rights analysis. As outlined above, this Commission has repeatedly stated that it will not engage in such analyses.

59. There may be a certain appeal to the idea put forward by Dr. Flyvbjerg that agreements with groups that might subsequently protest a megaproject could avoid the costs arising from dealing with those protests. However, such a proposition would have to be weighed against the long-term public policy implications, and cost consequences for future megaprojects, of employing such an approach to avoid potential protests. As the

Commissioner has stated that this question will not be considered by the Inquiry and that questioning on the subject was not proper, the Innu Nation submits that the Inquiry should refrain from making any findings on this point.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at pp. 16-41.

60. Moreover, the Commissioner has specifically stated that the Commission will not consider whether IBAs ought to have been negotiated with Indigenous groups other than Innu Nation, since to do so would involve consideration of whether there is a constitutional right at issue.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 16.

61. For these reasons, Innu Nation agrees with the Commissioner that it would be outside the Inquiry's scope to make determinations on this issue.

Consultation with the Innu

62. Innu Nation adopts the evidence set out in the *Innu Nation submission on Consultation and Mitigation Measures in relation to the Muskrat Falls Project*, as presented by former Grand Chief Prote Poker. To economize on space, we will not repeat the evidence set out in that document here and simply rely on the report as filed.

Reference Innu Nation Submission on Consultation and Mitigation Measures dated August 7, 2018, Exhibit P-00266.

Innu Participation in the Project

63. One of the areas covered by Innu Nation's IBA with Nalcor is Innu economic involvement with the Project through employment and contracting opportunities.
64. These provisions are a crucial component of the accommodation measures required by the Innu in providing consent to the Project's development. From Innu Nation's

perspective, the Innu's economic involvement in the Project is intended to ensure that the Innu no longer have projects built on their land, often with the help of Innu labour, that leave them with only token benefits.

Reference See e.g. Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at pp. 65-66.

65. This Commission is tasked with looking at the causes for cost overruns on the Project. It is Innu Nation's position that there is no reliable evidence to support the proposition that Innu participation in the Project arising from the IBA led to any escalations or overruns in Project costs.

Innu Contracting Opportunities

66. The Commission has heard evidence regarding the IBA and the types of contracts awarded pursuant to its terms. Mr. Pat Hussey, the Project's supply chain manager, who has been the Project's procurement lead at all material times, gave evidence on these questions in March 2019. Other project team members deferred to Mr. Hussey on questions around contracts and procurement.

Reference Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at p. 5.
Testimony of Jason Kean, Hearing Transcript, May 7, 2019 at p. 81.

67. The Commission heard evidence that certain members of Nalcor's team had the impression that Innu contract prices were higher than anticipated, with the implication that this was a problem unique to Innu contracts, and not a common trend across the Project. However, the evidence presented to this Commission does not bear out such an impression.

Reference Testimony of Jason Kean, Hearing Transcript, May 7, 2019 at pp. 80-81.
Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at pp. 80-82.

68. The IBA provided for certain first bid contract opportunities for Innu businesses listed on the Innu business registry. The right to “first bid” was not a right to be awarded the contract – Innu businesses bidding on a contract had to qualify and to meet Nalcor’s requirements in order to be successful. In the event that Nalcor was not satisfied with the bids received from Innu businesses for these contracts, the IBA provided that Nalcor could opt to open bidding to non-Innu businesses.

Reference Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at p. 51-52; 55-56.

69. In his testimony, Mr. Hussey stated that the Innu-first contracts required by the IBA had a 2% to 5% premium attached to them by virtue of Innu businesses’ participation. However, when Mr. Hussey was asked to explain how he had come to this “premium” range, he explained that it was derived from information he had received about just one contract bid, for a camp site. Mr. Hussey explained that in negotiations with the non-Innu business counterparty for the camp contract, he was informed by that one counterparty that there was a cost to Innu participation by this counterparty’s Innu partner. Mr. Hussey conceded that he did not take any steps to confirm the accuracy of what this counterparty had told him, and had simply estimated a premium range on the basis on this one contract negotiation. Jason Kean, who also testified as to a “premium” attributed to Innu-first contracts, testified that he was actually not familiar with the contracting provisions of the IBA, and in any event could not attribute any “premium” to the fact of the contractor being an Innu business apart from the fact that “there may not be the existing capacity for those [contracting] packages in that region.”

Reference Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at pp. 80-82.
Testimony of Jason Kean, Hearing Transcript, November 8, 2018, at pp. 80-84.

70. Mr. Hussey stated that, to his knowledge, no reports or audits were ever conducted by Nalcor to ascertain whether there was in fact any kind of premium associated with the Innu-first contracts.

Reference Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at p. 82.
See also Testimony of Jason Kean, Hearing Transcript, May 7, 2019 at p. 81.

71. Mr. Hussey's evidence therefore did not support a broad conclusion that Innu bids contained a "premium" special to Innu businesses. Rather, Mr. Hussey's impression was derived from a single occurrence. Mr. Hussey took no steps to investigate the claim or to ascertain whether bids from other Innu businesses contained a hidden "premium."

72. Since, as the head of contracts and procurement, Mr. Hussey would be the person at Nalcor with the most knowledge of Project contracts and procurement, it appears that the general impression that there was an Innu-first "premium" was based on doubtful grounds – the representations to Mr. Hussey of one non-Innu counterparty made in a negotiation context in relation to one contract bid.

73. There is therefore no reliable evidence before the Commission that would support a finding that there was a "premium" associated with Innu-first contracts.

Innu Employment Opportunities

74. As noted above, the IBA also provided for employment opportunities for Innu workers. At various points over the Project's construction, between 15 to 213 Innu workers have been employed at the Project site.

Reference Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at pp. 53-54.
Chart 3 – Innu Employed by Position, Exhibit P-02110 at pp. 39-43.

75. The Commission has not heard any evidence to suggest that Innu participation under the IBA affected labour productivity at the Project site.

Reference See e.g. Testimony of Paul Lemay, Hearing Transcript, March 28, 2019 at p. 102.

76. The Commission *has* heard evidence regarding the difficulties that Innu workers have faced onsite, and the steps Innu Nation has had to take in order to have these difficulties addressed.

77. The Innu consented to the Project's development based on the accommodation commitments made in the IBA. These commitments include, among other things, the business and employment opportunities outlined above. The implementation of the business and employment opportunities, however, often fell short, since:

- (a) Innu Nation often had to take steps to insist that Nalcor and GNL live up to their IBA commitments;
- (b) Innu workers were not able to access the range and number of work opportunities Innu Nation had anticipated pursuant to the IBA provisions;
- (c) Innu workers were passed over for hiring and training opportunities;
- (d) Innu workers were unable to stay at the site's camp, and had to commute a long distance every day;
- (e) The transportation provided to Innu workers from Sheshatshiu had punishing hours; and
- (f) Innu workers experienced racism on the Project site.

Reference Testimony of Anastasia Qupee and Clementine Kuypers, Hearing Transcript, February 28, 2019 at pp. 48-49; 60; 52; 54-58; 63; 65.
See also Testimony of Pat Hussey, Hearing Transcript, March 1, 2019 at p. 58.
See also Testimony of Tom Walsh, Hearing Transcript, May 27, 2019, pp 72, 77, 82-83
Testimony of Gilbert Bennett, Hearing Transcript, June 21, 2019 at pp. 61-62.

78. Nalcor was aware of and acknowledged that many of these were valid concerns.

Reference Testimony of Gilbert Bennett, Hearing Transcript, June 21, 2019 at p. 61-63.

79. One particularly egregious example of the racism experienced by Innu workers onsite is the incident of workplace violence in which a racist remark was made to an Innu worker, after which that Innu worker was kicked in the head. This incident led to Innu elders and others protesting at the worksite. Ed Martin subsequently came to the worksite and spoke

with the Innu elders and the victim, apologizing for what had occurred. This apology was accepted.

Reference Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at pp. 57-58.

Protests

80. The Commission has heard evidence that protests could put Project cost estimates and scheduling at risk, and also potentially lead to cost overruns.

Reference See e.g. Testimony of Gilbert Bennett, Hearing Transcript, November 27, 2018 at p. 10, 19, 44, 46. Testimony of Gilbert Bennett, Hearing Transcript, June 21, 2019 at p. 58-60.

81. Innu Nation did not organize or endorse any of the protests that have occurred in relation to the Project following the signing of the IBA in 2011.

Reference See e.g. Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at p. 59. Testimony of Gilbert Bennett, Hearing Transcript, June 26, 2019 at p. 35. Contra Testimony of Todd Russell, Hearing Transcript, February 27, 2019 at p. 87. Contra Testimony of Don Delarosbil, Hearing Transcript, May 9, 2019 at p. 29.

82. Members of Innu Nation may have chosen participate in certain protests relating to the Project, such as the protest linked to the incident of workplace violence described above. Such protest participation is an exercise of an individual's constitutional rights, and does not reflect an organized response on the part of Innu Nation.

Reference Testimony of Anastasia Qupee and Clementine Kuyper, Hearing Transcript, February 28, 2019 at p. 64. Testimony of Gilbert Bennett, Hearing Transcript, June 26, 2019 at pp. 35-36. Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 42.

83. In the event that the Commission does find that protests led to cost overruns, Innu Nation submits that there is no reliable evidence that links Innu Nation to these overruns.

Methylmercury

84. The issue of methylmercury and its potential impacts on waters affected by the Project is a controversial and complex one, with a long history. It is open to the Commission to

consider and make findings regarding the experience of various parties in dealing with the methylmercury issue. However, in our submission, it would be beyond the scope of the Commission to reach conclusions on scientific matters or engage in legal analysis about consultation adequacy on this issue.

85. As the Commission is aware, the potential for methylmercury production caused by the flooding of the Muskrat Falls Reservoir has been well-known for many years. For example, the Joint Review Panel considered this issue in its environmental assessment of the Project in and around 2011.

Reference Report of the Joint Review Panel dated August 2011, Exhibit P-00041.

86. In 2015, a report titled “Freshwater discharges drive high levels of methylmercury in Arctic marine biota” (referred to herein as the “Schartup report”) was released that suggested that methylmercury production caused by flooding the Muskrat Falls Reservoir would be much higher than had been estimated by the previous modelling undertaken by Nalcor, and that these impacts would be felt downstream as far as Lake Melville.

Reference Letter dated November 9, 2015 from Darryl Shiwak to Colleen Janes, Exhibit P-04118.
Testimony of Dwight Ball, Hearing Transcript, July 5, 2019 at p. 18.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 33.

87. This report sparked renewed concerns around this issue, including for Innu Nation, as the Indigenous rights holders in the Muskrat Falls area and the Indigenous people in closest proximity to the Reservoir.

Reference Testimony of Dwight Ball, Hearing Transcript, July 5, 2019 at pp. 18-19.
Letter dated July 7, 2016 from Grand Chief Anastasia Qupee to Premier Dwight Ball, Exhibit P-02070.

88. In response to the Schartup report and these renewed concerns, and in response to pressure from Indigenous leadership in Labrador, the GNL struck the Independent Expert

Advisory Committee (“IEAC”) to consider responses to anticipated methylmercury production. The IEAC had voting committee members from Innu Nation, Nunatsiavut, NCC, and Affected Municipalities, as well as non-voting members from Nalcor and the provincial and federal governments. These committee members nominated western scientists to participate in an Independent Expert Committee (“IEC”) to consider the methylmercury issue and how best to address it. Innu Nation, Nunatsiavut and NCC also nominated Indigenous Knowledge Experts, as provided for in the IEAC’s Terms of Reference, to participate in the IEC.

Reference IEAC Terms of Reference dated March 24, 2017, Exhibit P-01694 at pp. 2-3.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 47.
Testimony of Dwight Ball, Hearing Transcript, July 4, 2019 at p. 74; July 5, 2019 at pp. 18-19.

89. The IEC made unanimous recommendations on monitoring and management of human health, but not on mitigation. The IEC considered five options for mitigation:
- (a) No further action for mitigation;
 - (b) Full clearing of soils and vegetation;
 - (c) Targeted removal of soils and vegetation;
 - (d) Capping of wetlands; and
 - (e) Combination of targeted removal of soils and vegetation and capping of wetlands.

Reference IEAC Independent Expert Committee Recommendations: Mitigation, Exhibit P-01699 at pp. 14-15.

90. None of the western scientists or Indigenous Knowledge Experts favoured full soil and vegetation removal.

Reference IEAC Independent Expert Committee Recommendations: Mitigation, Exhibit P-01699 at pp. 14-15.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 81.

91. Four of the six western scientists on the expert committee opposed partial soil and vegetation removal. There were concerns raised by those scientists about possible

unintended impacts of soil and vegetation removal, including increased methylmercury production.

Reference IEAC Independent Expert Committee Recommendations: Mitigation, Exhibit P-01699 at pp. 4, 14-15.
Testimony of Dwight Ball, Hearing Transcript, July 5, 2019 at pp. 19-20.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 33.

92. On this basis, Innu Nation, the acknowledged rights holder in the Muskrat Falls Project area, opposed soil and vegetation removal and recommended wetland capping. The GNL has acknowledged that it must account for Innu Nation's position on soil and vegetation removal, as the rights holder in the area.

Reference Letter dated April 10, 2018 from Dr. Kenneth Reimer to Eddie Joyce, Exhibit P-01702 at pp. 2, 14-16.
Letter dated April 24, 2018 from Grand Chief Rich and Deputy Grand Chief Rich to Eddie Joyce, Exhibit P-04172.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at pp. 82-83.
Testimony of Dwight Ball, Hearing Transcript, July 5, 2019 at pp. 20, 23-24.
See also Testimony of Carl McLean and Rodd Laing, Hearing Transcript, February 28, 2019 at pp. 32-33.

93. Nunatsiavut and NCC's IEAC members both recommended partial soil and vegetation removal and wetland capping

Reference Letter dated April 10, 2018 from Dr. Kenneth Reimer to Eddie Joyce, Exhibit P-01702 at pp. 8-10, 11-12.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 49.

94. The GNL has recently taken steps to address the IEAC's recommendations on methylmercury mitigation. The Commission has heard that wetland capping is no longer possible, and the GNL has suggested it will focus its efforts on other avenues for mitigation. It should also be noted that, as the Commission has heard, the evidence to date from the reservoir's partial flooding does not show the significant increase in methylmercury predicted by the Schartup report.

Reference Testimony of Dwight Ball, Hearing Transcript, July 5, 2019 at pp. 20, 23-24.
Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20,

2019 at pp. 42-44.
Testimony of Siobhan Coady, Hearing Transcript, June 27, 2019 at pp. 34-36, 39.

Scope of Inquiry Regarding Methylmercury

95. In paragraph 41 of the Interpretation, the Commissioner states that article 4(b) of the Terms of Reference requires that he consider whether appropriate or proper consideration was given and actions taken regarding potential risk to the environment, human safety and property related to methylmercury contamination.

Reference Interpretation at para. 41.
See also Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 17.

96. Section 4(b) of the Terms of Reference states that the Commission shall inquire into:

... why there are significant differences between the estimated costs of the Muskrat Falls Project at the time of sanction and the costs by Nalcor during project execution, to the time of this inquiry [...] including whether [...] any risk assessments, financial or otherwise, were conducted [...] and whether the assessments were conducted in accordance with best practice, [... whether] Nalcor took appropriate measures to mitigate the risks identified and whether Nalcor made the government aware of the reports and assessments.

Reference Order in Council at article 5(b)(v).

97. Any consideration of the methylmercury issue by this Commission is therefore limited, pursuant to the Terms of Reference, to whether risk assessments relating to methylmercury contributed to the significant differences between the estimated costs of the Project and its current cost projections.

98. Moreover, the Commission must be mindful that in considering cost implications associated with the methylmercury issue, it cannot go so far as to make determinations as to whether the measures taken to mitigate potential methylmercury production have been sufficient, because of:

- (a) the previous findings made by the Joint Review Panel and reviewing courts on this topic;
- (b) the paucity of evidence, especially expert evidence, heard by the Commission on this topic; and
- (c) the ongoing developments in the GNL's actions to address potential methylmercury production, some of which have taken place after the Inquiry was no longer adducing evidence on this issue.

Previous Findings

99. As noted above, the Joint Review Panel considered methylmercury impacts and mitigation measures in its environmental assessment. This assessment spanned many months, and all of Innu Nation, NCC, Nunatsiavut and Ekuanitshit participated in the hearing and were given the opportunity to comment on the Joint Review Panel's report.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 5.
Report of the Joint Review Panel dated August 2011, Exhibit P-00041 at pp. 11-12.

100. The Joint Review Panel was presented evidence regarding the potential for methylmercury production and approaches to mitigate such production. The Panel's consideration of this issue is extensive, and findings on methylmercury impacts and mitigation can be found in six sections of the Report, including: Project Need and Alternatives; Aquatic Environment; Terrestrial Environment and Wildlife; Land and Resource Use; Current Aboriginal Land and Resource Use for Traditional Purposes; and Family and Community Life, and Public Services.

Reference Report of the Joint Review Panel dated August 2011, Exhibit P-00041, sections 4, 6, 7, 8, 9, 13.

101. The Commissioner has stated that the Commission will not be engaging in another environmental assessment of the Project.

Reference Interpretation at para. 54.
Testimony of Danny Williams, Hearing Transcript, October 2, 2018 at p. 70.
Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018 at p. 2.

102. Innu Nation agrees that the Commission should not re-do the environmental assessment work already undertaken by the Joint Review Panel. To do so would be to go outside the Terms of Reference.

103. Moreover, the Joint Review Panel's report and related outcomes, and the Project's release from the environmental assessment process in 2012, have been considered by, and unsuccessfully challenged in, the Federal Court and Federal Court of Appeal. For example, the release of conditions related to methylmercury was specifically considered, at length, in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981.

Reference See e.g. *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520.
Council of the Innu of Ekuanitshit v. Canada (Attorney General), 2014 FCA 189.
Nunatukavut Community Council Inc. v. Canada (Attorney General), 2015 FC 981 at paras. 245-285, 315.

104. This is also important in considering the suggestion that the work done by the IEAC ought to have been conducted earlier than it was. The environmental assessment process in 2011 considered issues relating to methylmercury and made findings on these issues. In 2012, the Project was released from the environmental assessment process. This was the appropriate time to challenge findings relating to methylmercury and the Federal and provincial governments' proposed responses to these findings and recommendations. Such challenges were brought and dismissed before the Federal Court. New information on methylmercury was released in the Schartup report in 2015. This led to renewed discussions between the GNL and Indigenous leaders, and the eventual creation of the IEAC. The information that arose in 2015 was not known at the time of the Joint Review Panel and it would be unfair to use hindsight to impugn the decisions taken in 2011.

Reference See e.g. Testimony of Carl McLean and Rodd Laing, Hearing Transcript, February 28, 2019 at pp. 19-20.

Paucity of Evidence

105. Issues relating to estimated and actual methylmercury production, as well as mitigation measures designed to address this production, are complex and require rigorous scientific analysis. The IEAC's Independent Expert Committee's inability to reach a consensus recommendation on this issue is illustrative of this complexity.

Reference See e.g. Letter dated April 10, 2018 from Dr. Kenneth Reimer to Eddie Joyce, Exhibit P-01702 at p. 2.

106. The Commission has heard from only one witness with any expertise on methylmercury – Mr. Martin Goebel. This witness, though knowledgeable and informative regarding GNL's response to the methylmercury issues raised by the Project, was not presented as a witness with a scientific background able to opine on the complexities of methylmercury production and the effectiveness of methylmercury mitigation measures. Rather, Mr. Goebel is an engineer with a background working for the Department of the Environment and, more recently, as senior advisor on methylmercury.

Reference Testimony of Jamie Chippett, Martin Goebel and Dr. Susan Squires, Hearing Transcript, June 20, 2019 at p. 18.

107. No scientific evidence has been presented by an expert witness to the Commission regarding methylmercury production or mitigation. The Commission has heard the views of interested groups and individuals on these topics, but does not have the evidence before it to evaluate whether these issues have been dealt with appropriately by Nalcor and the GNL.

108. It would be inefficient for the Commission to duplicate the work of the IEAC, and the limited evidence available to the Commission does not enable it to engage in a full scale peer review of the work that the IEAC has already done. As such, the Commission must avoid making any findings implicating the science of methylmercury.

Ongoing Developments

109. Finally, the Commission's ability to make determinations as to whether appropriate mitigation measures relating to methylmercury production have been undertaken is constrained because such mitigation measures are ongoing.
110. As the Commission heard from recent witnesses, the GNL and leaders from Innu Nation, Nunatsiavut and NCC are meeting to discuss implementation of the IEAC's recommendations. It is not known where those discussions will lead.

Reference Testimony of Dwight Ball, Hearing Transcript, July 4, 2019 at pp. 78-79.
 Testimony of Siobhan Coady, Hearing Transcript, June 27, 2019 at p. 28.

111. Given the evolving nature of these mitigation measures, the Commission does not have the information required to make determinations as to whether appropriate mitigation measures relating to methylmercury production have been undertaken.
112. To conclude, for the reasons outlined above, the Commission's jurisdiction in considering issues relating to methylmercury production and mitigation is limited to considering cost implications.

Upper Churchill Redress Agreement

113. One final cost consideration relating to Innu Nation that the Commission may consider is the Upper Churchill Redress Agreement ("UCRA"). The Commission has heard evidence that this Agreement flowed from the Tshash Petapen Agreement. It compensates the Innu for the devastating impacts caused by the flooding of the Upper Churchill Reservoir without consultation or consent.

Reference Testimony of Prote Poker, Hearing Transcript, October 3, 2018 at p. 78.

114. First, it is Innu Nation's position that the UCRA is not a cost associated with the Project. It is an Agreement that should never have been necessary, but became necessary as a result of the GNL's actions in developing the Upper Churchill Falls without the Labrador Innu's consultation or consent. The UCRA was required to provide some kind of compensation for this wrong and the wrongs that flowed from it. The GNL had an independent obligation, entirely unrelated to the Project, to provide the Innu with compensation for the development of the Upper Churchill Project.

Reference Testimony of Prote Poker, Hearing Transcript, October 3, 2018 at p. 76-78.
Testimony of Gilbert Bennett, Hearing Transcript, June 21, 2019 at pp. 64-65; June 26, 2019 at pp. 38-39.

115. To characterize the UCRA as a Project expense is to misunderstand the reasons for which this Agreement was necessary, and its importance.

116. Second, as the Commission has heard, the GNL is responsible for payments under the UCRA. It is therefore not an estimated cost to Nalcor that would fall under article 4(b) of the Terms of Reference.

Reference Testimony of Charles Bown, Hearing Transcript, May 15 2019 at pp. 81-82.
Testimony of Gilbert Bennett, Hearing Transcript, June 26, 2019 at pp. 38-39.

117. For these reasons, Innu Nation submits that the Commission should not consider the UCRA in its analysis of Project costs and cost overruns.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 9th day of August, 2019.

OLTHUIS KLEER TOWNSHEND LLP



Senwung Luk

TAB 2

CITATION: Ontario Provincial Police v. The Cornwall Public Inquiry, 2008 ONCA 33

DATE: 20080118
DOCKET: C47951

COURT OF APPEAL FOR ONTARIO

DOHERTY, MOLDAVER and GILLESSE J.J.A.

BETWEEN:

ONTARIO PROVINCIAL POLICE, ONTARIO PROVINCIAL POLICE
ASSOCIATION, CORNWALL COMMUNITY POLICE SERVICE, MNISTRY OF
COMMUNITY SAFETY AND CORRECTIONAL SERVICES and THE EPISCOPAL
CORPORATION OF THE DIOCESE OF ALEXANDRIA CORNWALL

Appellants

and

THE HONOURABLE G. NORMAND GLAUDE, COMMISSIONER
THE CORNWALL PUBLIC INQUIRY

Respondent

Gina Saccoccio Brannan, Q.C. for the Ontario Provincial Police

W. Mark Wallace for the Ontario Provincial Police Association

David Rose for the Ministry of Community Safety and Correctional Services

Peter E. Manderville for the Cornwall Community Police Service

Brian J. Gover and Patricia M. Latimer for the respondent Commissioner

Leslie M. McIntosh for the Intervenor, the Attorney General for Ontario

Heard: December 13, 2007

On appeal from the order of the Divisional Court (James D. Carnwath and Colin L. Campbell J.J., Harvey Spiegel J. dissenting) dated September 17, 2007 and reported at (2007), 229 O.A.C. 238, dismissing the appellants' application for an order directing the Honourable Justice G. Normand Glaude, Commissioner, to state a case.

MOLDAVER J.A.:

[1] On April 14, 2005, a Commission known as the Cornwall Public Inquiry was established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P. 41 (“Act”). Mr. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner.

[2] The Commission has been functioning for the better part of two years. After sorting out a host of preliminary matters, including the issue of which parties would be granted standing, the Commission began hearing evidence in mid-February 2006. As of mid-July 2007, the Commission had heard from sixty-four witnesses, including eleven contextual expert witnesses, nineteen corporate officials representing various public institutions, twenty-eight alleged victims and six relatives of alleged victims.

[3] Against that backdrop, it is hard to believe that the Commissioner, his counsel and the parties would, at this late stage, be involved in a debate about the subject matter of the Inquiry and the breadth of the Commissioner’s mandate. And yet that is precisely the issue that lies at the core of this appeal.

[4] The issue has its genesis in the evidence of two witnesses, identified for privacy purposes as C12 and C13. Commission counsel seeks to lead their evidence before the Commissioner, while the appellants and the Attorney General for Ontario, as intervenor, seek to exclude it.

[5] In a nutshell, the impugned evidence arises from an allegation by C12 that on December 8, 1993, when she was sixteen years old and living with her mother in Alexandria, Ontario, she was sexually assaulted at knifepoint by two teenage boys. C12 reported the matter to the police in Alexandria the next day. If permitted to testify, C12 and her mother, C13, will speak about the abusive, insensitive and unprofessional treatment that C12 allegedly received at the hands of an officer of the Ontario Provincial Police who took her complaint and commenced the investigation. C12 will also speak about her loss of confidence in the police, her decision not to proceed with the charges and the emotional difficulties that she has suffered as a result of the incident.

[6] The appellants, led by the Ontario Provincial Police (“OPP”), and the intervenor submit that the proposed evidence falls outside the ambit of the Commission’s mandate. They say that the phrase “allegations of historical abuse of young people” in the Order in Council (“OIC”) establishing the Commission restricts the subject matter of the Commission to allegations of abuse of young persons in the Cornwall area by persons who were in positions of trust or authority, and which were reported to a public institution a considerable time after the abuse occurred. Commission counsel, on the other hand, submits that the subject matter of the Commission extends to all cases

involving allegations of abuse of young people in the Cornwall area, including allegations of sexual assault such as those made by C12, so long as the allegations were made before April 14, 2005, the date on which the Commission was established.

[7] Following a hearing in which the parties set out their respective positions, the Commissioner determined that the subject matter of the Commission was the more expansive one urged by Commission counsel. In his written reasons dated June 16, 2007, the Commissioner refused a request under s. 6(1) of the Act to state a case to the Divisional Court questioning his authority to receive the evidence of C12 and C13.

[8] The OPP and others then applied to the Divisional Court under s. 6(2) of the Act for an order directing the Commissioner to state such a case. In the application to the Divisional Court, the appellants posed the following questions:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to "...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?"

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

[9] In a split decision, the Divisional Court dismissed the application to direct the Commissioner to state such a case. The majority concluded that the Commissioner did not err in construing his mandate broadly. They further held that it was open to him to find that the evidence of C12 and C13 was "reasonably relevant" to the subject matter of the Inquiry. Accordingly, they declined to direct the Commissioner to state a case.

[10] H. Spiegel J., in dissent, came to the opposite conclusion. In his view, the Commissioner misconstrued the subject matter of the Commission and exceeded his jurisdiction in concluding that the proposed evidence of C12 and C13 came within it. He would have allowed the application and answered the questions on the stated case as follows:¹

¹ The first question on the stated case as set out by Spiegel J. is worded slightly differently than the first question as framed by the appellants. In the Commissioner's factum filed with the Divisional Court, he also framed questions that he would have stated in the event he were directed to do so by the Divisional Court. It is not necessary to set

Question 1: Is evidence of sexual abuse of a young person reported at or near the time it was alleged to have occurred reasonably relevant to the Terms of Reference given the mandate of the inquiry to "... inquire into and report on the institutional response of the justice system... to allegations of historical abuse ...?"

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13 did the Commissioner properly exercise his jurisdiction or exceed his jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

[11] For reasons that follow, I am respectfully of the view that the Commissioner erred in finding that the proposed evidence of C12 and C13 comes within the subject matter of the Commission. In so concluding, the Commissioner impermissibly redefined and expanded the scope of his mandate and committed jurisdictional error. Accordingly, I would allow the appeal and would answer the questions on the stated case, as framed by the appellants, in the same manner as did Spiegel J.

RELEVANT STATUTORY PROVISIONS

[12] Section 6 of the Act states:

6. (1) Where the authority to appoint a commission under this Act or the authority of a commission to do any act or thing proposed to be done or done by the commission in the course of its inquiry is called into question by a person affected, the commission may of its own motion or upon the request of such person state a case in writing to the Divisional Court setting forth the material facts and the grounds upon which the authority to appoint the commission or the authority of the commission to do the act or thing are questioned.

out these questions; although the Commissioner included much more detail, the ultimate questions he raised do not differ in any significant way from the questions posed by the appellants.

(2) If the commission refuses to state a case under subsection (1), the person requesting it may apply to the Divisional Court for an order directing the commission to state such a case.

(3) Where a case is stated under this section, the Divisional Court shall hear and determine in a summary manner the question raised.

[13] The relevant parts of the OIC dated April 14, 2005, which created the Cornwall Public Inquiry, state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will encourage individual and community healing;

AND WHEREAS under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, the Lieutenant Governor in Council may, by commission, appoint one or more persons to inquire into any matter connected with or affecting the good government of Ontario or the conduct of any part of the public business thereof or the administration of justice therein or any matter of public concern, if the inquiry is not regulated by any special law and if the Lieutenant Governor in Council considers it desirable to inquire into that matter;

AND WHEREAS the Lieutenant Governor in Council considers it desirable to inquire into the following matters. The inquiry is not regulated by any special law;

THEREFORE, pursuant to the *Public Inquiries Act*:

Establishment of the Commission

1. A Commission shall be issued effective April 14, 2005, appointing the Honourable G. Normand Glaude as a Commissioner.

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.
4. The Commission may provide community meetings or other opportunities apart from formal evidentiary hearings for individuals affected by the allegations of historical abuse of young people in the Cornwall area to express their experiences of events and the impact on their lives.

ANALYSIS

[14] I begin my analysis by referring in more detail to the reasons of the Commissioner for refusing to state a case on the issue whether he had jurisdiction to hear the evidence of C12 and C13. The appellants' position before the Commissioner was that the term "historical abuse of young people" in para. 2 of the OIC restricts the scope of the Inquiry to situations where the abuse complained of occurred to a child, by a person in authority, and which was only reported to an institution much later. In contrast, Commission counsel took the view that the word "historical" means abuse that occurred prior to April 14, 2005, the date of the OIC.

[15] The Commissioner concluded that the proposed evidence came within the subject matter of the Inquiry and for that reason it was within his jurisdiction to admit it. This conclusion is made clear at p. 4 of his reasons where he defined the issue confronting him as follows:

Finally, I should note that the parties did make submissions with respect to relevance of the evidence in question.

In my view, the question before me is *one of jurisdiction only* as relevance would go to issues such as admissibility generally and the weight to be given to such evidence, which is not the subject matter of a section 6 application.² [Emphasis added.]

[16] In reaching this conclusion, the Commissioner expressed the opinion that both of the competing interpretations of “historical” that were advanced by the parties “have merit and that they are not mutually exclusive but are quite compatible.” He acknowledged that “the main focus of Parliament” in appointing the Inquiry “was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.” More will be said later in these reasons about the nature of the cases that were in the spotlight in Cornwall at the time of the decision to convene the Inquiry. Suffice to say at this point that these cases involved allegations of historical abuse of young people by persons in authority or positions of trust.

[17] Having identified the main focus of his mandate, the Commissioner was of the view that such mandate should not be read as being limited to a consideration of those particular cases:

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

To interpret the mandate in such a way is unduly restrictive and contrary to the spirit of the preamble and to section 3 of the Order in Council.

² The Commissioner’s statement that matters of relevance, such as “admissibility generally and the weight to be given to such evidence” are “not the subject matter of a section 6 application” is not entirely accurate. As was held by this court in *Re Bortolotti et al. and the Ministry of Housing et al.*, discussed *infra*, such matters can give rise to jurisdictional error if the proposed evidence is not “reasonably relevant” to the subject matter of the inquiry.

[18] On the Commissioner's view of the expansive mandate created by the OIC, the proposed evidence of C12 and C13 came within the terms of reference and as such, it was clearly admissible.

[19] The majority of the Divisional Court, in dismissing the appellants' application to direct the Commissioner to state a case, correctly articulated the principles that govern applications under s. 6 of the Act. These principles were first set out by Morden J. in *Re Royal Commission into Metro Toronto Police Practices* (1975), 10 O.R. (2d) 113 (Div. Ct.) and were later approved by Howland J.A. in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617 (C.A.). Howland J.A. held at p. 623 that applications under s. 6(1) of the Act are confined to matters of jurisdiction only:

Section 6(1) of the *Public Inquiries Act, 1971* no longer provides for a case to be stated as to the "validity of any decision, order, direction or other act of a commissioner". I am in agreement with the conclusion of Morden, J., in *Re Royal Com'n into Metropolitan Toronto Police Practices and Ashton* (1975), 10 O.R. (2d) 113 at pp. 119-21, 64 D.L.R. (3d) 477 at pp. 483-5, 27 C.C.C. (2d) 31, that "authority" in s. 6(1) means "jurisdiction", and that *the statutory powers of the Court are now "supervisory only, i.e., confined to seeing to it that the Commission does not exceed its jurisdiction. They do not extend to enable the Court to substitute its discretion for that of the Commission where the latter has made a decision lying within the confines of its jurisdiction."* [Emphasis added.]

[20] Howland J.A. went on at pp. 623-24 to explain how the court on a s. 6 application is to assess whether the Commission has committed a jurisdictional error:

An error of jurisdiction arises where the Commission has not kept within the subject-matter of the inquiry as set forth in Order in Council 2959/76. In the exercise of its powers under s. 6(1) of the Public Inquiries Act, 1971, the Divisional Court has a supervisory role to perform respecting errors of jurisdiction. In considering whether the Commission has exceeded or has declined its jurisdiction, it is necessary to determine what evidence is admissible before the Commission...

*In my opinion, any evidence should be admissible before the Commission which is reasonably relevant to the subject-matter of the inquiry, and the only exclusionary rule which should be applicable is that respecting privilege as required by s. 11 of the Public Inquiries Act, 1971. [Emphasis added.]*³

[21] *Bortolotti* thus directs that an error of jurisdiction occurs when the Commission admits evidence that is not reasonably relevant to the subject matter of the inquiry. Howland J.A. addressed the meaning of the phrase “reasonably relevant” at pp. 624-25:

Having determined that the test of reasonable relevance should be applied, it is necessary to consider the meaning of the words "reasonably relevant".

The definition of "relevant" which has been commonly cited with approval by the Courts is that in *Stephen's Digest of the Law of Evidence*, 12th ed., art. I. It states that the word means that "any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other". *In concluding what evidence is admissible as being reasonably relevant to a commission of inquiry, I would adopt the statement in McCormick on Evidence, 2nd ed., at p. 438: "Relevant evidence, then, is evidence that in some degree advances the inquiry, and thus has probative value ... "*

In deciding whether evidence is reasonably relevant it is necessary to scrutinize carefully the subject-matter of the inquiry as set forth in Order in Council 2959/76. This is the governing document....[Emphasis added.]

[22] Having correctly set out the applicable legal principles from *Bortolotti* at paras. 14-17 of their reasons, the majority did not go on to perform the review function that they

³ Section 11 reads:

11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

had identified, namely, “to scrutinize carefully the subject matter of the inquiry as set forth in the Order in Council”. Instead, the majority took a deferential approach to reviewing the Commissioner’s decision on the subject matter of the Inquiry and simply concluded that it was “open to him to place a different construction on ‘historical’ and ‘abuse’ as set out in the Terms of Reference in order to carry out his mandate” (at para. 20).

[23] In my respectful view, the majority erred in taking a deferential approach. No deference is owed to the Commissioner on the issue of the definition of the subject matter of the Inquiry. The Commissioner’s jurisdiction is limited to that subject matter, which is prescribed by the legislature in the OIC creating the Commission. If the Commissioner defines the subject matter too broadly or too narrowly, he or she will have rewritten the OIC and redefined the terms of reference. That, of course, is impermissible and constitutes jurisdictional error.

[24] In my view, the Commissioner misconstrued the OIC and in so doing he enlarged the subject matter of the Inquiry and conferred a much wider jurisdiction upon himself than the legislature contemplated. In interpreting the OIC as he did, I believe that the Commissioner committed four errors:

- (1) he failed to consider the context and circumstances in which the Commission was established;
- (2) he failed to consider relevant wording in the preamble to the OIC that provided valuable insight into the nature and type of allegations at issue;
- (3) he failed to construe wording used in the OIC harmoniously and with reference to the document as a whole;
- (4) by reason of the first three errors, he misidentified the subject matter of the Inquiry and ascribed to himself a mandate that is beyond anything contemplated by the legislature.

[25] I now propose to address each of the four errors.

(1) ***Failure to consider the context and circumstances leading to the creation of the Commission***

[26] The starting point for interpreting the Commissioner’s mandate is a consideration of the terms of the OIC: *Bortolotti*, p. 623. In this case, however, the words of the OIC are not plain and obvious and do not admit of only one meaning. The Commissioner essentially acknowledged this difficulty at the outset of his analysis with his comment

that the parties' competing interpretations of the word "historical" as used in the OIC both "have merit" and are "quite compatible". Likewise the word "abuse" - which appears in the paragraphs describing the mandate of the Commissioner and in the preamble - is capable of being broadly or narrowly construed, and yet the term is not defined in the OIC.

[27] Given the unclear language used in the OIC, the Commissioner was entitled to and should have looked beyond the four corners of the document for assistance in interpreting its meaning. Had he done so, he would have gained valuable insight into the scope of his mandate from the background circumstances and context in which the Commission was created.

[28] In upholding the Commissioner's interpretation of the subject matter of the Commission, the majority of the Divisional Court also failed to consider the background circumstances that led to the establishment of the Inquiry. With respect, I believe that it was necessary to have careful regard to these circumstances when defining the subject matter of the Inquiry.

[29] The background circumstances that gave rise to calls for this public inquiry are referred to in summary form in the first two sentences of the preamble to the OIC as follows:

WHEREAS *allegations of abuse of young people* have surrounded the City of Cornwall and the citizens for many years. *The police investigations and criminal prosecutions relating to these allegations have concluded.*⁴ [Emphasis added.]

[30] The factual matrix surrounding "the allegations of abuse of young people" in the City of Cornwall and the details of the completed "police investigations and criminal prosecutions relating to them" is described in the affidavit of acting Detective Superintendent Colleen McQuade of the OPP, dated July 18, 2007. In her affidavit, Det. Supt. McQuade details the background and history of allegations of historical sexual abuse involving children in the Cornwall area by persons in authority or positions of trust and how those allegations ultimately came to public attention. She refers to an initial complaint made in 1992 by a thirty-four year old Cornwall resident who claimed that, as a child, he had been sexually abused by a priest and a probation officer. She comments on the charges that were laid in relation to those allegations and how those charges eventually came to be withdrawn. She then details steps taken in 1994 by a member of

⁴ More will be said about these two sentences shortly. For now, I note that in his reasons purporting to identify the subject matter of the inquiry, the Commissioner made no mention of the second sentence.

the Cornwall Police Service that resulted in the public exposure of the original allegations, including the circumstances surrounding the withdrawal of charges relating to them, as well as further allegations of historical sexual abuse involving the priest made by two other adult complainants.

[31] Det. Supt. McQuade's affidavit also outlines the repercussions arising from these allegations, including charges that were laid "under the *Police Act*" against the Cornwall police officer who disclosed the pertinent information, as well as an ensuing civil action that the officer brought against a number of "named individuals and organizations including the former and current Chiefs of Police of the Cornwall Police Service". According to Det. Supt. McQuade, in the context of his civil suit, the Cornwall police officer and his lawyer "began to collect information regarding other alleged victims of child sexual abuse, a clan of pedophiles in the Cornwall area, a conspiracy [by the priest and the probation officer] and their lawyer... in the fall of 1993, to murder [the officer] and the members of his family, and a conspiracy to obstruct justice in late summer 1993 by prominent members of the Cornwall community including, amongst others, [the lawyer of the priest and the probation officer], the Crown Attorney, the Bishop of the Diocese and the Chief of Police".

[32] Det. Supt. McQuade explains that this information was delivered to the Chief of Police of the London Police Service in late 1996 and, by early 1997, it had found its way to the OPP and the Ministry of the Attorney General. Eventually, the Regional Director of Crown Attorneys for the Eastern Region of Ontario "requested that the OPP investigate the myriad of allegations contained in the information which [the Cornwall police officer] had provided". This in turn led to the commencement in July 1997 of an investigation by the OPP "into allegations of historic sexual abuse in the Cornwall area known as 'Project Truth'". That project ultimately resulted in "fifteen (15) persons being charged with one hundred and fifteen (115) offences involving thirty-four (34) alleged victims". All criminal proceedings arising from the project concluded on October 18, 2004. On November 4, 2004, the Premier of Ontario "announced that the Government of Ontario was committed to calling a public inquiry into 'Project Truth'".

[33] In my view, this information fleshes out the meaning of the first two sentences of the preamble to the OIC and makes it clear that the "allegations of abuse of young people" that had "surrounded the City of Cornwall and its citizens for many years" refer to the allegations of historical sexual abuse of young people by persons in authority or positions of trust that were the focus of Project Truth and the "police investigations and criminal prosecutions" in relation to those allegations that had now concluded.

[34] I am fortified in this interpretation of the preamble to the OIC by various Hansard extracts that both pre-date and post-date the formation of the Commission on April 14, 2005. Three of the relevant extracts pre-date the OIC and the other post-dates it.

[35] The first relevant Hansard extract is from April 20, 2004, when the MPP for Stormont-Dundas-Charlottenburgh, Mr. Jim Brownell, posed the following question to the Attorney General:

During the past decade in my riding of Stormont-Dundas-Charlottenburgh, there have been numerous cries for an independent public inquiry into childhood sexual abuse allegations and cover-ups in Cornwall. As a candidate in the last election, I wholeheartedly supported a public inquiry. The lives of many people have been touched by the issues surrounding these allegations. The citizens, police forces, public organizations and those who work in the judiciary system are in need of a sense of worth and community. A thorough investigation will have positive consequences for those who work to uphold pride, sensibility and the spirit of community in my riding.

[36] The Attorney General Michael Bryant responded:

There is right now a criminal proceeding that is underway. ...
A public inquiry cannot be held at this time, while this criminal proceeding is underway.

...

When the criminal proceeding is complete, at that point, we will be relying upon that member to continue to be an advocate on behalf of his community....

[37] Another Hansard extract of significance is from November 4, 2004, when MPP Peter Kormos from Niagara Centre posed the following question to the Premier:

A cloud continues to hang over the city of Cornwall because you haven't kept your promise to hold a full public inquiry into the Project Truth investigation. It's a troubling story because, as you know, a citizens' committee itself uncovered evidence of sexual assaults on close to 50 victims, some of them as young as 12 years old. The OPP subsequently laid 115 charges against 15 people, yet only one person was ever convicted, and most of the cases were stayed by the crown because of prosecutorial delay.

[38] In response to MPP Kormos' query, Premier Dalton McGuinty expressed his commitment to holding such an inquiry after the expiry of the appeal period in the criminal proceedings.

[39] In Hansard from November 18, 2004, MPP Bronwell made the following remarks:

... On November 4, 2004, the Premier stood before this House and committed to the people of my riding that a full public inquiry would be called in the Project Truth investigations once all criminal proceedings were concluded.

I'm happy to announce today that on Monday, November 15, 2004, the last of the criminal proceedings were concluded, and yesterday the Premier, myself and the Attorney General, Michael Bryant, committed to holding a full public inquiry in this case....

The Project Truth investigations and subsequent criminal proceedings have clouded over the Cornwall area for the past decade. With the announcement of this public inquiry, the truth of allegations of misconduct and alleged cover-ups will be able to come to light. The people of Cornwall and area will be able to lift this cloud of allegations and have these investigations come to a conclusion. [Emphasis added]

[40] The final relevant Hansard extract is from April 19, 2005, when MPP Brownell expressed his thanks to the Attorney General and Premier for ordering the Inquiry:

First let me congratulate and thank you and the Premier for the realization of a full public inquiry into the sex abuse scandal that has shaken the community of Cornwall and area. I was proud to be with you yesterday at city hall in Cornwall to see the looks of relief on the faces of the victims as it became clear that the McGuinty team was fulfilling its promise to hold an inquiry. From the formation of this government, you have worked tirelessly with me and with those involved in the community and area to see that this long-standing concern was addressed.

[41] The Attorney General responded as follows:

Yes, with the public inquiry, under the *Public Inquiries Act*, he has all the tools at his disposal to leave no stone unturned and to provide recommendations that ultimately, we hope, will lead to some reconciliation and healing for the people of Cornwall. Along the way, we will work with the commission, as the commissioner sees fit, to ensure that victims get the services they need during what will inevitably be a very painful time for them. *Ultimately, with this public inquiry, we will finally get to the bottom of what happened and will get recommendations so we can proceed better in the future, in a way that not only can everybody have confidence in the system, but the victims can feel that justice has been done.* [Emphasis added.]

[42] In my view, these extracts are telling. They provide valuable insight into the background and purpose of the OIC. They were available to the Commissioner and the Divisional Court as an interpretative aid and should have been used in determining the legislative purpose for creating the Commission: see *Re Canada 3000 Inc.; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865 at paras. 57-59; *Bruker v. Marcovitz*, 2007 SCC 54 at paras. 3-8.

[43] Considered in conjunction with the factual matrix outlined by Det. Supt. McQuade in her affidavit, these Hansard extracts provide clear evidence of the context and circumstances in which the Commission was created. I would summarize them as follows:

- a clan of pedophiles allegedly operated in the Cornwall area for a very long period of time;
- prominent local citizens allegedly conspired to cover up the activities of the clan of pedophiles; and
- Project Truth and the prosecutions it spawned failed to generate satisfactory results and a cloud of suspicion and mistrust continues to hang over the citizens of Cornwall.

[44] Had the Commissioner or the majority of the Divisional Court referred to the Hansard extracts and the factual matrix as outlined by Det. Supt. McQuade in her affidavit filed with the Divisional Court, they would have recognized that the legislative intention in appointing the Inquiry was not to investigate the institutional response to all allegations of abuse in the Cornwall area that pre-date April 14, 2005, including

allegations of sexual assault such as those made by C12. Rather, the legislative intention in ordering the Inquiry was more focused: the legislature sought to have the Commissioner investigate the institutional response to allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust and recommend ways in which those institutions could better respond to this type of allegation.

(2) *Failure to consider relevant wording in the preamble*

[45] As set out above, the first two sentences of the preamble to the OIC state:

WHEREAS allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The police investigations and criminal prosecutions relating to these allegations have concluded.

[46] In defining the subject matter of the Inquiry in broad terms, the Commissioner paid particular attention to the first sentence of the preamble. He mentioned this sentence in his reasons with a view to substantiating his conclusion that the legislature had chosen to give him a wide mandate. Thus, he noted that there was no reference in the preamble to “allegations of abuse at the hands of persons in authority” and that “the preamble clearly contemplates a general inclusive statement, not limited to historical allegations, but referring to ‘allegations of abuse of young people [that] have surrounded the City of Cornwall’ ...”.

[47] With respect, the Commissioner’s analysis ignores the second sentence of the preamble. As noted, that sentence narrows the so-called “general inclusive” allegations of abuse referred to in the first sentence to those that formed the subject matter of “police investigations and criminal proceedings related to these allegations [that] have concluded.” Such allegations related to historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust that were the subject of the Project Truth investigations.

[48] The Commissioner’s failure to consider the second sentence of the preamble was serious and in my view it skewed his subsequent analysis of the subject matter of the Commission.

(3) *Failure to construe the wording of the OIC harmoniously and with reference to the document as a whole*

[49] In determining that his mandate entitled him to look into institutional responses relating to any and all allegations of sexual assault involving young people in the

Cornwall area prior to April 14, 2005, the Commissioner focused heavily on para. 2(b) of the OIC. For convenience, para. 2 is again reproduced:

Mandate

2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
 - (a) allegations of historical abuse of young people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
 - (b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse

in order to make recommendations directed to the further improvement of the response in similar circumstances.

[50] The Commissioner noted that para. 2(b) contains no reference to “historical” abuse; rather, it refers to “policies and practices that were designed to improve the response to allegations of abuse”. In the Commissioner’s view, that provision, properly construed, calls for a “broad and liberal interpretation” as opposed to one that is restricted to “complaints [of historical abuse] reported by adults.”

[51] With respect, I believe that the Commissioner erred in reading para. 2(b) in isolation and in construing the words “allegations of abuse” differently from the words “allegations of historical abuse” used elsewhere in para. 2 and in other provisions of the OIC. In my view, he should have construed those phrases harmoniously and with reference to the document as a whole. Had he done so, I am satisfied for several reasons that he would have treated the words “allegations of historical abuse” and “allegations of abuse” synonymously.

[52] First, as I have already pointed out, the Commissioner misconstrued the words “allegations of abuse” in the first sentence of the preamble. Had he read those words in conjunction with the second sentence of the preamble, he would have realized that the “allegations of abuse” were the allegations of abuse that formed the subject matter of

Project Truth, i.e. allegations of historical sexual abuse of young people in the Cornwall area by persons in authority or positions of trust.

[53] Second, it must be noted that para. 2, although divided into sub-paragraphs, is one complete sentence. Paragraph 2(b) must be read together with the language in para. 2(a) and with the concluding words in that provision, which refer both explicitly and implicitly to allegations of historical abuse. Paragraph 2(a) speaks of “allegations of *historical abuse* ... including *the policies and practices then in place* to respond to such allegations” [Emphasis added.]. The concluding language of para. 2 speaks of “recommendations directed to further improvement of the response *in similar circumstances*” [Emphasis added.]. Surely “similar circumstances” refers to allegations of historical abuse, as the appellant suggests, and not allegations of sexual assault of any kind, as Commission counsel suggests.

[54] Third, the Commissioner failed to have regard to para. 4 of the OIC. Paragraph 4 is a free-standing provision that provides for informal opportunities “for individuals affected by *the allegations of historical abuse* of young people in the Cornwall area” to express their views and feelings [Emphasis added.]. That provision dovetails with the third sentence in the preamble to the OIC and it reflects the view of community members that “a public inquiry will encourage individual and collective healing”. If the subject matter of the inquiry were meant to include allegations of sexual assault such as those made by C12, it is illogical that the legislature would have restricted the community meetings and other informal opportunities to “individuals affected by allegations of historical abuse of young people in the Cornwall area”. And yet, para. 4 is clearly restricted in that fashion.

[55] When para. 2 of the OIC is read as a whole and in conjunction with the other provisions of the OIC including the preamble, it is apparent that the legislature was directing the Commissioner to look at institutional policies and practices – past, present and future – in responding to allegations of historical abuse of young people in the Cornwall area. Such allegations would include those that were the subject of the Project Truth investigation as well as any similar allegations of historical abuse of young people by persons in authority or positions of trust that were not investigated by Project Truth or that came to light after the Project Truth investigation ended. This interpretation harmonizes the meaning of the word “allegations” throughout the OIC, including its meaning in the preamble, para. 2 and para. 4.

[56] In contrast, reading para. 2(b) as the Commissioner does leads to the untenable conclusion that, by virtue of this clause, the legislature intended the Commissioner to compare and contrast present-day institutional responses to any and all allegations of abuse, including but not limited to the allegations of historical abuse, with past institutional responses limited solely to allegations of historical abuse under para. 2(a).

With respect, that interpretation is not logical. Moreover, it isolates para. 2(b) and promotes it from a clause that describes one discrete component of the Commissioner's mandate into a clause that single-handedly broadens his mandate beyond all proportions – something which in my view, the legislature did not contemplate. That leads me to the fourth error.

(4) *Failure to interpret the OIC in a manner that was reasonable and within the contemplation of the legislature*

[57] The Commissioner identified the primary focus of his mandate as follows:

In reviewing the mandate, it is clear that the main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry; hence, the reference to allegations of historical abuse.

...

I am of the view that while Parliament certainly indicated that historical allegations of abuse would be a central part of the Inquiry, the mandate certainly does not read to limit it to those specific cases.

[58] The Commissioner further observed that the Commission was “nearing the end of the victims’ evidence and it is not the intention of this Inquiry to now open the floodgates, or to widen the mandate that I have set to date.”

[59] With respect, these words of the Commissioner do not sit well with the expansive view he took of his mandate. As already indicated, by interpreting the OIC as he did, the Commissioner ascribed to himself a mandate that is truly breathtaking in its scope. By defining the words “historical” as he did, the Commissioner gave himself jurisdiction to assess the response of various institutions (past, present and future), including the justice system, the police, Children’s Aid Societies and the like, to any and all allegations of sexual abuse made by young people in the Cornwall area, including historical allegations of abuse such as those investigated by Project Truth and allegations of sexual assault, such as those reported by C12, presumably from the date of Cornwall’s inception in 1834 to April 14, 2005, the date on which the Commission was formed.

[60] Such a wide-ranging mandate is inconsistent with the Commissioner’s acknowledgement that the “main focus of Parliament was to highlight the cases that had been in the spotlight in the community at the time of the decision to convene this Inquiry;

hence, the reference to allegations of historical abuse.” I fail to see how, on the Commissioner’s view of his mandate, he could reasonably hope to keep the floodgates from opening. If C12’s evidence (which falls outside the Commissioner’s view of the main focus of the Inquiry) were to be admitted, it would open the door to similar testimony from hundreds of complainants and their family members who might wish to come forward and speak of their experiences with the police and other institutions, both pro and con, not to mention the hundreds of judicial officers, police officers, CAS workers and the like who would no doubt wish to respond.

[61] In short, the Commissioner’s view of his mandate runs the risk of standing the so-called “main focus” of the Inquiry on its head and creating an unwieldy, if not unmanageable, mega-inquiry that could go on for years at great public expense. Such an outcome would diminish the value to be gained from the important work that the legislature had assigned to the Commissioner.

Conclusion on the Subject Matter of the Commission

[62] Properly construed, the OIC empowers the Commissioner to look into and report on institutional responses – past, present and future – relating to allegations of historical abuse of young people in the Cornwall area by persons in authority or positions of trust, including the allegations investigated in Project Truth as well as similar such allegations. Allegations that were reported at the time of the abuse, or years later, or both, would fall within this mandate. In other words, the Commissioner can look at the response of various institutions to allegations made and reported in the 1950s, as well as their response to allegations made for the first time or renewed in the 1990s.⁵

[63] C12’s evidence does not come within the subject matter assigned to the Commissioner by the terms of the OIC. With respect, the Commissioner erred in holding otherwise. The same holds true for C13’s evidence. For these reasons, Questions 1 and 2 of the stated case should be answered as Spiegel J. did in his dissenting opinion.

Is the evidence of C12 and C13 reasonably relevant to the subject matter of the Inquiry?

[64] Although the evidence of C12 and C13 falls outside the subject matter of the Inquiry, it could nevertheless be admissible if it were found to be “reasonably relevant to the subject matter of the inquiry”: *Bortolotti* at p. 624. It would meet that test if it had a bearing on an issue to be resolved and could reasonably, in some degree, advance the

⁵ I do not agree with the dissenting opinion of Spiegel J. to the extent that he concluded at para. 31 that the term “historical” in para. 2(a) of the OIC imports a requirement that there must necessarily be a lapse of time between the time of the abuse and the time of reporting for the allegation to be considered as historical.

inquiry. A decision to admit evidence on this basis will attract a high degree of deference from a reviewing court and will be judged against a standard of reasonableness.

[65] Affording a high degree of deference to such a ruling makes eminent good sense. Otherwise, Commissions would constantly be in a state of “stop and go” as disgruntled parties trundled off to the Divisional Court to challenge evidentiary rulings with which they disagreed. If the Commissioner believes that an item or body of evidence, though peripheral to the subject matter of the Commission, bears on an issue to be resolved and will in some degree advance the inquiry, so long as the Commissioner’s view is reasonably based, the admission of the evidence will not constitute jurisdictional error. (For a general discussion of the standard of reasonableness see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-62 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paras. 46-56).

[66] The Commissioner made no finding on whether the evidence of C12 and C13 was reasonably relevant to the subject matter of the Inquiry. To be precise, he did not turn his mind to the issue, having concluded that their evidence came within his mandate and was thus clearly admissible.

[67] In circumstances where the Commissioner has not ruled on whether the proffered evidence is reasonably relevant to the subject matter of the Inquiry, I would normally refrain from commenting on whether the evidence is capable of passing the deferential test of “reasonably relevant” as set out in *Bortolotti*. However, the issue was canvassed by the parties in oral argument and I think it would be helpful to address it, in an effort to avoid further delays.

[68] Assuming that the evidence of C12 and C13 stands alone and is not the prelude to an avalanche of other such evidence from like complainants and their family members, I fail to see how it could reasonably advance the inquiry that the Commission had been asked to perform. Without wishing to minimize the seriousness of C12’s complaint or the gravity of her allegations against the investigating officer, her evidence, if true, essentially comes down to one person having been treated inappropriately by a police officer in a case where she allegedly was sexually assaulted by other teenagers. Her evidence does not speak to systemic problems that may or may not exist in the way police respond to allegations of sexual abuse of young people by persons in a position of trust or authority. In other words, it has no probative value in relation to the Commissioner’s mandate.

[69] On the other hand, if C12’s evidence does not stand alone but is a prelude to an avalanche of similar evidence – the reception of which is likely to be very time-

consuming, hotly contested and liable to deflect the Commissioner from the task at hand – any marginal probative value that such evidence might have would, in my view, be greatly outweighed by its prejudicial effect. As such, it would likewise not pass the “reasonably relevant” test.

[70] In so concluding, I do not wish to leave the impression that there can be no meaningful overlap, in so far as institutional responses are concerned, between cases such as the one described by C12 and the cases such as those investigated by Project Truth. Nor am I suggesting that allegations of historical sexual abuse of young people by persons in authority or positions of trust are a breed apart and entirely distinct from all other allegations of sexual abuse, including allegations of sexual assault committed by teenagers. By way of example, studies that have explored the systemic responses of institutions such as the police to general allegations of abuse made by young people might well pass the reasonable relevance test, even though the subject matter of the study will not be precisely the same as the subject matter of this Inquiry.

[71] For these reasons, I am of the view that the proposed evidence of C12 and C13 is not reasonably relevant to the subject matter of the Inquiry and should therefore not be received.

[72] In conclusion, I would answer the questions in the stated case as framed by the appellants as follows:

Question 1: Do the Terms of Reference of the Cornwall Public Inquiry contemplate the hearing of evidence of an allegation of sexual assault on a 16 year old female by a 16 year old male and a 17 year old male which was reported to the police on the day following the alleged offence given the mandate of the inquiry to “...inquire into and report on the institutional response of the justice system ... to allegations of historical abuse of young people...?”

Answer: No.

Question 2: In deciding to hear the evidence of C12 and C13, did the Commission of Inquiry properly exercise its jurisdiction or exceed its jurisdiction?

Answer: The Commissioner exceeded his jurisdiction.

Signed: “M.J. Moldaver J.A.”
“I agree Doherty J.A.”
“I agree E.E. Gillese J.A.”

RELEASED: “DD” JANUARY 18, 2008

TAB 3

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., [2017] 1 S.C.R. 1099

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 30, 2016;

Judgment: July 26, 2017.

File No.: 36776.

[2017] 1 S.C.R. 1099 | [2017] 1 R.C.S. 1099 | [2017] S.C.J. No. 41 | [2017] A.C.S. no 41 | 2017 SCC 41

Chippewas of the Thames First Nation Appellant; v. Enbridge Pipelines Inc., National Energy Board and Attorney General of Canada Respondents, and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Wildlife Management Board, Suncor Energy Marketing Inc., Mohawk Council of Kahnawà: ke, Mississaugas of the New Credit First Nation and Chiefs of Ontario Interveners

(66 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Aboriginal rights — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact Aboriginal and treaty rights — Pipeline crossing traditional territory of First Nation — National Energy Board approving modification of pipeline — Whether Board's contemplated decision on project's approval amounted to Crown conduct triggering duty to consult — Whether Crown consultation can be conducted through regulatory process — Role of regulatory tribunal when Crown not a party to regulatory process — Scope of duty to consult — Whether there was adequate notice to First Nation that Crown was relying on Board's process to fulfill its duty to consult — Whether Crown's consultation obligation fulfilled — Whether Board's written reasons were sufficient [page1100] to satisfy Crown's obligation — National Energy Board Act, R.S.C. 1985, c. N-7, s. 58.

Summary:

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, was the final decision maker on an application by Enbridge Pipelines Inc. for a modification to a pipeline that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. The NEB issued notice to Indigenous groups, including the Chippewas of the Thames First Nation (Chippewas), informing them of the project, the NEB's role, and the NEB's upcoming hearing process. The Chippewas were granted funding to participate in the process, and they filed evidence and delivered oral argument delineating their concerns that the project would increase the risk of pipeline ruptures and spills, which could adversely impact their use of the land. The NEB approved the project, and was satisfied that potentially affected Indigenous groups had received

adequate information and had the opportunity to share their views. The NEB also found that potential project impacts on the rights and interests of Aboriginal groups would likely be minimal and would be appropriately mitigated. A majority of the Federal Court of Appeal dismissed the Chippewas' appeal.

Held: The appeal should be dismissed.

When an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work could potentially adversely affect the Chippewas' asserted Aboriginal and treaty rights, the Crown had an obligation to consult.

The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the [page1101] agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

A regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the hearing process. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights. As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation was adequate if the concern is raised before it. The responsibility to ensure the honour of the Crown is upheld remains with the Crown. However, administrative decision makers have both the obligation to decide necessary questions of law and an obligation to make decisions within the contours of the state's constitutional obligations.

The duty to consult is not the vehicle to address historical grievances. The subject of the consultation is the impact on the claimed rights of the current decision under consideration. Even taking the strength of the Chippewas' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate. Potentially affected Indigenous groups were given early notice of the NEB's hearing and were invited to participate in the process. The Chippewas accepted the invitation and appeared before the NEB. They were aware that the NEB was the final decision maker. Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. The circumstances of this case made it sufficiently clear to the Chippewas that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice that it intended to [page1102] rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met.

The NEB's statutory powers under s. 58 of the *National Energy Board Act* were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

Finally, where affected Indigenous peoples have squarely raised concerns about Crown consultation, the NEB must usually provide written reasons. What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights and interests into consideration and accommodated them where appropriate. In this case, the NEB's written reasons are sufficient to satisfy the Crown's obligation. Unlike the NEB's reasons in the companion case *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, the discussion of Aboriginal consultation was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous groups and identified, in writing, the rights and

interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address any negative impacts on the asserted rights from the approval and completion of the project.

Cases Cited

Applied: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **referred to:** *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [page1103] [2004] 3 S.C.R. 511; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

National Energy Board Act, R.S.C. 1985, c. N-7, ss. 3, 22(1), Part III, 30(1), 52, 54(1), 58.

Oil Pipeline Uniform Accounting Regulations, C.R.C., c. 1058.

Authors Cited

Woodward, Jack. *Native Law*, vol. 1. Toronto: Thomson Reuters, 1994 (loose-leaf updated 2017, release 2).

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Ryer, Webb and Rennie JJ.A.), 2015 FCA 222, [2016] 3 F.C.R. 96, 390 D.L.R. (4th) 735, [2016] 1 C.N.L.R. 18, 479 N.R. 220, [2015] F.C.J. No. 1294 (QL), 2015 CarswellNat 5511 (WL Can.), affirming a decision of the National Energy Board, No. OH-002-2013, March 6, 2014, 2014 LNCNEB 4 (QL). Appeal dismissed.

Counsel

David C. Nahwegahbow and Scott Robertson, for the appellant.

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

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

Manizeh Fancy and Richard Ogden, for the intervener the Attorney General of Ontario.

[page1104]

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Marie-France Major and Thomas Slade, for the intervener the Nunavut Wildlife Management Board.

Martin Ignasiak, W. David Rankin and Thomas Kehler, for the intervener Suncor Energy Marketing Inc.

Francis Walsh and Suzanne Jackson, for the intervener the Mohawk Council of Kahnawà: ke.

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

Maxime Faille, Jaimie Lickers and Guy Régimbald, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ.

I. Introduction

1 In this appeal and in its companion, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, this Court must consider the Crown's duty to consult with Indigenous peoples prior to an independent regulatory agency's approval of a project that could impact their rights. As we explain in the companion case, the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.

2 These cases demonstrate that the duty to consult has meaningful content, but that it is limited in scope. The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires [page1105] an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.

3 The Chippewas of the Thames First Nation has historically resided near the Thames River in southwestern Ontario, where its members carry out traditional activities that are central to their identity and way of life. Enbridge Pipelines Inc.'s Line 9 pipeline crosses their traditional territory.

4 In November 2012, Enbridge applied to the National Energy Board (NEB) for approval of a modification of Line 9 that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would increase the assessed risk of spills along the pipeline. The Chippewas of the Thames requested Crown consultation before the NEB's approval, but the Crown signalled that it was relying on the NEB's public hearing process to address its duty to consult.

5 The NEB approved Enbridge's proposed modification. The Chippewas of the Thames then brought an appeal from that decision to the Federal Court of Appeal, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the Federal Court of Appeal dismissed the appeal, and the Chippewas of the Thames brought an appeal from that decision to this Court. For the reasons set out below, we would dismiss the appeal. The Crown is entitled to rely on the NEB's process to fulfill the duty to consult. In this case, in light of the scope of the project and the consultation process afforded to the Chippewas of the Thames by the NEB, the Crown's duty to consult and accommodate was fulfilled.

[page1106]

II. Background

A. *The Chippewas of the Thames First Nation*

6 The Chippewas of the Thames are the descendants of a part of the Anishinaabe Nation that lived along the shore of the Thames River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

7 The Chippewas of the Thames assert that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserve lands. They also assert Aboriginal harvesting rights as well as the right to access and preserve sacred sites in their traditional territory. Finally, they claim Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory.

B. *Legislative Scheme*

8 The NEB is a federal administrative tribunal and regulatory agency established under s. 3 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), whose functions include the approval and regulation of pipeline projects. The *NEB Act* prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline (s. 30(1)).

9 The NEB occupies an advisory role with respect to the issuance of a certificate of public convenience and necessity. Under ss. 52(1) and 52(2), it can submit a report to the Minister of Natural Resources setting out: (i) its recommendation on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms [page1107] and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. The Governor in Council may then direct the NEB either to issue the certificate or to dismiss the application (s. 54(1)).

10 Under s. 58 of the *NEB Act*, however, the NEB may make orders, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. The NEB is the final decision maker on s. 58 exemptions.

C. *The Line 9 Pipeline and the Project*

11 The Line 9 pipeline, connecting Sarnia to Montreal, opened in 1976 with the purpose of transporting crude oil from western Canada to eastern refineries. Line 9 cuts through the Chippewas of the Thames' traditional territory and crosses the Thames River. It was approved and built without any consultation of the Chippewas of the Thames.

12 In 1999, following NEB approval, Line 9 was reversed to carry oil westward. In July 2012, the NEB approved an

application from Enbridge, the current operator of Line 9, for the re-reversal (back to eastward flow) of the westernmost segment of Line 9, between Sarnia and North Westover, called "Line 9A".

13 In November 2012, Enbridge filed an application under Part III of the *NEB Act* for a modification to Line 9. The project would involve reversing the flow (to eastward) in the remaining 639-kilometre segment of Line 9, called "Line 9B", between North Westover and Montreal; increasing the annual capacity of Line 9 from 240,000 [page1108] to 300,000 barrels per day; and allowing for the transportation of heavy crude. While the project involved a significant increase of Line 9's throughput, virtually all of the required construction would take place on previously disturbed lands owned by Enbridge and on Enbridge's right of way.

14 Enbridge also sought exemptions under s. 58 from various filing requirements which would otherwise apply under Part III of the *NEB Act*, the *Oil Pipeline Uniform Accounting Regulations*, C.R.C., c. 1058, and the NEB's Filing Manual. The most significant requested exemption was to dispense with the requirement for a certificate of public convenience and necessity, which as explained above is subject to the Governor in Council's final approval under s. 52 of the *NEB Act*. Without the need for a Governor in Council-approved certificate, the NEB would have the final word on the project's approval.

15 In December 2012, the NEB, having determined that Enbridge's application was complete enough to proceed to assessment, issued a hearing order, which established the process for the NEB's consideration of the project. This process culminated in a public hearing, the purpose of which was for the NEB to gather and review information that was relevant to the assessment of the project. Persons or organizations interested in the outcome of the project, or in possession of relevant information or expertise, could apply to participate in the hearing. The NEB accepted the participation of 60 interveners and 111 commenters.

D. Indigenous Consultation on the Project

16 In February 2013, after Enbridge filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the NEB's role, and the NEB's upcoming hearing process. [page1109] Between April and July 2013, it also held information meetings in three communities upon their request.

17 In September 2013, prior to the NEB hearing, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing.

18 In the meantime, the NEB's process unfolded. The Chippewas of the Thames were granted funding to participate as an intervener, and they filed evidence and delivered oral argument at the hearing delineating their concerns that the project would increase the risk of pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the Thames River for traditional purposes.

19 In January 2014, after the NEB's hearing process had concluded, the Minister of Natural Resources responded to the September 2013 letter. The response acknowledged the Government of Canada's commitment to fulfilling its duty to consult where it exists, and stated that the "[NEB's] 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" (A.R., vol. VI, at p. 47). In sum, the Minister indicated that he would be relying solely on the NEB's process to fulfill the Crown's duty to consult Indigenous peoples on the project.

III. The Decisions Below

A. *The NEB's Decision, 2014 LNCNEB 4 (QL)*

20 The NEB approved the project, finding that it was in the public interest and consistent with the requirements in the *NEB Act*. It explained that the approval "enables Enbridge to react to market forces and provide benefits to Canadians, while at the same time implementing the Project in a safe and environmentally sensitive manner" (para. 20). The NEB imposed conditions on the project related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous communities.

21 In its discussion of Aboriginal Matters (Chapter 7 of the NEB's reasons), the NEB explained that it "interprets its responsibilities, including those outlined in section 58 of the *NEB Act*, in a manner consistent with the *Constitution Act, 1982*, including section 35" (para. 293). It noted that proponents are required to make reasonable efforts to consult with Indigenous groups, and that the NEB hearing process is part of the consultative process. In deciding whether a project is in the public interest, the NEB "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors" (para. 301).

22 The NEB noted that, in this case, the scope of the project was limited. It was not an assessment of the current operating Line 9, but rather of the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow of Line 9B. Enbridge would not need to acquire any new permanent land rights for the project. Most work would take place within existing Enbridge facilities and its existing right of way. Given the limited scope of the project, the NEB was satisfied that potentially affected Indigenous groups had received adequate information about the project. It was also satisfied that potentially affected Indigenous groups had the opportunity to share their views about the project through the NEB hearing process and through discussions with Enbridge. [page1111] The NEB expected that Enbridge would continue consultations after the project's approval.

23 While Enbridge acknowledged that the project would increase the assessed risk for some parts of Line 9, the NEB found that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated" (para. 343) given the project's limited scope, the commitments made by Enbridge, and the conditions imposed by the NEB. While the project would occur on lands used by Indigenous groups for traditional purposes, those lands are within Enbridge's existing right of way. The project was therefore unlikely to impact traditional land use. The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "Enbridge will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans" (*ibid.*).

24 The NEB imposed three conditions on the project related to Indigenous communities. Condition 6 required Enbridge to file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan. Condition 24 required Enbridge to prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward. Condition 26 "directs Enbridge to include Aboriginal groups in Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response" (*ibid.*).

B. *Appeal to the Federal Court of Appeal, 2015 FCA 222, [2016] 3 F.C.R. 96*

25 The Chippewas of the Thames brought an appeal from the NEB's decision to the Federal Court of Appeal pursuant to s. 22(1) of the *NEB Act*. They [page1112] argued that the decision should be quashed, as the NEB was "without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate" (para. 2).

26 The majority of the Federal Court of Appeal (Ryer and Webb JJ.A.) dismissed the appeal. It concluded that the NEB was not required to determine, as a condition of undertaking its mandate with respect to Enbridge's

application, whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and, if so, whether the Crown had fulfilled this duty.

27 The majority also concluded that the NEB did not have a duty to consult the Chippewas of the Thames. It noted that while the NEB is required to carry out its mandate in a manner that respects s. 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring Enbridge to consult extensively with the Chippewas of the Thames and other First Nations.

28 Rennie J.A. dissented. He would have allowed the appeal. In his view, the NEB was required to determine whether the duty to consult had been triggered and fulfilled. Given that the NEB is the final decision maker for s. 58 applications, it must have the power and duty to assess whether consultation is adequate, and to refuse a s. 58 application where consultation is inadequate.

IV. Analysis

A. *Crown Conduct Triggering the Duty to Consult*

29 In the companion case to this appeal, *Clyde River*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that [page1113] implicates the Crown's duty to consult (*Clyde River*, at para. 29). A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 31; *Clyde River*, at para. 25).

30 We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).

31 As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work - the increase in flow capacity and change to heavy crude - could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

B. *Crown Consultation Can Be Conducted Through a Regulatory Process*

32 The Chippewas of the Thames argue that meaningful Crown consultation cannot be carried out [page1114] wholly through a regulatory process. We disagree. As we conclude in *Clyde River*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani*, at para. 60; *Clyde River*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

33 The majority of the Federal Court of Appeal in this case expressed concern that a tribunal like the NEB might be

charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations (para. 66). A similar concern was expressed in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, where, in a pre-*Haida* decision, the Court held that quasi-judicial tribunals like the NEB do not owe Indigenous peoples a heightened degree of procedural fairness. The Court reasoned that imposition of such an obligation would risk compromising the independence of quasi-judicial bodies like the NEB (pp. 183-84).

34 In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but [page1115] its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. *The Role of a Regulatory Tribunal When the Crown Is Not a Party*

35 At the Federal Court of Appeal, the majority and dissenting judges disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of *Carrier Sekani* and whether it overruled *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500. In *Standing Buffalo*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved Enbridge's s. 58 application (para. 59). In dissent, Rennie J.A. [page1116] reasoned that *Standing Buffalo* had been overtaken by this Court's decision in *Carrier Sekani*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112).

36 We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77).

D. Scope of the Duty to Consult

38 The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida*, at paras. 39 and 43-45).

39 Relying on *Carrier Sekani*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976" (R.F., vol. I, at para. 80).

40 While the Chippewas of the Thames identify new impacts associated with the s. 58 application that trigger the duty to consult and delimit its scope, they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation, an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

41 The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue - not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration" (*Carrier Sekani*, at para. 53 (emphasis in original)). *Carrier Sekani* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may [page1118] adversely impact on established or claimed rights" (para. 54).

42 That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234, at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly*, at para. 119).

43 Neither the Federal Court of Appeal nor the NEB discussed the degree of consultation required. That said, and as we will explain below, even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.

E. Was There Adequate Notice That the Crown Was Relying on the NEB's Process in This Case?

44 As indicated in the companion case *Clyde River*, the Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult. However, where the Crown intends to do so, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Clyde River*, at para. 23). The Crown's constitutional obligation requires a meaningful consultation process that is carried out in good faith. Obviously, notice helps ensure the appropriate participation of Indigenous groups, because it makes clear to them that consultation [page1119] is being carried out through the regulatory body's processes (*ibid.*).

45 In this case, the Chippewas of the Thames say they did not receive explicit notice from the Crown that it intended to rely on the NEB's process to satisfy the duty. In September 2013, the Chippewas of the Thames wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development requesting a formal Crown consultation process in relation to the project. It was not until January 2014, after the NEB's hearing process was complete, that the Minister of Natural Resources responded to the

Chippewas of the Thames on behalf of the Crown advising them that it relied on the NEB's process. At the hearing before this Court, the Chippewas of the Thames conceded that the Crown may have been entitled to rely on the NEB to carry out the duty had they received the Minister's letter indicating the Crown's reliance prior to the NEB hearing (transcript, at pp. 34-35). However, having not received advance notice of the Crown's intention to do so, the Chippewas of the Thames maintain that consultation could not properly be carried out by the NEB.

46 In February 2013, the NEB contacted the Chippewas of the Thames and 18 other Indigenous groups to inform them of the project and of the NEB's role in relation to its approval. The Indigenous groups were given early notice of the hearing and were invited to participate in the NEB process. The Chippewas of the Thames accepted the invitation and appeared before the NEB as an intervener. In this role, they were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. Moreover, as is evidenced from their letter of September 2013, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. In our view, the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and [page1120] accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

F. Was the Crown's Consultation Obligation Fulfilled?

47 When deep consultation is required, the duty to consult may be satisfied if there is "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). As well, this Court has recognized that the Crown may wish to "adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers" (*ibid.*). This list is neither exhaustive nor mandatory. As we indicated above, neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case. However, the Attorney General of Canada submitted before this Court that the NEB's statutory powers were capable of satisfying the Crown's constitutional obligations in this case, accepting the rights as asserted by the Chippewas of the Thames and the potential adverse impact of a spill. With this, we agree.

48 As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad [page1121] jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.

49 However, a finding that the NEB's statutory authority allowed for it to satisfy the duty to consult is not determinative of whether the Crown's constitutional obligations were upheld in this case. The Chippewas of the Thames maintain that the process carried out by the NEB was not an adequate substitute for Crown consultation. In particular, the Chippewas of the Thames argue that the NEB's regulatory process failed to engage affected Indigenous groups in a "meaningful way in order for adverse impacts to be understood and minimized" (A.F., at para. 110). They allege that the NEB's process did not "apprehend or address the seriousness" of the potential infringement of their treaty rights and title, nor did it "afford a genuine opportunity for accommodation by the Crown" (A.F., at para. 113). By minimizing the rights of the affected Indigenous groups and relying upon the proponent to mitigate potential impacts, they allege the process undertaken by the NEB allowed for nothing more than "blowing off steam" (*ibid.*).

50 Enbridge, on the other hand, argues not only that the NEB was capable of satisfying the Crown's duty to consult but that, in fact, it did so here. In support of its position, Enbridge points to the Chippewas of the Thames' early notice of, and participation in, the NEB's formal hearing process as well as the NEB's provision of written reasons. Moreover, Enbridge submits that far from failing [page1122] to afford a genuine opportunity for accommodation by

the Crown, the NEB's process provided "effective accommodation" through the imposition of conditions on Enbridge to mitigate the risk and effect of potential spills arising from the project (R.F., at para. 107).

51 In our view, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, we find that the NEB provided the Chippewas of the Thames with an adequate opportunity to participate in the decision-making process. Second, we find that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, we agree with Enbridge that, in order to mitigate potential risks to the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

52 First, unlike the Inuit in the companion case of *Clyde River*, the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

[page1123]

53 Contrary to the submissions of the Chippewas of the Thames, we do not find that the NEB minimized or failed to apprehend the importance of their asserted Aboriginal and treaty rights. Before the NEB, the Chippewas of the Thames asserted rights that had the potential to be impacted by the project: (a) Aboriginal harvesting and hunting rights; (b) the right to access and preserve sacred sites; (c) Aboriginal title to the bed of the Thames River and its related airspace or, in the alternative, an Aboriginal right to use the water, resources and airspace in the bed of the Thames River; and (d) the treaty right to the exclusive use of their reserve lands. In its written reasons, the NEB expressly recognized these rights. Moreover, in light of the rights asserted, the NEB went on to consider whether affected Indigenous groups had received adequate information regarding the project and a proper opportunity to express their concerns to Enbridge. It noted that the project was to occur within Enbridge's existing right of way on previously disturbed land. No additional Crown land was required. Given the scope of the project and its location, the NEB was satisfied that all Indigenous groups had been adequately consulted.

54 Second, the NEB considered the potential for negative impacts on the rights and interests of the Chippewas of the Thames. It identified potential consequences that could arise from either the construction required for the completion of the project or the increased risk of spill brought about by the continued operation of Line 9.

55 The NEB found that any potential negative impacts on the rights and interests of the Chippewas of the Thames from the modification of Line 9 were minimal and could be reasonably mitigated. The NEB found that it was unlikely that the completion of the project would have any impact on the traditional land use rights of Indigenous groups. Given the location of the project and its limited scope, as well as the conditions that the NEB imposed on Enbridge, the NEB was satisfied that the risk of [page1124] negative impact through the completion of the project was negligible.

56 Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given Enbridge's commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project. The risk to the rights asserted by the Chippewas of the Thames resulting from a potential spill or leak was therefore minimal.

57 Third, we do not agree with the Chippewas of the Thames that the NEB's process failed to provide an

opportunity for adequate accommodation. Having enumerated the rights asserted by the Chippewas of the Thames and other Indigenous groups, the adequacy of information provided to the Indigenous groups from Enbridge in light of those rights, and the risks to those rights posed by the construction and ongoing operation of Line 9, the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups. To facilitate ongoing communication between Enbridge and affected Indigenous groups regarding the project, the NEB imposed Condition 24. This accommodation measure required Enbridge to continue to consult with Indigenous groups and produce Ongoing Engagement Reports which were to be provided to the NEB. Similarly, Condition 29 required Enbridge to file a plan for continued engagement with persons and groups during the operation of Line 9. Therefore, we find that the NEB carried out a meaningful process of consultation including the imposition of appropriate accommodation measures where necessary.

[page1125]

58 Nonetheless, the Chippewas of the Thames argue that any putative consultation that occurred in this case was inadequate as the NEB "focused on balancing multiple interests" which resulted in the Chippewas of the Thames' "Aboriginal and treaty rights [being] weighed by the Board against a number of economic and public interest factors" (A.F., at paras. 95 and 104). This, the Chippewas of the Thames assert, is an inadequate means by which to assess Aboriginal and treaty rights that are constitutionally guaranteed by s. 35 of the *Constitution Act, 1982*.

59 In *Carrier Sekani*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River*, at para. 40; *Carrier Sekani*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida*, at para. 50).

60 Here, the NEB recognized that the impact of the project on the rights and interests of the Chippewas of the Thames was likely to be minimal. Nonetheless, it imposed conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida*, at para. 50).

[page1126]

G. Were the NEB's Reasons Sufficient?

61 Finally, in the hearing before us, the Chippewas of the Thames raised the issue of the adequacy of the NEB's reasons regarding consultation with Indigenous groups. The Chippewas of the Thames asserted that the NEB's process could not have constituted consultation in part because of the NEB's failure to engage in a *Haida*-style analysis. In particular, the NEB did not identify the strength of the asserted Aboriginal and treaty rights, nor did it identify the depth of consultation required in relation to each Indigenous group. As a consequence, the Chippewas of the Thames submit that the NEB could not have fulfilled the Crown's duty to consult.

62 In *Haida*, this Court found that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (para. 44). In *Clyde River*, we note that written reasons foster reconciliation (para. 41). Where Aboriginal and treaty rights are asserted, the provision of reasons denotes respect (*Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107, at para. 117 (CanLII)) and encourages proper decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

63 We agree with the Chippewas of the Thames that this case required the NEB to provide written reasons. Additionally, as we recognized in the companion case *Clyde River*, where affected Indigenous peoples have

squarely raised concerns about Crown consultation with the NEB, the NEB must usually provide written reasons (*Clyde River*, at para. 41). However, this requirement does not necessitate a formulaic "*Haida* analysis" in all circumstances (para. 42). Instead, where deep consultation is required and the issue of Crown consultation is raised with the NEB, the NEB will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that [page1127] the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.

64 In our view, the NEB's written reasons are sufficient to satisfy the Crown's obligation. It is notable that, unlike the NEB's reasons in the companion case *Clyde River*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

65 For these reasons, we reject the Chippewas of the Thames' assertion that the NEB's reasons were insufficient to satisfy the Crown's duty to consult.

V. Conclusion

66 We are of the view that the Crown's duty to consult was met. Accordingly, we would dismiss this appeal with costs to Enbridge.

Appeal dismissed with costs to Enbridge Pipelines Inc.

Solicitors:

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Solicitors for the respondent Enbridge Pipelines Inc.: Dentons Canada, Calgary; Enbridge Law Department, Calgary.

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Solicitor for the respondent the National Energy Board: National Energy Board, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

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Solicitor for the intervener the Mohawk Council of Kahnawà: ke: Mohawk Council of Kahnawake Legal Services, Mohawk Territory of Kahnawà: ke, Quebec.

Solicitors for the intervener the Mississaugas of the New Credit First Nation: Pape Salter Teillet, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

End of Document

TAB 4

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Heard: March 24, 2004;

Judgment: November 18, 2004.

File No.: 29419.

[page512]

[2004] 3 S.C.R. 511 | [2004] 3 R.C.S. 511 | [2004] S.C.J. No. 70 | [2004] A.C.S. no 70 | 2004 SCC 73

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia, appellants; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents. And between Weyerhaeuser Company Limited, appellant; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements, interveners.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

Summary:

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and

accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which [page513] may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably [page514] with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which predated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; referred to: *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; [page515] *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township) (2000)*, 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) (2003)*, 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen (1888)*, 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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History and Disposition:

APPEALS from a judgment of the British Columbia Court of Appeal, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147, [page516] with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by *Weyerhaeuser Co.* allowed.

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McLACHLIN C.J.I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their [page518] lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land -- title which they are in the process of trying to prove -- and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the [page519] Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida

people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

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10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be [page521] suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state [page522] and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by [page524] stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow, supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

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23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery ..., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

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C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only [page527] a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow, supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)" (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The [page528] government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and [page529] title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow, Nikal*, and *Gladstone, supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will [page530] frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 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.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest [page531] pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw, supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

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41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. 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.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed

...

... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Maori opinion on those proposals
- informing Maori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Maori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised [page536] the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British

Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[page537]

E. Do Third Parties Owe a Duty to Consult and Accommodate?

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. [page538] As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it [page539] a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do [page540] so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling, supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

60 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. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or [page541] mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. 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. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but

reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts [page542] to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

[page543]

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space... . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii

continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their [page544] rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

- (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
- (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

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(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida [page546] prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management

plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

[page547]

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

[O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits... . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting ..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

[page548]

Solicitors

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

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Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

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Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

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Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

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Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

TAB 5

Clyde River (Hamlet) v. Petroleum Geo-Services Inc., [2017] 1 S.C.R. 1069

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: November 30, 2016;

Judgment: July 26, 2017.*

File No.: 36692.

[2017] 1 S.C.R. 1069 | [2017] 1 R.C.S. 1069 | [2017] S.C.J. No. 40 | [2017] A.C.S. no 40 | 2017 SCC 40

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine Appellants v. Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-NOPEC Geophysical Company ASA (TGS) and Attorney General of Canada Respondents, and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario Interveners

(53 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Subsequent History:

* The judgment was amended on October 30, 2017, by adding the footnotes that now appear at paras. 31 and 47 of the English and French versions of the reasons.

Catchwords:

Constitutional law — Inuit — Treaty rights — Crown — Duty to consult — Decision by federal independent regulatory agency which could impact upon treaty rights — Offshore seismic testing for oil and gas resources potentially affecting Inuit treaty rights — National Energy Board authorizing project — Whether Board's approval process triggered Crown's duty to consult - Whether [page1070] Crown can rely on Board's process to fulfill its duty — Role of Board in considering Crown consultation before approval of project — Whether consultation was adequate in this case — Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5(1)(b).

Summary:

The National Energy Board (NEB), a federal administrative tribunal and regulatory agency, is the final decision maker for issuing authorizations for activities such as exploration and drilling for the production of oil and gas in certain designated areas. The proponents applied to the NEB to conduct offshore seismic testing for oil and gas

in Nunavut. The proposed testing could negatively affect the treaty rights of the Inuit of Clyde River, who opposed the seismic testing, alleging that the duty to consult had not been fulfilled in relation to it. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The NEB also concluded that the testing was unlikely to cause significant adverse environmental effects. Clyde River applied for judicial review of the NEB's decision. The Federal Court of Appeal found that while the duty to consult had been triggered, the Crown was entitled to rely on the NEB to undertake such consultation, and the Crown's duty to consult had been satisfied in this case by the NEB's process.

Held: The appeal should be allowed and the NEB's authorization quashed.

The NEB's approval process, in this case, triggered the duty to consult. Crown conduct which would trigger the duty to consult is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The NEB is not, strictly speaking, "the Crown" or an agent of the Crown. However, it acts on behalf of the Crown when making a final decision on a project application. In this context, the NEB is the vehicle through which the Crown acts. It therefore does not matter whether the final decision maker is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. [page1071] The substance of the duty does not change when a regulatory agency holds final decision-making authority.

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The NEB has broad powers to hear and determine all relevant matters of fact and law, and its decisions must conform to s. 35(1) the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty has been fulfilled. The public interest and the duty to consult do not operate in conflict here. The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project [page1072] approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review.

While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues -- the potential impact on treaty rights, and possible accommodations. As well, the changes

made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

Cases Cited

Applied: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; **distinguished:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; **referred to:** *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. [page1073] v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96; *McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1; *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Kainaiwa/Blood Tribe v. Alberta (Energy)*, 2017 ABQB 107; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263.

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Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52.

Constitution Act, 1982, s. 35.

National Energy Board Act, R.S.C. 1985, c. N-7, s. 12(2), 16.3, 24.

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Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Boivin JJ.A.), 2015 FCA 179, [2016] 3 F.C.R. 167, 474 N.R. 96, 94 C.E.L.R. (3d) 1, [2015] F.C.J. No. 991 (QL), 2015 CarswellNat 3750 (WL Can.), affirming a decision of the National Energy Board, No. 5554587, June 26, 2014. Appeal allowed.

Counsel

Nader R. Hasan, Justin Safayeni and Pam Hrick, for the appellants.

Sandy Carpenter and Ian Breneman, for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS).

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

Manizeh Fancy and Richard Ogden, for the intervener the Attorney General of Ontario.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Dominique Nouvet, Marie Belleau and Sonya Morgan, for the intervener Nunavut Tunngavik Incorporated.

Written submissions only by *David Schulze and Nicholas Dodd*, for the intervener the Makivik Corporation.

Marie-France Major and Thomas Slade, for the intervener the Nunavut Wildlife Management Board.

Kate Darling, Lorraine Land, Matt McPherson and Krista Nerland, for the intervener the Inuvialuit Regional Corporation.

Maxime Faille, Jaimie Lickers and Guy Régimbald, for the intervener the Chiefs of Ontario.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ.

I. Introduction

1 This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

2 The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

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3 In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

4 While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. *Legislative Framework*

5 The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

6 The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to [page1077] provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. *The Seismic Testing Authorization*

7 In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct

seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

8 The NEB launched an environmental assessment of the project.¹

9 Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

10 In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in [page1078] Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

... a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.

(A.R., vol. III, at p. 651)

11 These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

12 Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

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13 In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment² before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

14 In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

15 In its environmental assessment report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that [page1080] "Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. *The Judicial Review Proceedings*

16 Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin J.J.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of COGOA (2015 FCA 179, [2016] 3 F.C.R. 167). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

17 The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development [page1081] activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

18 The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?
2. Can the Crown rely on the NEB's process to fulfill the duty to consult?
3. What is the NEB's role in considering Crown consultation before approval?
4. Was the consultation adequate in this case?

A. *The Duty to Consult - General Principles*

19 The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; *Carrier Sekani*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida*, at para. 53).

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20 The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation,

depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida*, at paras. 39 and 43-45).

21 This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani*, at para. 56; *Haida*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

22 In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties [page1083] are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 12).

23 Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

24 Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstrance following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal [page1084] interests" (para. 14). No one benefits - not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities - when projects are prematurely approved only to be subjected to litigation.

B. *Can an NEB Approval Process Trigger the Duty to Consult?*

25 The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida*, at para. 35; *Carrier Sekani*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty

rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani*, at paras. 45-46).

26 In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in COGOA's requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment [page1085] of the *NEB Act*³ (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

27 Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames*, triggered the duty to consult.

28 It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of the Environment*, [1978] A.C. 359 (H.L.), at p. 397:

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The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

29 By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since - as the NEB operates independently of the Crown's ministers - no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of COGOA, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames*, "[t]he 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" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of COGOA to make final [page1087] decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. *Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?*

30 As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

31 We note that the NEB and COGOA each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River*, at para. 22). Under COGOA, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of COGOA and the public interest (ss. 5.331, 5.31(1) and 5.32). It can also require [page1088] studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).⁴

32 COGOA also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), 5(5) and 5.36(2)).

33 The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

34 In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill [page1089] the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

D. *What Is the NEB's Role in Considering Crown Consultation Before Approval?*

35 The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

36 Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "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). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the

authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani*, at para. 72).

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37 The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

38 We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames* considered that this issue was not properly before the NEB. It distinguished *Carrier Sekani* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames*, while the Crown (in the form of BC Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500, the majority of the Federal Court of Appeal in *Chippewas of the Thames* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

39 The difficulty with this view, however, is that - as we have explained - action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been [page1091] triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 78).

40 Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

41 This leaves the question of what a regulatory agency must do where the adequacy of Crown [page1092] consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood*

Tribe v. Alberta (Energy), 2017 ABQB 107, at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39).

42 This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

E. Was the Consultation Adequate in This Case?

43 The Crown acknowledges that deep consultation was required in this case, and we agree. As [page1093] this Court explained in *Haida*, deep consultation is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than ... just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.

(*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263, at para. 25)

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44 The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

45 Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source - in a treaty - of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

46 Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

47 Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida*, at para. 44). Despite the NEB's broad powers under COGOA to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. [page1095] Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument.⁵ While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani*, at para. 38).

48 The consultation in this case also stands in contrast to *Taku River* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

49 While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including [page1096] basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61). No mutual understanding on the core issues - the potential impact on treaty rights, and possible accommodations - could possibly have emerged from what occurred here.

50 The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimagatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

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51 These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

52 The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the

proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

53 For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed with costs.

[page1098]

Solicitors:

Solicitors for the appellants: Stockwoods, Toronto.

Solicitors for the respondents Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI) and TGS-NOPEC Geophysical Company ASA (TGS): Blake, Cassels & Graydon, Calgary.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener Nunavut Tunngavik Incorporated: Woodward & Company, Victoria; Nunavut Tunngavik Incorporated, Iqaluit.

Solicitors for the intervener the Makivik Corporation: Dionne Schulze, Montréal.

Solicitors for the intervener the Nunavut Wildlife Management Board: Supreme Advocacy, Ottawa.

Solicitors for the intervener the Inuvialuit Regional Corporation: Inuvialuit Regional Corporation, Inuvik; Olthuis Kleer Townshend, Toronto.

Solicitors for the intervener the Chiefs of Ontario: Gowling WLG (Canada), Ottawa.

1 This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under COGOA.

2 At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment - specifically, the "Eastern Arctic Strategic Environmental Assessment" - for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights

Clyde River (Hamlet) v. Petroleum Geo-Services Inc., [2017] 1 S.C.R. 1069

in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

- 3** *National Energy Board Act*, S.C. 1959, c. 46.
- 4** While s. 5.002 (participant funding) and s. 5.331 (public hearings) of *COGOA* were not in force at the time the NEB considered and authorized the project at issue here, they were added later (see S.C. 2015, c. 4, ss. 7 and 13).
- 5** The NEB process in *Chippewas of the Thames* was undertaken pursuant to the *NEB Act*, not *COGOA*. Under the *NEB Act*, the NEB had at the relevant time, and still has today, explicit statutory powers to conduct public hearings (s. 24) and provide participant funding for such hearings (s. 16.3). As noted above. Parliament conferred similar powers upon the NEB under *COGOA* in 2015.

TAB 6

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), [2017] 2 S.C.R. 386

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: December 1, 2016;

Judgment: November 2, 2017.

File No.: 36664.

[2017] 2 S.C.R. 386 | [2017] 2 R.C.S. 386 | [2017] S.C.J. No. 54 | [2017] A.C.S. no 54 | 2017 SCC 54

Ktunaxa Nation Council and Kathryn Teneese, on their own behalf and on behalf of all citizens of the Ktunaxa Nation Appellants; v. Minister of Forests, Lands and Natural Resource Operations and Glacier Resorts Ltd. Respondents and Attorney General of Canada, Attorney General of Saskatchewan, Canadian Muslim Lawyers Association, South Asian Legal Clinic of Ontario, Kootenay Presbytery (United Church of Canada), Evangelical Fellowship of Canada, Christian Legal Fellowship, Alberta Muslim Public Affairs Council, Amnesty International Canada, Te'mexw Treaty Association, Central Coast Indigenous Resource Alliance, Shibogama First Nations Council, Canadian Chamber of Commerce, British Columbia Civil Liberties Association, Council of the Passamaquoddy Nation at Schoodic, Katzie First Nation, West Moberly First Nations and Prophet River First Nation Interveners

(156 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

[page387]

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of religion — First Nation alleging that ski resort project would drive spirit central to their religious beliefs from their traditional territory — Provincial government approving ski resort despite claim by First Nation that development would breach right to freedom of religion — Whether Minister's decision violates s. 2(a) of Canadian Charter of Rights and Freedoms.

Constitutional law — Aboriginal rights — Crown — Duty to consult — Provincial government approving ski resort despite claim by First Nation that development would breach constitutional right to protection of Aboriginal interests — Whether Minister's decision that Crown had met duty to consult and accommodate was reasonable — Constitution Act, 1982, s. 35.

Summary:

The Ktunaxa are a First Nation whose traditional territories include an area in British Columbia that they call Qat'muk. Qat'muk is a place of spiritual significance for them because it is home to Grizzly Bear Spirit, a principal spirit within Ktunaxa religious beliefs and cosmology. Glacier Resorts sought government approval to build a year-round ski resort in Qat'muk. The Ktunaxa were consulted and raised concerns about the impact of the project, and as a result, the resort plan was changed to add new protections for Ktunaxa interests. The Ktunaxa remained unsatisfied, but committed themselves to further consultation. Late in the process, the Ktunaxa adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit from Qat'muk and therefore irrevocably impair their religious beliefs and practices. After efforts to continue consultation failed, the respondent Minister declared that reasonable consultation had occurred and approved the project. The Ktunaxa brought a petition for judicial review of the approval decision on the grounds that the project would violate their constitutional right to freedom of religion, and that the Minister's decision breached the Crown's duty of consultation and accommodation. The chambers judge dismissed the petition, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

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Per McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The Minister's decision does not violate the Ktunaxa's s. 2(a) *Charter* right to freedom of religion. In this case, the Ktunaxa's claim does not fall within the scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief. In this case, the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place.

The second part of the test, however, is not met. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. Yet the Ktunaxa are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect the presence of Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. This is a novel claim that would extend s. 2(a) beyond its scope and would put deeply held personal beliefs under judicial scrutiny. The state's duty under s. 2(a) is not to protect the object of beliefs or the spiritual focal point of worship, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination.

In addition, the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* was reasonable. The Minister's decision is entitled to deference. A court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* raised in isolation on a standard of correctness, and therefore does not decide the issue for itself. Rather, it must ask whether the decision maker's finding on the issue was reasonable.

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The constitutional guarantee of s. 35 is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

In this case, the Ktunaxa's petition asked the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence, and

submissions. Nor can administrative decision makers themselves pronounce upon the existence or scope of Aboriginal rights without specifically delegated authority. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. In the interim, while claims are resolved, consultation and accommodation are the best available legal tools for achieving reconciliation.

The record here supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to consult with the Ktunaxa on the newly formulated claim, but was told that [page390] there was no point in further consultation. The process protected by s. 35 was at an end.

The record does not suggest, conversely, that the Minister mischaracterized the right as a claim to preclude development, instead of a claim to a spiritual right. The Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in Qat'muk, which the Ktunaxa believed would be driven out by the development. Spiritual practices and interests were raised at the beginning of the process and continued to be discussed throughout. Nor did the Minister misunderstand the Ktunaxa's secrecy imperative, which had contributed to the late disclosure of the true nature of the claim: an absolute claim to a sacred site, which must be preserved and protected from permanent human habitation. The Minister understood and accepted that spiritual beliefs did not permit details of beliefs to be shared with outsiders. Nothing in the record suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred. In addition, the Minister did not treat the broader spiritual right as weak. The Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the new, absolute claim that no accommodation was possible because the project would drive Grizzly Bear Spirit from Qat'muk. The record also does not demonstrate that the Minister failed to properly assess the adverse impact of the development on the spiritual interests of the Ktunaxa.

Ultimately, the consultation was not inadequate. The Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge and the Court of Appeal. Moreover, the record does not establish that no accommodation was made with respect to the spiritual right. While the Minister did not offer the ultimate accommodation demanded by the Ktunaxa -- complete rejection of the ski resort project -- the Crown met its obligation to consult and accommodate. Section 35 guarantees a process, not a particular result. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. Section 35 does not give unsatisfied claimants a veto. Where adequate consultation has occurred, a development may proceed without consent.

[page391]

Per Moldaver and Côté JJ.: The Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 of the *Constitution Act, 1982* was met; however, the Minister's decision to approve the ski resort infringed the Ktunaxa's s. 2(a) *Charter* right to religious freedom.

The first part of the s. 2(a) test is not at issue in this case. The second part focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. Where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her religious beliefs, constituting an infringement of s. 2(a).

This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. To ensure that all religions are afforded the same level of protection, courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices. In many Indigenous religions, land is not only the site of spiritual practices; land

itself can be sacred. As such, state action that impacts land can sever the connection to the divine, rendering beliefs and practices devoid of spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with the ability to act in accordance with religious beliefs and practices.

In this case, the Ktunaxa sincerely believe that Grizzly Bear Spirit inhabits Qat'muk, a body of sacred land in their religion, and that the Minister's decision to approve the ski resort would sever their connection to Qat'muk and to Grizzly Bear Spirit. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. Their religious beliefs in Grizzly Bear Spirit would become entirely devoid of religious significance, and accordingly, their prayers, ceremonies, and rituals associated with Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. Moreover, without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, the Ktunaxa would be unable to pass on their beliefs and practices to future generations. Therefore, the Minister's decision approving the proposed development interferes with the Ktunaxa's [page392] ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial.

The Minister's decision is reasonable, however, because it reflects a proportionate balancing between the Ktunaxa's s. 2(a) *Charter* right and the Minister's statutory objectives: to administer Crown land and dispose of it in the public interest. A proportionate balancing is one that gives effect as fully as possible to the *Charter* protections at stake given the particular statutory mandate. When the Minister balances the *Charter* protections with these objectives, he must ensure that the *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives.

In this case, the Minister did not refer to s. 2(a) explicitly in his reasons for decision; however, it is clear from his reasons that he was alive to the substance of the Ktunaxa's s. 2(a) right. He recognized that the development put at stake the Ktunaxa's spiritual connection to Qat'muk.

In addition, it is implicit from the Minister's reasons that he proportionately balanced the Ktunaxa's s. 2(a) right with his statutory objectives. The Minister tried to limit the impact of the development on the substance of the Ktunaxa's s. 2(a) right as much as reasonably possible given these objectives. He provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. Ultimately, however, the Minister had two options before him: approve the development or permit the Ktunaxa to veto the development on the basis of their freedom of religion. Granting the Ktunaxa a power to veto development over the land would effectively give them a significant property interest in Qat'muk -- namely, a power to exclude others from constructing permanent structures on public land. This right of exclusion would not be a minimal or negligible restraint on public ownership. It can be implied from the Minister's reasons that permitting the Ktunaxa to dictate the use of a large tract of land according to their religious belief was not consistent with his statutory mandate. Rather, it would significantly undermine, if not completely compromise, this mandate. In view of the options open to the Minister, his decision was reasonable, and amounted to a proportionate balancing.

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Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), [2017] 2 S.C.R. 386

2 S.C.R. 713; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.

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Counsel

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Senwung Luk and Krista Nerland, for the intervener the Shibogama First Nations Council.

Neil Finkelstein, Brandon Kain and Bryn Gray, for the intervener the Canadian Chamber of Commerce.

Jessica Orkin and Adriel Weaver, for the intervener the British Columbia Civil Liberties Association.

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Written submissions only by *John Burns* and *Amy Jo Scherman*, for the intervener the Katzie First Nation.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the interveners the West Moberly First Nations and the Prophet River First Nation.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. was delivered by

McLACHLIN C.J. AND ROWE J.

I. Introduction

1 The issue in this case is whether the British Columbia Minister of Forests, Lands and Natural Resource Operations ("Minister") erred in approving a ski resort development, despite claims by the Ktunaxa that the development would breach their constitutional right to freedom of religion and to protection of Aboriginal interests under s. 35 of the *Constitution Act, 1982*.

2 The appellants represent the Ktunaxa people. The Ktunaxa's traditional territories are said to consist of land that straddles the international boundary between Canada and the United States, comprised of northeastern Washington, northern Idaho, northwestern Montana, southwestern Alberta and southeastern British Columbia.

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3 This case concerns a proposed development in an area the Ktunaxa call Qat'muk. This area is located in a Canadian valley in the northwestern part of the larger Ktunaxa territory, the Jumbo Valley, about 55 kilometres west of the town of Invermere, B.C.

4 The respondent Glacier Resorts Ltd. ("Glacier Resorts") wishes to build a year-round ski resort in Qat'muk with lifts to glacier runs and overnight accommodation for guests and staff. For more than two decades, Glacier Resorts has been negotiating with the B.C. government and stakeholders, including the Aboriginal peoples who inhabit the valley, the Ktunaxa and the Shuswap, on the terms and conditions of the development.

5 Early on in the process, the Ktunaxa and Shuswap peoples raised concerns about the impact of the resort project. The Ktunaxa asserted that Qat'muk was a place of spiritual significance for them. Notably, it is home to an important population of grizzly bears and to Grizzly Bear Spirit, or K?aw?a Tuk?u?ak?is, "a principal spirit within Ktunaxa religious beliefs and cosmology": A.F., at para. 18.

6 Consultation ensued, leading to significant changes to the original proposal. The Shuswap declared themselves satisfied with the changes and indicated their support for the proposal given the benefits it would bring to their people and the region. The Ktunaxa were not satisfied, but committed themselves to further consultation to remove

the remaining obstacles and find mutually satisfactory accommodation. Lengthy discussions ensued, and it seemed agreement would be achieved. Then, late in the process, the Ktunaxa adopted an uncompromising position - that accommodation was impossible because a ski resort with lifts to glacier runs and permanent structures would drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices. After fruitless efforts to revive the consultation process and reach agreement, the [page398] government declared that reasonable consultation had occurred and approved the project.

7 The appellants, the Ktunaxa Nation Council and the Chair of the Council, Kathryn Teneese, brought proceedings in judicial review before the British Columbia Supreme Court to overturn the approval by the Minister of the ski resort on two independent grounds: first, that the project would violate the Ktunaxa's freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*; and second, that the government breached the duty of consultation and accommodation imposed on the Crown by s. 35 of the *Constitution Act, 1982*. The chambers judge dismissed the petition for judicial review, and the Court of Appeal affirmed his decision. The Ktunaxa now appeal to this Court.

8 We would dismiss the appeal. We conclude that the claim does not engage the right to freedom of conscience and religion under s. 2(a) of the *Charter*. Section 2(a) protects the freedom of individuals and groups to hold and manifest religious beliefs: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336. The Ktunaxa's claim does not fall within the scope of s. 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project.

9 We also conclude that the Minister, while bound by s. 35 of the *Constitution Act, 1982* to consult with the Ktunaxa in an effort to find a way to accommodate their concerns, did not act unreasonably in concluding that the requirements of s. 35 had been met and approving the project.

10 We arrive at these conclusions cognizant of the importance of protecting Indigenous religious beliefs and practices, and the place of such [page399] protection in achieving reconciliation between Indigenous peoples and non-Indigenous communities.

II. Facts

11 The Jumbo Valley and Qat'muk are located in the traditional territory of the Ktunaxa. The Ktunaxa believe that Grizzly Bear Spirit inhabits Qat'muk. It is undisputed that Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices.

12 The Jumbo Valley has long been used for heli-skiing, which involves flying skiers to the top of runs by helicopter, whence they ski to the valley floor. In the 1980s, Glacier Resorts became interested in building a permanent ski resort on a site near the north end of the valley and sought government approval of the project.

13 The regulatory process for approval of the ski resort was a protracted matter, involving a number of cascading processes: (1) the Commercial Alpine Ski Policy ("CASP") process to determine sole proponent status; (2) the Commission on Resources and the Environment ("CORE") process to determine best uses of the land; (3) an environmental assessment process to resolve issues related to environmental, wildlife and cultural impact and culminating in an Environmental Assessment Certificate ("EAC"); and (4) submission of a Master Plan which, if approved, would lead to a Master Development Agreement ("MDA") between the developer and the government. These processes involved public consultation, and the Ktunaxa participated at every stage. In the course of the various reviews, many changes were made to the original plan. The entire process, until the Minister determined consultation was adequate, took place from 1991 to 2011 - over 20 years.

14 Until 2005, the Ktunaxa participated in the regulatory processes jointly with the Shuswap as part [page400] of the Ktunaxa/Kinbasket Tribal Council ("KKTC"). However, in 2005, the Shuswap parted company with the Ktunaxa over the proposed ski resort and left the KKTC. The Shuswap support the project, believing their interests have

been reasonably accommodated and that the project will be good for their community. The Ktunaxa, by contrast, say their interests cannot be accommodated and demand the project's rejection.

15 Adequacy of consultation is a central issue in this appeal. It is therefore necessary to set out in some detail what occurred at each step of the regulatory process.

A. Stage One: The CASP Process

16 In 1991, Glacier Resorts filed a formal proposal to build a year-round ski resort in the upper Jumbo Valley. The government conducted public hearings on the project under the CASP, the first phase in the regulatory approval process. The predecessor of the appellants, the KKTC, participated in public hearings in the fall of 1991. After a call for proposals, Glacier Resorts was granted sole proponent status and moved up to the next step on the regulatory ladder.

B. Stage Two: The Land Use or CORE Process

17 In 1993 and 1994, the second phase of the regulatory process began. The government conducted a site utilization review under the CORE process, with the goal of producing a new land use plan for the region focusing specifically on construction of the ski resort. The CORE process involved public hearings, which the KKTC attended as an observer. In 1994, the CORE process concluded with a report that assigned very high recreational and tourism values to the area of the proposed ski resort and recommended that the approval process for the resort include a statutory environmental assessment.

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18 In March 1995, the government released a summary of the CORE East Kootenay Land Use Plan and West Kootenay-Boundary Land Use Plan, identifying a ski resort development as an acceptable land use of the upper Jumbo Creek Valley. In July 1995, the government and Glacier Resorts entered into an interim agreement pursuant to the CASP, and the third step on the regulatory ladder, review under the *Environmental Assessment Act*, S.B.C. 1994, c. 35, began.

C. Stage Three: The Environmental Assessment Process

19 The environmental assessment process lasted almost a decade, from 1995 to 2004. The KKTC, representing both the Ktunaxa and the Shuswap peoples, and supported by government funding, was extensively involved in the environmental assessment process for the ski resort. It was invited to participate in the technical review committee and to comment on the project report. It raised the issue of "sacred values" in the valley, which were discussed in the "First Nations Socio-Economic Assessment: Jumbo Glacier Resort Project, A Genuine Wealth Analysis", a 2003 report of consultants retained by the B.C. government's Environmental Assessment Office ("EAO").

20 In parallel, Glacier Resorts submitted the information required to complete the environmental review under the new *Environmental Assessment Act*, S.B.C. 2002, c. 43, in a comprehensive "Project Report" in December 2003 that was accepted by the EAO in the following months.

21 In response to this report, the KKTC submitted a document to the EAO entitled "Jumbo Glacier Resort Project: Final Comments on Measures Proposed to Address Issues Identified by the Ktunaxa Nation" stating that the Jumbo Valley area is invested with sacred values, and Glacier Resorts should be required to negotiate an Impact Management [page402] and Benefits Agreement ("IMBA") to mitigate the potential impact of the ski resort. The KKTC submitted detailed comments, under protest, on the measures proposed by the EAO to address the concerns of the valley's Indigenous inhabitants.

22 On October 4, 2004, an EAC was issued, approving the development subject to numerous conditions. Among them was a requirement that Glacier Resorts negotiate with the KKTC and attempt to conclude an IMBA before the

next stage of the regulatory process. The KKTC did not seek judicial review of the conditional EAC. At this point, from the government's perspective, the consultation was proceeding smoothly toward mutually acceptable accommodation.

D. Stage Four: Development of a Resort Master Plan

23 The regulatory process moved to the fourth stage - the development of a Master Plan and an MDA for the ski resort.

24 Glacier Resorts submitted a revised draft Master Plan in 2005. The process of reviewing this plan took place from December 2005 to July 2007.

25 At the outset of the review process, the government offered to enter into additional consultations with the Ktunaxa Nation Council, which was formed following the withdrawal of the Shuswap from the KKTC. In June 2006, a consultant retained by the Ktunaxa and funded by the government prepared a "Gap Analysis" to identify what the Ktunaxa considered to be the outstanding issues for discussion. The Gap Analysis highlighted the need for further information to facilitate discussion on: (1) contemporary land and resource use by the Ktunaxa of the Jumbo Valley; (2) the effectiveness of proposed mitigation measures to reduce disturbance, displacement and mortality impacts to key wildlife populations from road traffic on the access road; and (3) project-induced socio-economic effects to the regional economy, including land use and cost of living that might affect Ktunaxa well-being. One of the [page403] 34 issues identified in the Gap Analysis was that the Jumbo Valley is an "area of cultural significance and has sacred values": chambers judge's reasons, 2014 BCSC 568, 306 C.R.R. (2d) 211, at para. 69. In this regard, the analysis stated that the "cultural impacts remain unassessed" (*ibid.*).

26 The Ktunaxa met with the Minister and they agreed on further consultation built around the Gap Analysis. As part of this process, the cultural significance/sacred values issue was discussed at the "Land Issues" workshop held on October 12 and 13, 2006 in Cranbrook, B.C. Following the workshop, the Ktunaxa consultant circulated a document entitled "Working Outline: Ktunaxa-British Columbia Accommodation", which identified the cultural and sacred significance of the valley as an issue to be addressed, and suggested a conceptual framework for accommodating the Ktunaxa land use concerns through: (a) a fee simple land transfer to the Ktunaxa; (b) the establishment of a land reserve; and (c) the establishment of a conservancy area in proximity to the ski-run site. The land use issues workshop was followed by workshops in November and December 2006 and January 2007. These addressed grizzly bear, other wildlife, and residual issues.

27 In November 2006, prospects for agreement on accommodation looked bright. The Minister received a copy of a letter where the Ktunaxa informed Glacier Resorts that they had made "considerable progress in setting up a process for the negotiation of an [IMBA]": chambers judge's reasons, at para. 76. Only two issues appeared to stand in the way of final agreement - "funding" and "the outstanding issue of unpaid monies" (*ibid.*). In April 2007, Glacier Resorts wrote the Minister that it believed it had reached an "agreement in principle" with the Ktunaxa (*ibid.*). On July 12, the Minister approved a Master Plan, which outlined the nature, [page404] scope and pace of the proposed development, identified land tenure requirements, and incorporated recommendations arising from consultation with Glacier Resorts, the public and First Nations and from the environmental review process.

28 The Minister advised the Ktunaxa that Master Plan approval did not preclude additional mitigation measures based on ongoing consultation. In the months following the approval, the discussion turned to economic issues. The Minister made an accommodation proposal to the Ktunaxa in December 2007, which included \$650,000 in economic benefits to be taken in cash or Crown land, plus nine non-financial accommodations. In February 2008, the Ktunaxa rejected the proposed accommodation on the basis that (1) the financial component was "grossly insufficient" and (2) it was inappropriate for the Minister to provide identical financial accommodation to the Shuswap, given the Ktunaxa's "far greater history in the Jumbo area": chambers judge's reasons, at para. 82. The rejection letter did not mention the sacred nature of the Jumbo Valley or Grizzly Bear Spirit.

29 The Minister came back in September 2008 with a second offer of accommodation to the Ktunaxa, in the form

of revenue sharing in an Economic and Community Development Agreement. The Ktunaxa rejected this proposal in December. While the negotiations suggested that an agreement could be reached regarding the construction of the ski resort project, the Ktunaxa rejected this proposal on the basis that the Jumbo Valley is a "place unique and sacred" to them: chambers judge's reasons, at para. 83. Again, there was no special mention of Grizzly Bear Spirit.

30 Discussions continued. In February 2009, the Ktunaxa gave formal notice to the Minister that they wished to enter into a process to negotiate an [page405] accommodation and benefits agreement. In April, the Minister accepted and offered additional capacity funding for the process. In May, the Ktunaxa provided the Minister with a list of outstanding issues and possible accommodation measures to be discussed, including land transfers, land reserves, a wildlife conservancy, development-free buffer zones beside the access road, access rights in the controlled recreation area, a stewardship framework for economic compensation, revenue sharing, ongoing supervision of environmental commitments, and other measures. The Ktunaxa did not place the sacred nature of the Jumbo Valley on the list of outstanding issues.

31 On June 3, 2009, the Minister advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were "primarily interest-based rather than legally driven by asserted Aboriginal rights and title claims": chambers judge's reasons, at para. 86. Accordingly, he was of the view that approval for the resort could be given. The Minister expressed the intention to continue negotiating a benefits agreement with the Ktunaxa.

32 At this point, the big issues appeared to have been resolved. In deference to the Ktunaxa claim, the MDA changed the scope of the proposed development and added new protections for Ktunaxa interests. The size of the controlled recreational area was reduced by approximately 60% and the total resort area was reduced to approximately 104 hectares. Protections for Ktunaxa access and activities were put in place, and environmental protections were established.

33 To accommodate the Ktunaxa's spiritual concerns, changes had been proposed to provide special protection of grizzly bear habitat:

- * The lower Jumbo Creek area was removed from the recreation area because it was perceived as having greater visitation potential from grizzly bears;

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- * Ski lifts were removed on the west side of the valley, where impact to grizzly bear habitat was expected to be greatest; and
- * The province committed to pursuing a Wildlife Management Area to address potential impacts in relation to grizzly bears and Aboriginal claims relating to the spiritual value of the valley.

34 On June 8, 2009, five days after the Minister had concluded that all major issues had been resolved, the Ktunaxa responded with a table of outstanding concerns. They did not list the sacred nature of the area or a threat to the grizzly bear population among their concerns.

35 At meetings on June 9 and 10, however, the Ktunaxa took a very different and uncompromising position regarding the spiritual value of Qat'muk. They asserted that the consultation process was deficient, not because interest-based issues like money and land reserves had not been concluded, but because the process had not properly considered information that the Jumbo Valley was a sacred site. They advised the Minister that only certain members of the community, knowledge keepers, possessed information about these values. Elder Chris Luke Sr. was better placed to speak to the issue. The Minister agreed to meet Mr. Luke on June 22, 2009 but the meeting did not proceed on that date. The Minister agreed to extend the consultation process with the Ktunaxa until at least December 2009 to specifically address the issue of the sacred nature of the Jumbo Valley.

36 After ongoing efforts to arrange a meeting about sacred values, the Minister was finally able to meet with the

Ktunaxa and Mr. Luke on September 19, 2009 in Cranbrook. Mr. Luke, through translators, advised the Minister that Qat'muk was "a life and death matter", that "Jumbo is one of the major spiritual places", and that to say the sacredness of the area for the Ktunaxa was important would be [page407] an understatement: chambers judge's reasons, at para. 94. He stated that any movement of earth and the construction of permanent structures would desecrate the area and destroy the valley's spiritual value. The Ktunaxa at the meeting told the Minister that there was no middle ground regarding the proposed resort. Simply put, no accommodation was possible. The Ktunaxa confirmed this position in a second meeting in Creston, B.C., on December 7, 2009. It emerged that the revelation that led to the position that permanent structures would desecrate and irrevocably devalue the sacred site came to Mr. Luke in 2004, but that health problems and secrecy concerns had prevented him from disclosing the revelation to others until 2009.

37 The Minister persisted. After further study of the Ktunaxa's spiritual claims, on June 11, 2010 he sent the Ktunaxa a 71-page draft "Consultation/ Accommodation Summary" that included seven pages devoted to describing the consultation and accommodation specifically related to the Ktunaxa's assertions regarding the sacred nature of the Jumbo Valley and invited the Ktunaxa's comments. He met with the Ktunaxa on July 8, 2010 and revisions were made to the document.

38 The Ktunaxa responded with a 40-page document that devoted the first page and a half to sacred values. A few months later, in November 2010, the Ktunaxa issued the "Qat'muk Declaration" (Schedule "E" of 2014 BCSC 568, at pp. 115-16 (CanLII)) - a unilateral declaration of rights based on "pre-existing sovereignty". The Qat'muk Declaration mapped an area in which the Ktunaxa would not permit development. No disturbance or alteration of the ground would be permitted within an area identified as the "refuge area". Construction of buildings with permanent foundations or permanent human habitation was forbidden within the refuge area and [page408] the access road and buffer area. This amounted to saying that the resort could not proceed, as the proposed resort was partially within the refuge area and its access road ran through the buffer area.

39 Consistent with the Qat'muk Declaration, the Ktunaxa now took the position that negotiations were over. The only point of further discussion was to make decision makers understand why the proposed resort could not proceed. The Minister continued to explore potential mitigation and accommodation measures through additional consultations, without success. Negotiations were at an end.

40 On March 20, 2012, the Minister signed the MDA with Glacier Resorts. The MDA contained a number of measures responding to concerns raised by the Ktunaxa during the consultations: chambers judge's reasons, at paras. 236-39.

41 In summary, the Ktunaxa played an active part in all phases of the lengthy regulatory process leading to the approval of the resort project. As a result of the consultation that occurred during the regulation process, the resort plan was significantly reduced in scope; safeguards for the grizzly bear population and the spiritual interests of the Ktunaxa were put in place; and economic and interest-based issues, including compensation, were discussed. Areas of significant frequentation by grizzly bears were removed from the project. Progress was made and agreement seemed imminent.

42 This trajectory toward accommodation ended in 2010, with the issuance of the Qat'muk Declaration. The Ktunaxa said at the September 2009 meeting that their spiritual concerns could not be accommodated. The 2010 Qat'muk Declaration unequivocally changed the process from a search for [page409] accommodation to rejection of the entire project; from a search for protection of spiritual values inhering in the valley and the grizzly bear population, to the position that any permanent structures on the proposed resort site would drive out Grizzly Bear Spirit and destroy the foundation of Ktunaxa spiritual practice.

43 The stance taken by the Ktunaxa in September 2009 and again in late 2010 with the issuance of the Qat'muk Declaration amounted, in effect, to a different and uncompromising claim regarding suitable accommodation. The claim now was not a claim to generalized spiritual values that could be accommodated by measures like land reserves, economic payments and environmental protections. Instead, it was an absolute claim to a sacred site,

which must be preserved and protected from permanent human habitation. To identify this claim - which first arose in September 2009 and was affirmed in December 2009 and again by the Qat'muk Declaration - we refer to it below as the "Late-2009 Claim". There was no way the proposed resort could be reconciled with this claim. The Minister made efforts to continue consultation, but, not surprisingly, they failed. In 2011, the Minister concluded that sufficient consultation had occurred and approved the resort development.

III. Decisional History

A. *The Minister's Rationale*

44 On March 20, 2012, the Minister approved the resort MDA and issued the Rationale for his decision: Schedule "F" of 2014 BCSC 568, at pp. 117-24 (CanLII) ("Rationale"). The Rationale in turn referenced the detailed Consultation/Accommodation Summary, which was finalized in March 2011: see R.R. (Minister), at pp. 66-154.

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45 The Minister stated that while the Aboriginal claims to the area remained to be proven, he was required to give them due respect and recognition, and consult with the groups with a view to accommodating their interests. The Shuswap had concluded that sufficient consultation had occurred, but the Ktunaxa had not.

46 The Minister stated that he recognized the genuinely sacred values at stake for the Ktunaxa leadership and knowledge keepers. He stated that it was not clear whether the Ktunaxa spiritual claims would be found to be a constitutionally protected right or whether the claimed right could be reconciled with other claimed Aboriginal rights and Ktunaxa access to the valley for a variety of traditional and modern uses, including hunting, gathering and fishing. He viewed the claim as weak, due to lack of indication that the claimed right was part of an Aboriginal tradition, practice or activity integral to the Ktunaxa culture, and the fact that details of the spiritual interest were not shared with or known to the general Ktunaxa population. (The latter point must refer to the Late-2009 Claim, since the more general spiritual claims that had been advanced from the start of the process were broadly known and shared.)

47 The Minister reviewed the extensive record of consultation with the Ktunaxa over the past two decades, and noted the many accommodations and adjustments that had been made in an effort to accommodate their interests. These included a 60% reduction in the resort development area, on-site environmental monitors, continued use of the area for traditional practices, and measures designed to reduce the impact of the development on grizzly bears. The lower Jumbo Creek area and a ski lift on the west side of the valley had been removed from the development because of perceived greater visitation by grizzly bears in these areas. A wildlife management area had been established to address potential impacts in relation to grizzly bears and the [page411] spiritual value of the valley. And the province committed to continue to proactively manage the grizzly bear population through existing legislation and policies. The Minister stated in his Rationale:

For these reasons I have concluded that, on balance, the commitments and strategies in place are reasonable and minimize the potential impact to the environment and specifically, to Grizzly bear habitat.

[p. 124]

48 The Minister concluded that overall, consultation had been at the "deep end of the consultation spectrum" (p. 123). This, combined with the accommodation measures put in place, was adequate "in respect of those rights for which the strength of claim is strong, and for which potential impacts of the project could be significant" (*ibid.*). The extensive accommodation measures relating to the continued ability of the Ktunaxa to continue to exercise their Aboriginal rights, balanced against the societal benefits of the project (\$900 million in capital investment and 750 to 800 permanent, direct jobs), were reasonable.

49 Noting once again the extensive consultation and assessment processes that had taken place, the Minister stated that he had decided to approve the MDA for the Jumbo Glacier Resort.

B. *The Chambers Judge's Reasons*

50 The Ktunaxa sought judicial review of the Minister's decision. They filed a petition, claiming the decision violated their freedom of religion guaranteed by s. 2(a) of the *Charter*, and breached the Crown's duty to consult and accommodate their Aboriginal rights under s. 35 of the *Constitution Act, 1982*.

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51 The chambers judge, Savage J. (as he then was), dismissed the petition. On the *Charter* claim, he held that s. 2(a) protects against state coercion or constraint on individual conduct, but does not encompass "subjective loss of meaning" to a religion, without associated coercion or constraint on conduct (para. 299). He therefore rejected the claim that the state had a duty under s. 2(a) to stop the development because the Ktunaxa believe it would undermine their religious beliefs and practices.

52 The chambers judge went on to say that if he were wrong in this conclusion about the scope of s. 2(a), the Minister's actions and accommodations represented a reasonable balancing of the s. 2(a) value and the statutory objectives, and thus did not unreasonably trench on freedom of religion.

53 On the issue of consultation, the chambers judge found that the consultation process undertaken by the Minister was reasonable and appropriate, and that the Minister's proposed accommodations fell within a range of reasonable responses which upheld the honour of the Crown and satisfied the Crown's duty to consult and accommodate under s. 35 of the *Constitution Act, 1982*.

C. *The Court of Appeal*

54 The Court of Appeal dismissed the appeal: 2015 BCCA 352, 387 D.L.R. (4th) 10.

55 The Court of Appeal held that the Minister's decision did not violate the Ktunaxa's right to freedom of religion under s. 2(a) of the *Charter*. The chambers judge's view that s. 2(a) protected only against state coercion or constraint on individual conduct was too narrow; s. 2(a) freedom implies the vitality of a religious community as a whole. The proper test was whether "the subjective loss of meaning more than trivially or substantially interfere[d] with the *communal dimension* of the s. 2(a) right [page413] by diminishing the vitality of the Ktunaxa religious community through a disruption of the 'deep linkages' between the asserted religious belief and its manifestation through communal Ktunaxa institutions": para. 67 (emphasis in original). However, protection of the communal dimension of freedom of religion does not extend to "restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning" (para. 73). The court found that the Ktunaxa cannot, in the name of their own religious freedom, require others who do not share that belief to modify their behaviour. As stated in *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 62, "[c]onduct which would potentially cause harm to or interference with the rights of others [may not] be protected."

56 On s. 35, the Court of Appeal agreed with the chambers judge's conclusion that "the process of consultation and the accommodation offered meets the reasonableness standard" (para. 93). It concluded that the chambers judge did not err in law by finding reasonable the Minister's characterization of the potential Aboriginal right as a right to "preclude permanent development" rather than a right to "exercise spiritual practices which rely on a sacred site and require its protection" (para. 81). Nor did the chambers judge understate the scale of the alleged infringement to the Ktunaxa and apply too light a standard of consultation; in fact, deep consultation consistent with an important impact took place. Finally, the chambers judge did not err in finding that the Ktunaxa first asserted the permanent nature of the proposed project would infringe their s. 35 Aboriginal rights in 2009. In fact, the chambers judge found that what was first asserted in 2009 was the position that "no accommodation" was possible - a finding

supported by the record.

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IV. Issues

57

- A. Did the Minister's decision violate the Ktunaxa's freedom of conscience and religion?
- B. Was the Minister's decision that the Crown had met its duty to consult and accommodate under s. 35 of the *Constitution Act, 1982* reasonable?

V. Analysis

A. *Did the Minister's Decision Violate the Ktunaxa's Freedom of Conscience and Religion?*

(1) The Claim

58 The Ktunaxa contend that the Minister's decision to allow the Glacier Resorts project to proceed violates their right to freedom of conscience and religion protected by s. 2(a) of the *Charter*. This claim is asserted independently from the Ktunaxa's s. 35 claim. Even if the Minister undertook adequate consultation under s. 35 of the *Constitution Act, 1982*, his decision could be impeached on the ground that it violated the Ktunaxa's *Charter* guarantee of freedom of religion. We note that with respect to the s. 2(a) claim, the Ktunaxa stand in the same position as non-Aboriginal litigants.

59 The Ktunaxa assert that the project, and in particular permanent overnight accommodation, will drive Grizzly Bear Spirit from Qat'muk. As Grizzly Bear Spirit is central to Ktunaxa religious beliefs and practices, its departure, they say, would remove the basis of their beliefs and render their practices futile. The Ktunaxa argue that the vitality of their religious community depends on maintaining the presence of Grizzly Bear Spirit in Qat'muk.

60 The Ktunaxa fault the Minister for not having considered their right to freedom of religion in [page415] the course of his decision. The Ktunaxa raised the potential breach of s. 2(a) before the Minister. Nevertheless, the Minister's Rationale for approving the Jumbo Glacier Resort did not analyze the s. 2(a) claim. The Minister should have discussed the s. 2(a) claim. However, his failure to conduct an analysis of the Ktunaxa's right to freedom of religion is immaterial because the claim falls outside the scope of s. 2(a). This was the finding of both the chambers judge and the Court of Appeal and we agree, though for somewhat different reasons.

(2) The Scope of Freedom of Religion

61 The first step where a claim is made that a law or governmental act violates freedom of religion is to determine whether the claim falls within the scope of s. 2(a). If not, there is no need to consider whether the decision represents a proportionate balance between freedom of religion and other considerations: *Amselem*, at para. 181.

62 The seminal case on the scope of the *Charter* guarantee of freedom of religion is this Court's decision in *Big M Drug Mart*. The majority of the Court, per Justice Dickson (as he then was), defined s. 2(a) as protecting "the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (p. 336).

63 So defined, s. 2(a) has two aspects - the freedom to hold religious beliefs and the freedom to manifest those beliefs. This definition has been adopted in subsequent cases: *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 58; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16,

[2015] 2 S.C.R. 3, at para. 68; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 159; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 32; *Amselem*, at para. 40.

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64 These two aspects of the right to freedom of religion - the freedom to hold a religious belief and the freedom to manifest it - are reflected in international human rights law. Article 18 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948) ("UDHR"), first defined the right in international law in these terms: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

65 Similarly, art. 18(1) of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("ICCPR"), defined the right to freedom of religion as consisting of "freedom to have or to adopt a religion or belief of [one's] choice" and "freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching". The relevance of art. 18(1) of the ICCPR to s. 2(a) of the *Charter* was considered by a noted human rights jurist, Tarnopolsky J.A., in *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 (C.A.). He observed that art. 18(1) defined freedom of religion "as including not only the right to have or adopt a religion or belief of one's choice, but also to be able to 'manifest' the religion or belief" (p. 421 (emphasis deleted)), and added that s. 2(a) of the *Charter* - then a new and judicially unconsidered feature of Canada's Constitution - should be "interpreted in conformity with our international obligations" (p. 420). On further appeal to this Court, Dickson C.J. approved Tarnopolsky J.A.'s approach to s. 2(a), noting that his definition of freedom of religion "to include the freedom to manifest and practice one's religious beliefs ... anticipated conclusions which were reached by this Court in the *Big M Drug Mart Ltd.* case": *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 735. Later, in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349, Dickson C.J. proposed, as Tarnopolsky J.A. had done, that the *Charter* be presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. The Court has since [page417] adopted this interpretive presumption: *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at paras. 22-23 and 25; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38.

66 The two aspects of freedom of religion enunciated in the UDHR and ICCPR are also found in international human rights instruments to which Canada is not a party. Article 9(1) of the *European Convention on Human Rights*, 213 U.N.T.S. 221, recognizes everyone's right to "freedom of thought, conscience and religion" including "freedom ... to manifest [one's] religion or belief, in worship, teaching, practice and observance". The *American Convention on Human Rights*, 1144 U.N.T.S. 123, provides, at art. 12(1), that "[e]veryone has the right to freedom of conscience and of religion" including "freedom to profess or disseminate one's religion or beliefs", while art. 12(3) indicates that the "[f]reedom to manifest one's religion and beliefs" may be subject only to lawful limitations. While these instruments are not binding on Canada and therefore do not attract the presumption of conformity, they are nevertheless important illustrations of how freedom of religion is conceived around the world.

67 The scope of freedom of religion in these instruments is expressed in terms of the right's two aspects: the freedom to believe and the freedom to manifest belief. This Court's definition from *Big M Drug Mart*, consistently applied in later cases, is in keeping with this conception of the right's scope. The question, then, is whether the Ktunaxa's claim falls within that scope.

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(3) Application to This Case

68 To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she

sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief: see *Multani*, at para. 34.

69 In this case, it is undisputed that the Ktunaxa sincerely believe in the existence and importance of Grizzly Bear Spirit. They also believe that permanent development in Qat'muk will drive this spirit from that place. The chambers judge indicated that Mr. Luke came to this belief in 2004 but whether this belief is ancient or recent plays no part in our s. 2(a) analysis. The *Charter* protects all sincere religious beliefs and practices, old or new.

70 The second part of the test, however, is not met in this case. This stage of the analysis requires an objective analysis of the interference caused by the impugned state action: *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 24. The Ktunaxa must show that the Minister's decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief. But the Minister's decision does neither of those things. This case is not concerned with either the freedom to hold a religious belief or to manifest that belief. The claim is rather that s. 2(a) of the *Charter* protects the presence of Grizzly Bear Spirit in Qat'muk. This is a novel claim and invites this Court to extend s. 2(a) beyond the scope recognized in our law.

71 We would decline this invitation. The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does [page419] not protect the spiritual focal point of worship. We have been directed to no authority that supports the proposition that s. 2(a) protects the latter, rather than individuals' liberty to hold a belief and to manifest that belief. Section 2(a) protects the freedom to pursue practices, like the wearing of a kirpan in *Multani* or refusing to be photographed in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. And s. 2(a) protects the right to freely hold the religious beliefs that motivate such practices. In this case, however, the appellants are not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, they seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it. That claim is beyond the scope of s. 2(a).

72 The extension of s. 2(a) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs. In *Amselem*, this Court chose to protect *any* sincerely held belief rather than examining the specific merits of religious beliefs:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

(para. 50, per Iacobucci J.)

The Court in *Amselem* concluded that such an inquiry into profoundly personal beliefs would be inconsistent with the principles underlying freedom of religion (para. 49).

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73 The Ktunaxa argue that the *Big M Drug Mart* definition of the s. 2(a) guarantee has been subsequently enriched by an understanding that freedom of religion has a communal aspect, and that the state cannot act in a way that constrains or destroys the communal dimension of a religion. Grizzly Bear Spirit's continued occupation of Qat'muk is essential to the communal aspect of Ktunaxa religious beliefs and practices, they assert. State action that drives

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Grizzly Bear Spirit from Qat'muk will, the Ktunaxa say, "constrain" or "interfere" with - indeed destroy - the communal aspect of s. 2(a) protection.

74 The difficulty with this argument is that the communal aspect of the claim is also confined to the scope of freedom of religion under s. 2(a). It is true that freedom of religion under s. 2(a) has a communal aspect: *Loyola; Hutterian Brethren*, at para. 89; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650. But the communal aspects of freedom of religion do not, and should not, extend s. 2(a)'s protection beyond the freedom to have beliefs and the freedom to manifest them.

75 We conclude that s. 2(a) protects the freedom to have and manifest religious beliefs, and that the Ktunaxa's claim does not fall within these parameters. It is therefore unnecessary to consider whether the Minister's decision represents a reasonable balance between freedom of religion and other considerations.

B. Was the Minister's Decision That the Crown Had Met Its Duty to Consult and Accommodate Under Section 35 of the Constitution Act, 1982 Reasonable?

76 The Ktunaxa say that the Minister's decision that consultation and accommodation had been sufficient to satisfy s. 35 was unreasonable, which in turn rendered his decision to approve the resort unreasonable and invalid.

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77 The Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 62. The chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

(1) The Legal Requirements of the Section 35 Consultation and Accommodation Process

78 The constitutional guarantee of s. 35 of the *Constitution Act, 1982* is not confined to treaty rights or to proven or settled Aboriginal rights and title claims. Section 35 also protects the potential rights embedded in as-yet unproven Aboriginal claims and, pending the determination of such claims through negotiation or otherwise, may require the Crown to consult and accommodate Aboriginal interests: *Haida Nation*, at paras. 25 and 27. Where, as here, a permit is sought to use or develop lands subject to an unproven Aboriginal claim, the government is required to consult with the affected Aboriginal group and, where appropriate, accommodate the group's claim pending its final resolution. This obligation flows from the honour of the Crown and is constitutionalized by s. 35.

79 The extent of the Crown's duty to consult and accommodate in the case of an unproven Aboriginal claim varies with the *prima facie* strength of the claim and the effect the proposed development or use will have on the claimed Aboriginal right: *Haida Nation*, at paras. 43-44. A strong *prima facie* claim and significant impact may require deep consultation. A weak claim or transient impact may [page422] attract a lighter duty of consultation. The duty is to consult and, where warranted, accommodate. Section 35 guarantees a process, not a particular result. The Aboriginal group is called on to facilitate the process of consultation and accommodation by setting out its claims clearly (*Haida Nation*, at para. 36) and as early as possible. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. The ultimate obligation is that the Crown act honourably.

80 The holdings of *Haida Nation*, as they pertain to this case, may be summarized as follows:

- * The duty to consult and, if appropriate, accommodate pending the resolution of claims is grounded in the honour of the Crown, and must be understood generously to achieve reconciliation (paras. 16-17).

- * The Crown, acting honourably, cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation"; it must consult and, if appropriate, accommodate the Aboriginal interest (para. 27).
- * The duty to consult is triggered by the Crown having "[k]nowledge of a credible but unproven claim" (para. 37).
- * The content of the duty to consult and accommodate varies with the strength of the claim and the significance of the potential adverse effect on the Aboriginal interest (para. 39). Cases with a weak claim, a limited Aboriginal right, or a minor intrusion may require only notice, information, and response to queries. At the other end of the spectrum, a strong *prima facie* case with significant intrusion on an important right may require the Crown to engage in "deep consultation" and to accommodate the interest [page423] by altering its plans. Between these extremes lie other cases (paras. 43-45).
- * When the consultation process suggests amendment of Crown policy, a duty to reasonably accommodate the Aboriginal interest may arise (para. 47).
- * The duty to consult and, if appropriate, accommodate the Aboriginal interest is a two-way street. The obligations on the Crown are to provide notice and information on the project, and to consult with the Aboriginal group about its concerns. The obligations on the Aboriginal group include: defining the elements of the claim with clarity (para. 36); not frustrating the Crown's reasonable good faith attempts; and not taking unreasonable positions to thwart the Crown from making decisions or acting where, despite meaningful consultation, agreement is not reached (para. 42).
- * The duty to consult and, if appropriate, accommodate Aboriginal interests may require the alteration of a proposed development. However, it does not give Aboriginal groups a veto over developments pending proof of their claims. Consent is required only for *proven* claims, and even then only in certain cases. What is required is a balancing of interests, a process of give and take (paras. 45 and 48-50).

81 The steps in a consultation process may be summarized as follows:

1. Initiation of the consultation process, triggered when the Crown has knowledge, whether real [page424] or constructive, of the potential existence of an Aboriginal right or treaty right and contemplates conduct that might adversely affect it;
2. Determination of the level of consultation required, by reference to the strength of the *prima facie* claim and the significance of the potential adverse impact on the Aboriginal interest;
3. Consultation at the appropriate level; and
4. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.

This summary of the steps in a consultation process is offered as guidance to assist parties in ensuring that adequate consultation takes place, not as a rigid test or a perfunctory formula. In the end there is only one question - whether in fact the consultation that took place was adequate.

(2) Was the Minister's Conclusion That the Consultation Process Satisfied Section 35 Reasonable?

82 After an extensive regulatory process and negotiations with the Ktunaxa spanning two decades, the Minister concluded that the s. 35 duty of consultation and accommodation had been satisfied, and authorized the Glacier Resorts ski project. As noted, a court reviewing an administrative decision under s. 35 does not decide the constitutional issue *de novo* for itself. Rather, it must ask whether the administrative decision maker's finding on the

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issue was reasonable. The question before us is whether the Minister's conclusion, that consultation and accommodation sufficient to satisfy s. 35 had occurred, was reasonable.

83 The s. 35 obligation to consult and accommodate regarding unproven claims is a right to a process, not to a particular outcome. The question is [page425] not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. While the hope is always that s. 35 consultation will lead to agreement and reconciliation of Aboriginal and non-Aboriginal interests, *Haida Nation* makes clear that in some situations this may not occur, and that s. 35 does not give unsatisfied claimants a veto over development. Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.

84 The Ktunaxa's petition asked the chambers judge to issue a declaration that Qat'muk is sacred to the Ktunaxa and that permanent construction is banned from that site. In effect, they ask the courts, in the guise of judicial review of an administrative decision, to pronounce on the validity of their claim to a sacred site and associated spiritual practices. This declaration cannot be made by a court sitting in judicial review of an administrative decision to approve a development. In judicial proceedings, such a declaration can only be made after a trial of the issue and with the benefit of pleadings, discovery, evidence and submissions. Aboriginal rights must be proven by tested evidence; they cannot be established as an incident of administrative law proceedings that centre on the adequacy of consultation and accommodation. To permit this would invite uncertainty and discourage final settlement of alleged rights through the proper processes. Aboriginal rights claims require that proper evidence be marshalled to meet specific legal tests in the context of a trial: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 109 and 143; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 26; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 26.

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85 Without specifically delegated authority, administrative decision makers cannot themselves pronounce upon the existence or scope of Aboriginal rights, although they may be called upon to assess the *prima facie* strength of unproven Aboriginal claims and the adverse impact of proposed government actions on those claims in order to determine the depth of consultation required. Indeed, in this case, the duty to consult arises regarding rights that remain unproven: *Haida Nation*, at para. 37.

86 The Ktunaxa reply that they must have relief now, for if development proceeds Grizzly Bear Spirit will flee Qat'muk long before they are able to prove their claim or establish it under the B.C. treaty process. We are not insensible to this point. But the solution is not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims. Injunctive relief to delay the project may be available. Otherwise, the best that can be achieved in the uncertain interim while claims are resolved is to follow a fair and respectful process and work in good faith toward reconciliation. Claims should be identified early in the process and defined as clearly as possible. In most cases, this will lead to agreement and reconciliation. Where it does not, mitigating potential adverse impacts on the asserted right ultimately requires resolving questions about the existence and scope of unsettled claims as expeditiously as possible. For the Ktunaxa, this may seem unsatisfactory, indeed tragic. But in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.

[page427]

87 On the face of the matter, the Minister's decision that consultation sufficient to satisfy s. 35 had taken place does not appear to be unreasonable. The Ktunaxa spiritual claims to Qat'muk had been acknowledged from the outset. Negotiations spanning two decades and deep consultation had taken place. Many changes had been made to the project to accommodate the Ktunaxa's spiritual claims. At a point when it appeared all major issues had been resolved, the Ktunaxa, in the form of the Late-2009 Claim, adopted a new, absolute position that no accommodation was possible because permanent structures would drive Grizzly Bear Spirit from Qat'muk. The Minister sought to

consult with the Ktunaxa on the newly formulated claim, but was told that there was no point in further consultation given the new Ktunaxa position that no accommodation was possible and that only total rejection of the project would satisfy them. The process protected by s. 35 was at an end.

88 We conclude that on its face, the record supports the reasonableness of the Minister's conclusion that the s. 35 obligation of consultation and accommodation had been met. However, it is necessary to consider the arguments advanced by the Ktunaxa in support of their position that this conclusion was unreasonable.

89 The Ktunaxa in their factum say that the consultation process was inadequate to satisfy s. 35 because: (1) the government failed to properly characterize the right; (2) the government failed to comprehend the role of knowledge keepers, which contributed to the late disclosure of the true nature of the claim; (3) the government erroneously treated the spiritual right as weak; (4) the government failed to properly address the adverse impact of the project on the Ktunaxa's rights; (5) consultation was inadequate; and (6) no accommodation was made with respect to the spiritual right. The Ktunaxa point to errors and omissions in the Minister's Rationale, which they say show the unreasonableness of his conclusion that adequate s. 35 consultation occurred. [page428] Overall, the Ktunaxa say the process of consultation was flawed and did not fulfill the honour of the Crown or meet the goal of reconciliation. We will consider each of these submissions in turn. In this analysis we employ the term "spiritual" rather than "religious" only because this term was used by the parties in their submissions. As the chambers judge rightly noted (at para. 275), there is no issue here that the Ktunaxa's system of spiritual beliefs constitutes a religion.

(a) Failure to Properly Characterize the Right

90 The Ktunaxa say that while the right claimed was the right "to exercise spiritual practices which rely on a sacred site and require its protection" (A.F., at para. 112), the Minister erroneously characterized it as a right "to preclude permanent development" (*ibid.*, at para. 116). This mischaracterization, the Ktunaxa say, precluded proper consultation and accommodation. In short, the Ktunaxa say, the Minister viewed the Ktunaxa as making a claim to preclude development, instead of a making a claim to a spiritual right.

91 The record does not support the contention that the Minister mischaracterized the right in this way. Spiritual practices and interests were raised at the beginning of the regulatory process and continued to be discussed throughout, leading to a number of accommodations. The Minister's Rationale states:

With respect to the Ktunaxa Nation's asserted spiritual interests in the area ... the Consultation/Accommodation Summary notes how the Crown has endeavored to honourably give consideration to those interests, while at the same time applying the tests for determination of aboriginal rights as set out in relevant case law. [p. 122]

92 The Consultation/Accommodation Summary states:

[page429]

With respect to an aboriginal rights claim, the Ministry has had to take the grizzly and spiritual values information presented and characterize it in terms of an aboriginal tradition, practice or activity that is integral to the culture of the Ktunaxa. In addition to the hunting, gathering and fishing rights claims discussed above, the Ministry has assessed the spiritual and cultural related information not as a rights claim to carry out a specific activity but more as a non-exclusive aboriginal right to ensure protection of Jumbo valley from permanent forms of development for the purposes of preserving a place for the spirit of the Grizzly bear which embodies a core spirit of the Ktunaxa people. The claim seems to amount to a right to preclude certain kinds of permanent development (excluding logging and other resource extraction which is more ephemeral) so that the grizzly and its spirit, together with the spirit of the Ktunaxa, can be maintained. [Emphasis added.]

(R.R. (Minister), at p. 115)

93 It is clear from this and from many other statements throughout the process that the Minister understood that the Ktunaxa were claiming a broad spiritual right, not just a right to block development. It is also clear that the Minister understood that this right entailed practices which depended on the continued presence of Grizzly Bear Spirit in the valley, which the Ktunaxa believed would be driven out by the development.

94 Moreover, the Late-2009 Claim did not change the nature of the spiritual interests in play. Rather, it attempted to include a specific *accommodation*- no permanent construction - as part of the asserted right. The characterization of an asserted right should not include any specific qualification of that right: *Mitchell*, at para. 23. These potential limitations are better examined in the consideration of adverse effects and the reasonableness of the accommodation, and are addressed below.

(b) *Failure to Understand the Role of Knowledge Keepers*

95 The Ktunaxa say the Minister erred by failing to comprehend the role of the knowledge keepers. [page430] This criticism is based on a statement in the Rationale that "details of the spiritual interest in the valley have not been shared with or known by the general Ktunaxa population" (p. 122). This led the Minister to question "whether any of these values can take the shape of a constitutionally protected aboriginal right", they contend (*ibid.*).

96 The Minister's query does not establish that the Minister misunderstood the secrecy imperative. The Rationale makes it clear that the Minister understood the special role of knowledge keepers, and accepted that spiritual beliefs did not permit details of beliefs to be shared with the population or outsiders. The Minister refers to "spiritual information" which has been imparted to him "in a trusting way": Rationale, at p. 122. The need for knowledge keepers to keep details of spiritual beliefs secret was made plain to the Minister during the regulatory process, and in particular at his meeting in Cranbrook with knowledge keeper Mr. Luke and other Ktunaxa members in September 2009. The record is clear that the Ktunaxa at this meeting advised the Minister that only certain members of the community, knowledge keepers, possessed information about spiritual values, and that only Mr. Luke could speak to these matters. Nothing in the Rationale suggests that the Minister had forgotten this fundamental point when he made his decision that adequate consultation had occurred.

(c) *Treating the Constitutional Right as Weak*

97 The Ktunaxa argue that the Minister treated their claimed spiritual interest in Qat'muk as weak. If the Crown significantly undervalues the Aboriginal right at stake, this may render a decision adverse to that interest reviewable: *Haida Nation*, at para. 63.

98 The Minister took account of numerous asserted Aboriginal rights including the right to gather, the right to hunt and fish, and the right to Aboriginal title: Rationale, at p. 122. The Minister's assessment [page431] of the strength of these asserted rights and the consultation and accommodation flowing from them are not in dispute in this case. The main issue of contention is, rather, the Minister's appreciation and weighing of the spiritual significance of Qat'muk, particularly following the Ktunaxa's advancement of the Late-2009 Claim.

99 The Minister at one point in his Rationale did indeed refer to the spiritual claim as "weak", stating that it had not been shown to be part of a pre-contact practice integral to the Ktunaxa culture, and that it had not been shared with and was not known to the general Ktunaxa population (p. 122). This comment may seem at odds with the Minister's statement later in the Rationale that "[o]verall, the consultation applied in this case is at the deep end of the consultation spectrum" (p. 123). The explanation for this apparent tension lies in the fact that when the Minister described the claim as "weak" early in the Rationale he had in mind the Late-2009 Claim that the resort development could not proceed because this would drive out Grizzly Bear Spirit and irrevocably impair the foundation of the Ktunaxa spiritual practices. The Minister was not here referring to the broader claim to spiritual values in Qat'muk. This is apparent from the Minister's statement that the claim he characterized as "weak" had not been shared with and was not known to the Ktunaxa population generally. It is also supported by the Minister's

reference to deep consultation being adequate "in respect of those rights for which the strength of the claim is strong" (p. 123). We view the Rationale as indicating that the Minister considered the overall spiritual claim to be strong, but had doubts about the strength of the Late-2009 Claim.

100 Even if the Minister had accepted the Ktunaxa's characterization of the Late-2009 Claim as a right to "exercise spiritual practices which rely on a sacred site and require its protection", it still [page432] would have been reasonable to find this aspect of the Ktunaxa's overall claim weak: C.A. reasons, at para. 81. As the Minister noted, in the negotiations the Ktunaxa did not advise the Crown of "specific spiritual practices": R.R. (Minister), at p. 113; see also chambers judge's reasons, at para. 212. As such, the Minister did not have evidence that the Ktunaxa were asserting a particular practice that took place in Qat'muk prior to contact. The Late-2009 Claim seemed designed to require a particular accommodation rather than to assert and support a particular pre-contact practice, custom, or tradition that took place on the territory in question.

(d) *Failure to Properly Assess the Adverse Impact
of the Development on the Spiritual Right*

101 The Ktunaxa assert that because the Minister mischaracterized the asserted right, he "could not have properly assessed the ski resort's adverse impact on the right": A.F., at para. 123. The Ktunaxa do not point to anything said by the Minister, but reference para. 83 of the Court of Appeal reasons.

102 The record supports the view that, after June 2009, the Minister understood the Ktunaxa position that any construction of permanent accommodation on the resort site would drive Grizzly Bear Spirit from Qat'muk and undermine the basis of their spiritual beliefs and practices. The Court of Appeal in the criticized passage summarized the adverse impact issue as follows, using the description provided by the Ktunaxa themselves in the Qat'muk Declaration, and concluded that the Minister understood the adverse impact from the Ktunaxa perspective:

In this case, the "adverse impacts flowing from the specific Crown proposal at issue" concerns the spiritual consequences that follow from permitting development of the Proposed Resort in the Qat'muk area. In the Qat'muk declaration, this is the adverse impact that the Ktunaxa describe:

[page433]

The refuge and buffer areas will not be shared with those who engage in activities that harm or appropriate the spiritual nature of the area. These activities include, but are not limited to:

- * The construction of buildings or structures with permanent foundations;
- * Permanent occupation of residences.

To further safeguard spiritual values, no disturbances or alteration of the ground will be permitted within the refuge area.

In my view, the Minister reasonably characterized the above adverse impact on the s. 35 right as concerning the impact of development of the Proposed Resort on the Ktunaxa and, in particular, as a claim that development in the Qat'muk area was fundamentally inimical to their belief. [paras. 83-84]

103 We agree with the Court of Appeal on this point. The record does not support the view that the Minister failed to properly assess the adverse impact of the development on the spiritual claim.

(e) *Inadequate Consultation on the Asserted Right*

104 The overall contention of the Ktunaxa is that the Crown did not offer sufficient consultation on their asserted right. It is possible for a decision maker to mischaracterize a right and still fulfill the duty to consult: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 38-39. Thus, even in the face of

any alleged mischaracterization or undervaluing, the key question is the level of consultation regarding the asserted right.

105 We are satisfied that the Minister engaged in deep consultation on the spiritual claim. This level of consultation was confirmed by both the chambers judge (at para. 233) and the Court of Appeal (at para. 86) and we would not disturb that finding.

[page434]

106 Regarding the Late-2009 Claim that no permanent construction be built, the Ktunaxa argue that the Minister wrongly ended the consultation on June 3, 2009. There is a contradiction, it is argued, between the Minister's June 3, 2009 letter expressing the view that the s. 35 consultation process had been completed, and the chambers judge's conclusion that when post-2009 consultations were considered in the context of the extensive prior consultation, "the Minister's consultation in respect of the Ktunaxa's asserted spiritual claims was reasonable and appropriate": A.F., at para. 128, citing chambers judge's reasons, at para. 232; see also A.F., at para. 129.

107 This argument takes the Minister's letter stating that he considered sufficient consultation had taken place by June 3, 2009 out of context and fails to take account of what the Minister actually said. The letter was written at a time when the sacred value of Jumbo Valley was no longer listed as an outstanding issue for the Ktunaxa's agreement, and before the Late-2009 Claim. Negotiations with the Ktunaxa had been going well, and the Minister reasonably believed that the only outstanding matters were unrelated to the Ktunaxa rights claims. The Minister's letter therefore advised the Ktunaxa that, in his opinion, a reasonable consultation process had occurred and that most of the outstanding issues were interest-based.

108 Five days later, on June 8, 2009, the Ktunaxa responded to this letter with a list of concerns, not including the sacred nature of the area. At meetings the next day, however, the Ktunaxa refocused on the sacred nature of the site and asked for more consultation on this issue. The Minister agreed to this, and lengthy in-depth consultations on this new spiritual claim took place, including the meeting between the Minister himself and knowledge keeper Mr. Luke, in Cranbrook in September. The Minister sent the Ktunaxa a "Consultation/Accommodation Summary" that included a description of the consultation and accommodation efforts specifically [page435] related to the Late-2009 Claim and invited them to comment on it. He then met with them and revisions were made to the document. Consultation continued until the Ktunaxa issued the Qat'muk Declaration in November 2010 declaring that no accommodation was possible and that the only point of further discussions was to make decision makers understand why the proposed resort could not proceed. Even after this, the Minister sought further consultation, without success.

109 There is no contradiction between the Minister's letter on June 3, 2009 and the chambers judge's conclusion that negotiations from 2009 onwards indicated deep consultation on the Late-2009 Claim. On June 3, that claim was not in play. Six days later, with the Ktunaxa change of position, it assumed central importance, and renewed consultation focused on this issue ensued.

110 The Ktunaxa also contend that the courts below relied too much on the length of the consultation process. We agree that adequacy of consultation is not determined by the length of the process, although this may be a factor to be considered. While the Minister's Rationale mentions two decades of consulting, there is no evidence that he made his decision simply because he felt the process had gone on too long. Rather, it was clear to all by the spring of 2012 that given the position of the Ktunaxa, more consultation would be fruitless.

111 Finally, the Ktunaxa assert that although the Minister may have undertaken deep consultation on other issues, he did not engage in deep consultation with respect to the Late-2009 Claim. We cannot agree. Even after the Ktunaxa said further [page436] consultation was pointless, the Minister persisted in attempts to consult.

(f) *Failure to Accommodate the Asserted Right*

112 As a consequence of the lengthy regulatory process, many accommodations were made with respect to Ktunaxa spiritual concerns. These included specific changes to protect the grizzly population in Qat'muk - the west chair lift was removed because of the grizzly bear population in that area and the resort was confined to the upper half of the valley - as well as extensive environmental reserves and monitoring. The findings of the chambers judge on this point (at para. 236) have not been impugned.

113 The Ktunaxa say these changes were inadequate: "Changes to the ski resort were measures required by economic, environmental and wildlife protection concerns and, while they do set out some limited protection for grizzly bears, there was no accommodation to address the ability of the Ktunaxa to carry on their spiritual practices dependent upon Grizzly Bear Spirit": A.F., at para. 133; see generally paras. 133-38.

114 In point of fact, there was no evidence before the Minister of "specific spiritual practices". It is true, of course, that the Minister did not offer the ultimate accommodation demanded by the Ktunaxa - complete rejection of the ski resort project. It does not follow, however, that the Crown failed to meet its obligation to consult and accommodate. The s. 35 right to consultation and accommodation is a right to a process, not a right to a particular outcome: *Haida Nation*. While the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of "give and take", and outcomes are not guaranteed.

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VI. Conclusion

115 The Minister's decision did not violate the Ktunaxa's freedom of religion as their claim does not fall within the scope of s. 2(a) of the *Charter*. The Minister's conclusion that consultation sufficient to satisfy s. 35 of the *Constitution Act, 1982* had occurred has not been shown to be unreasonable. For these reasons, we would dismiss the appeal.

The reasons of Moldaver and Côté JJ. were delivered by

MOLDAVER J.

I. Overview

116 The Ktunaxa are an Aboriginal people who inhabit parts of southeastern British Columbia. They claim that the decision by the provincial Minister of Forests, Lands and Natural Resource Operations ("Minister") to approve a ski resort development infringes their right to religious freedom under s. 2(a) of the *Canadian Charter of Rights and Freedoms* and constitutes a breach of the Crown's duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

117 I agree with the Chief Justice and Rowe J. that the Minister reasonably concluded that the duty to consult and accommodate the Ktunaxa under s. 35 was met. Respectfully, however, I disagree with my colleagues' s. 2(a) analysis. In my view, the Ktunaxa's right to religious freedom was infringed by the Minister's decision to approve the development of the ski resort proposed by the respondent Glacier Resorts Ltd. The Ktunaxa hold as sacred several sites within their traditional lands, and they revere multiple spirits in their religion. The Ktunaxa believe that a very important spirit in their religious tradition, Grizzly Bear Spirit, inhabits Qat'muk, a body of sacred land that lies at the heart of the proposed ski resort. The development of the ski resort would desecrate Qat'muk and cause Grizzly Bear Spirit to leave, thus severing the Ktunaxa's connection to the [page438] land. As a result, the Ktunaxa would no longer receive spiritual guidance and assistance from Grizzly Bear Spirit. All songs, rituals and ceremonies associated with Grizzly Bear Spirit would become meaningless.

118 In my respectful view, where state conduct renders a person's sincerely held religious beliefs devoid of all religious significance, this infringes a person's right to religious freedom. Religious beliefs have spiritual significance for the believer. When this significance is taken away by state action, the person can no longer act in accordance with his or her *religious* beliefs, constituting an infringement of s. 2(a). That is exactly what happened in this case. The Minister's decision to approve the ski resort will render all of the Ktunaxa's religious beliefs related to Grizzly Bear Spirit devoid of any spiritual significance. Accordingly, the Ktunaxa will be unable to perform songs, rituals or ceremonies in recognition of Grizzly Bear Spirit in a manner that has any religious significance for them. In my view, this amounts to a s. 2(a) breach.

119 That being said, I am of the view that the Minister proportionately balanced the Ktunaxa's s. 2(a) right with the relevant statutory objectives: to administer Crown land and dispose of it in the public interest. The Minister was faced with two options: approve the development of the ski resort or grant the Ktunaxa a right to exclude others from constructing permanent structures on over 50 square kilometres of Crown land. This placed the Minister in a difficult, if not impossible, position. If he granted this right of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives. In the end, it is apparent that he determined that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa the veto right that they were seeking.

120 In view of the options open to the Minister, I am satisfied that his decision was reasonable. [page439] It limited the Ktunaxa's right "as little as reasonably possible" given these statutory objectives (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 40), and amounted to a proportionate balancing. I would therefore dismiss the appeal.

II. Analysis

A. *Section 2(a) of the Charter*

(1) The Scope of Section 2(a)

121 All *Charter* rights - including freedom of religion under s. 2(a) - must be interpreted in a broad and purposive manner (*Figueroa v. Canada (Attorney General)*, 2003 SCC 37, [2003] 1 S.C.R. 912, at para. 20; *Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 179, per McLachlin J. (as she then was)). As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, the interpretation of freedom of religion must be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection" (emphasis added). The interpretation of s. 2(a) must therefore be guided by its purpose, which is to "ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being" (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759).

122 In light of this purpose, this Court has articulated a two-part test for determining whether s. 2(a) has been infringed. The claimant must show: (1) that he or she sincerely believes in a belief or practice that has a nexus with religion; and (2) that the impugned conduct interferes with the claimant's ability to act in accordance with that belief or practice "in a manner that is more than trivial or insubstantial" (*Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 59 (emphasis deleted); *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 34; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 32).

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123 The first part of the test is not at issue in this case. None of the parties dispute that the Ktunaxa sincerely believe that Grizzly Bear Spirit lives in Qat'muk, and that any permanent development would drive Grizzly Bear Spirit out, desecrate the land and sever the Ktunaxa's spiritual connection to it. The central issue raised by this

appeal concerns the second part of the test. The Chief Justice and Rowe J. maintain that the Minister's decision does not interfere with the Ktunaxa's ability to act in accordance with their religious beliefs or practices. With respect, I disagree. As I will explain, in my view, the Minister's decision interferes with the Ktunaxa's ability to act in accordance with their religious beliefs and practices in a manner that is more than trivial or insubstantial, and the Ktunaxa's claim therefore falls within the scope of s. 2(a).

(2) The Ability to Act in Accordance With a Religious Belief or Practice

124 As indicated, the s. 2(a) inquiry focuses on whether state action has interfered with the ability of a person to act in accordance with his or her religious beliefs or practices. This Court has recognized that religious beliefs are "deeply held personal convictions ... integrally linked to one's self-definition and spiritual fulfillment", while religious practices are those that "allow individuals to foster a connection with the divine" (*Amselem*, at para. 39). In my view, where a person's religious belief no longer provides spiritual fulfillment, or where the person's religious practice no longer allows him or her to foster a connection with the divine, that person cannot act in accordance with his or her *religious* beliefs or practices, as they have lost all religious significance. Though an individual could still publicly profess a specific belief, or act out a given ritual, it would hold no religious significance for him or her.

125 The same holds true of a person's ability to pass on beliefs and practices to future generations. This Court has recognized that the ability of a religious community's members to pass on their beliefs to their children is an essential aspect of religious [page441] freedom protected under s. 2(a) (*Loyola*, at paras. 64 and 67). Where state action has rendered a certain belief or practice devoid of spiritual significance, this interferes with one's ability to pass on that tradition to future generations, as there would be no reason to continue a tradition that lacks spiritual significance.

126 Therefore, where the spiritual significance of beliefs or practices has been taken away by state action, this interferes with an individual's ability to act in accordance with his or her religious beliefs or practices - whether by professing a belief, engaging in a ritual, or passing traditions on to future generations.

127 This kind of state interference is a reality where individuals find spiritual fulfillment through their connection to the physical world. The connection to the physical world, specifically to land, is a central feature of Indigenous religions. Indeed, as M. L. Ross explains, "First Nations spirituality and religion are rooted in the land" (*First Nations Sacred Sites in Canada's Courts* (2005), at p. 3 (emphasis added)). In many Indigenous religions, land is not only the site of spiritual practices in the sense that a church, mosque or holy site might be; land may *itself* be sacred, in the sense that it is where the divine manifests itself. Unlike in Judeo-Christian faiths, for example, where the divine is considered to be supernatural, the spiritual realm in the Indigenous context is inextricably linked to the physical world. For Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance. Where state action has this effect on an Indigenous religion, it interferes with a believer's ability to act in accordance with his or her religious beliefs and practices.

128 Taking this feature of Indigenous religions into account is therefore critical in assessing whether there has been a s. 2(a) infringement. The principle of state neutrality requires that the state not favour or [page442] hinder one religion over the other (see *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, at para. 32; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 72). To ensure that all religions are afforded the same level of protection under s. 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices.

(3) The Chief Justice and Rowe J.'s Position on the Scope of Section 2(a)

129 McLACHLIN C.J. and Rowe J. take a different approach. They maintain that the *Charter* protects the "freedom to worship", but not what they call the "spiritual focal point of worship" (para. 71). If I understand my colleagues'

approach correctly, s. 2(a) of the *Charter* protects *only* the freedom to hold beliefs and manifest them through worship and practice (para. 71). In their view, even where the effect of state action is to render beliefs and practices devoid of all spiritual significance, claimants still have the freedom to hold beliefs and manifest those beliefs through practices, and there is therefore no interference with their ability to act in accordance with their beliefs. Thus, under my colleagues' approach, as long as a Sikh student can carry a kirpan into a school (*Multani*), Orthodox Jews can erect a personal succah (*Amselem*), or the Ktunaxa have the ability to conduct ceremonies and rituals, there is no infringement of s. 2(a), even where the effect of state action is to reduce these acts to empty gestures.

130 I cannot accept such a restrictive reading of s. 2(a). As I have indicated, where a belief or practice is rendered devoid of spiritual significance, there is obviously an interference with the ability to act in accordance with that *religious* belief or practice. The scope of s. 2(a) is therefore not limited to the freedom to hold a belief and manifest that belief through religious practices. Rather, as this Court noted in *Amselem*, "[i]t is the religious or spiritual essence of an action" that attracts protection under s. 2(a) (para. 47). In my view, the [page443] approach adopted by my colleagues does not engage with this crucial point. It does not take into account that if a belief or practice becomes devoid of spiritual significance, it is highly unlikely that a person would continue to hold those beliefs or engage in those practices. Indeed, that person would have no reason to do so. With respect, my colleagues' approach amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with "profoundly personal beliefs", the true purpose of s. 2(a)'s protection (*Edwards Books*, at p. 759).

131 This approach also risks excluding Indigenous religious freedom claims involving land from the scope of s. 2(a)'s protection. As indicated, there is an inextricable link between spirituality and land in Indigenous religious traditions. In this context, state action that impacts land can sever the spiritual connection to the divine, rendering Indigenous beliefs and practices devoid of their spiritual significance. My colleagues have not taken this unique and central feature of Indigenous religion into account. Their approach therefore risks foreclosing the protections of s. 2(a) of the *Charter* to substantial elements of Indigenous religious traditions.

(4) The Minister's Decision Infringes the Ktunaxa's Freedom of Religion Under Section 2(a) of the *Charter*

132 I turn now to the facts of this case. The Ktunaxa's religion encompasses multiple spirits and several places of spiritual significance (see, e.g., A.R., vol. II, at pp. 119 and 197). The Ktunaxa sincerely believe that Qat'muk is a highly sacred site, home to a very important spirit - Grizzly Bear Spirit. The Ktunaxa assert that Grizzly Bear Spirit provides them with spiritual guidance and assistance. They claim that the proposed development would drive Grizzly Bear Spirit out, sever their spiritual connection with Qat'muk, and render their beliefs in Grizzly Bear Spirit devoid of spiritual significance.

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133 McLACHLIN C.J. and Rowe J. frame the Ktunaxa's religious freedom claim as one that seeks to protect the "spiritual focal point of worship" - that is, Grizzly Bear Spirit (para. 71). I disagree. The Ktunaxa are seeking protection of their ability to act in accordance with their religious beliefs and practices, which falls squarely within the scope of s. 2(a). If the Ktunaxa's religious beliefs in Grizzly Bear Spirit become entirely devoid of religious significance, their prayers, ceremonies and rituals in recognition of Grizzly Bear Spirit would become nothing more than empty words and hollow gestures. There would be no reason for them to continue engaging in these acts, as they would be devoid of any spiritual significance. Members of the Ktunaxa assert that without their spiritual connection to Qat'muk and to Grizzly Bear Spirit, they would be unable to pass on their beliefs and practices to future generations in any meaningful way, as illustrated in the following excerpt from an affidavit quoted in the appellants' factum:

If the proposed resort were to go ahead in the heart of Qat'muk, I do not see how I can meaningfully speak to my grandchildren about Grizzly Bear Spirit. How can I teach them his songs, what to ask from him, if he no longer has a place recognizable to us and respected as his within our world? [para. 28]

134 Viewed this way, I am satisfied that the Minister's decision approving the proposed development interferes with the Ktunaxa's ability to act in accordance with their religious beliefs or practices in a manner that is more than trivial or insubstantial. The decision therefore amounts to an infringement of the Ktunaxa's freedom of religion under s. 2(a).

B. *The Minister's Decision Was Reasonable*

(1) The Doré Framework

135 Having resolved the preliminary issue that the Minister's decision to approve the development infringes the Ktunaxa's s. 2(a) right, I turn now to [page445] the question of whether the Minister's decision was reasonable.

136 This Court's decision in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister reasonably exercised his statutory discretion in accordance with the Ktunaxa's *Charter* protections (*Loyola*, at para. 3). On judicial review, the task of the reviewing court applying the *Doré* framework "is to assess whether the decision is reasonable because it reflects a proportionate balance" between the *Charter* protections - both rights and values - at stake and the relevant statutory objectives (*Loyola*, at para. 37, citing *Doré*, at para. 57). As this Court explained in *Loyola*, a proportionate balancing is one "that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (para. 39). That is, when the Minister balances the *Charter* protections with the relevant statutory objectives, he or she must ensure that the *Charter* protections are "affected as little as reasonably possible" in light of the state's particular objectives (*Loyola*, at para. 40). This approach respects the expertise that decision makers like the Minister bring to balancing *Charter* protections and statutory objectives in the context of the particular facts before them (*Loyola*, at para. 42, citing *Doré*, at para. 47).

(2) A Reviewing Court May Consider an Administrative Decision Maker's Implicit Reasons

137 The Ktunaxa submit that the Minister did not consider their s. 2(a) claim at all when he made his decision and that his decision was therefore unreasonable. Although the Ktunaxa advised the Minister that their s. 2(a) right was implicated by his decision regarding the development (A.F., at para. 17), the Minister did not refer to s. 2(a) explicitly in his reasons for his decision.

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138 The chambers judge, Savage J., held that the Minister did not need to specifically refer to the s. 2(a) claim made by the Ktunaxa, because the Minister addressed the "substance" of the asserted *Charter* right in his reasons: the Ktunaxa's spiritual connection to Qat'muk, and the impact the development would have on this connection (2014 BCSC 568, 306 C.R.R. (2d) 211, at paras. 270 and 273). Although Savage J. found that the Minister's decision did not infringe the Ktunaxa's s. 2(a) right, he stated that if he was wrong in this regard, the Minister's decision amounted to a proportionate balancing of the *Charter* protections with the statutory objectives (para. 301).

139 As I will explain, I agree with Savage J. in two respects: (1) that the Minister addressed the "substance" of the Ktunaxa's s. 2(a) right; and (2) that it is implicit from the Minister's reasons that he proportionately balanced the *Charter* protections at stake for the Ktunaxa with the relevant statutory objectives. In this case, it is important to recall that reviewing courts may consider an administrative decision maker's implicit reasoning for reaching a decision. As Abella J. held in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the reasons given by an administrative decision maker are not required to explicitly address every argument raised by the claimant:

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the

result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion ... [para. 16]

140 Rather, the ultimate question for the reviewing court is whether "the reasons allow the reviewing court to understand why the [administrative decision maker] made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*ibid.*). Even if the reasons [page447] do not seem wholly adequate to justify the outcome, a reviewing court should seek to first supplement the reasons of the decision maker before substituting its own decision (*ibid.*, at para. 12). Reasonableness review thus entails "a respectful attention to the reasons offered or which could be offered in support of a decision" (*ibid.*, at para. 12, citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286; see also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at para. 58). For example, in *Newfoundland Nurses*, although the chambers judge and a dissenting judge at the Court of Appeal found that the administrative decision maker's reasons disclosed no line of reasoning which could lead to his conclusion, this Court held that the decision maker was "alive to the question at issue and came to a result well within the range of reasonable outcomes" (para. 26). His decision was therefore reasonable.

(3) The Minister Was Alive to the Substance of the Ktunaxa's Section 2(a) Right

141 In my view, it is clear from the Minister's reasons that he was alive to the "substance" of the Ktunaxa's asserted *Charter* right: the Ktunaxa's spiritual connection to Qat'muk, and the fact that any permanent development in Qat'muk would sever their spiritual connection to the land. The Minister did note that the Ktunaxa's *prima facie* claim to an Aboriginal right under s. 35 based on their spiritual connection to the land was "weak" (see Minister's Rationale, at Schedule "F" of 2014 BCSC 568, pp. 117-24 ("Rationale"), at p. 122 (CanLII)). However, as I will explain, this assessment of the s. 35 claim was based on factors which are irrelevant to the s. 2(a) inquiry and thus had no bearing on the Minister's consideration of the Ktunaxa's s. 2(a) right.

142 In assessing the *prima facie* claim to an Aboriginal right as "weak", the Minister specifically referred to elements of the test under s. 35 for evaluating an Aboriginal right (see *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [page448] at paras. 46, 55 and 60). These elements include whether the tradition or practice was engaged in prior to contact with Europeans and whether it was integral to the distinctive culture of the Aboriginal group. The Minister noted that there was no indication that Jumbo Valley was under threat from "permanent forms of development at the time of contact such that the right claimed would have been one that was exercised or an aboriginal tradition, practice or activity integral to the culture of [the] Ktunaxa", and that the "details of the spiritual interest in the valley" were not shared with or known by the general Ktunaxa population (Rationale, at p. 122).

143 These elements of the test for identifying an Aboriginal right under s. 35 are not part of the s. 2(a) inquiry. As indicated, in order to determine that there is an infringement of a s. 2(a) right, there are two requirements: (1) that the religious belief or practice is sincerely held; and (2) that state conduct has interfered with the ability to act in accordance with the belief or practice in a non-trivial way. It follows that the Minister's comment that the *prima facie* claim concerning the Ktunaxa's spiritual connection to the land was "weak" goes only to the strength of the s. 35 claim and has no bearing on the assessment of the Ktunaxa's s. 2(a) right.

144 In fact, in his Rationale, the Minister explicitly recognized that the proposed development put at stake the Ktunaxa's spiritual connection to Qat'muk - the substance of their s. 2(a) right. Although the Minister assessed the strength of the s. 35 claim to an Aboriginal right as "weak", he stated that he "sincerely recognize[d] the genuinely sacred values at stake for Ktunaxa leadership and the Knowledge Keepers in particular" (p. 122). In his Consultation/Accommodation Summary (reproduced in R.R. (Minister), at pp. 66-154), which the Minister refers to in his Rationale, he noted that Jumbo Valley is an area of cultural significance with sacred values, and that "the Land of the Grizzly Spirit" is a highly important spiritual site in the Ktunaxa's traditional [page449] lands (p. 111). In my view, the Minister was thus alive to the substance of the Ktunaxa's s. 2(a) right.

(4) The Minister Engaged in Proportionate Balancing(a) *Statutory Objectives*

145 Before turning to the question of whether the Minister engaged in proportionate balancing of the substance of the Ktunaxa's s. 2(a) right and his statutory mandate, I begin with the relevant statutory objectives in this case. The Minister referred to several of his statutory obligations under the *Land Act*, R.S.B.C. 1996, c. 245, and the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307, that were relevant to his decision. At page 119 of his Rationale, the Minister noted that under those Acts, he is "responsible for the administration of Crown land" (see *Land Act*, s. 4), "responsible to dispose of Crown land where [he] considers advisable in the public interest" (see *Land Act*, s. 11(1)), and "responsible for encouraging outdoor recreation" (see *Ministry of Lands, Parks and Housing Act*, s. 5(b)). When the reasons of the Minister are read fairly as a whole, it is apparent that he took these objectives into account in arriving at his decision.

(b) *The Minister's Efforts to Accommodate the Ktunaxa's Section 2(a) Claim*

146 As I will explain, it is apparent from the Minister's reasons that he tried to limit the impact of the proposed development on the substance of the Ktunaxa's s. 2(a) right as much as reasonably possible given these statutory objectives. The Minister in fact provided significant accommodation measures that specifically addressed the Ktunaxa's spiritual connection to the land. As Savage J. noted, these accommodations were "clearly intended to reduce the footprint of the Proposed Resort within Qat'muk and lessen the effect of the Proposed Resort on Grizzly bears, within which the Ktunaxa say [page450] the Grizzly Bear Spirit manifests itself" (para. 313). These measures included the following (Rationale, at p. 123):

- * The area of the "controlled recreation area" was reduced by 60% and reductions were also made to the "total resort development area".
- * An area was removed "from the controlled recreation area of the lower Jumbo Creek area that has been perceived as having greater visitation potential from Grizzly bears".
- * The "controlled recreation area" was also "amended to remove ski lifts on the West side of the valley, where impact to Grizzly bear habitat was expected to be greatest".
- * The Province of B.C. would "pursue the establishment of a Wildlife Management Area (WMA)" in order "to address potential impacts in relation to Grizzly bears and aboriginal claims relating to spiritual value of the valley". The Ktunaxa were invited to engage with the Province in the development and implementation of the WMA objectives.

147 It is true that these accommodation measures were provided in the context of the Minister's duty to consult and accommodate under s. 35. The Minister provided these measures, as well as other accommodations, as part of a consultative process that occurred "at the deep end of the consultation spectrum" (Rationale, at p. 123). But, as indicated, the Minister provided the accommodation listed above to specifically address the Ktunaxa's spiritual interest in the land, even though the Minister assessed the strength of the Ktunaxa's *prima facie* s. 35 claim based on this interest as "weak". In my opinion, it does not make sense that the Minister would provide significant accommodation for a "weak" s. 35 claim, which suggests that the Minister took into account the Ktunaxa's broader spiritual [page451] interest in the land, distinct from the context of their s. 35 claim.

148 McLACHLIN C.J. and Rowe J. take a different approach. They explain this apparent tension by asserting that the Minister assessed as "weak" only the Ktunaxa's s. 35 claim that their spiritual connection to the land would be severed by any permanent development. For them, the Minister determined that the Ktunaxa's "broader claim to spiritual values in Qat'muk" under s. 35 was strong, and he accordingly engaged in deep consultation (para. 99).¹ In my view, even if my colleagues are right that the Minister engaged in deep consultation to address the Ktunaxa's "overall spiritual claim" (para. 99) under s. 35, it follows that the Minister provided the accommodation above to reduce the impact of the development on the Ktunaxa's spiritual connection to Qat'muk. These measures indicate

that the Minister made efforts to mitigate the impact on the substance of their s. 2(a) right as much as reasonably possible given his statutory mandate.

149 Nonetheless, I acknowledge that these accommodation measures only reduce the footprint of the development in Qat'muk, a very important spiritual site in the Ktunaxa's religion. They do not prevent the loss of the Ktunaxa's spiritual connection to the land once the development is built and Grizzly Bear Spirit leaves Qat'muk. The Ktunaxa's position is that there is no "middle ground" available regarding the development: no accommodation is possible, as no permanent structures can be built on the land or Qat'muk will lose its sacred nature. The Minister therefore had two options before him: approve the development or permit the Ktunaxa to [page452] veto the development on the basis of their freedom of religion. As I will explain, it can be implied from the Minister's decision that permitting the Ktunaxa to veto the development was not consistent with his statutory mandate. Indeed, it would significantly undermine, if not completely compromise, this mandate.

(c) *The Right to Exclude*

150 Granting the Ktunaxa a power to veto development over the land would effectively give the Ktunaxa a significant property interest in Qat'muk - namely, a power to exclude others from constructing permanent structures on over 50 square kilometres of public land. This right of exclusion is not a minimal or negligible restraint on public ownership. It gives the Ktunaxa the power to exclude others from developing land that the public in fact owns. The public in this case includes an Aboriginal group, the Shuswap Indian Band, that supports the development - a fact which the Minister explicitly took into consideration in his reasons. The Shuswap Indian Band is supportive of the development in part because of "the potential economic development opportunities it may provide" (R.R. (Minister), at p. 68).

151 The power of exclusion is an essential right in property ownership, because it gives an owner the exclusive right to determine the use of his or her property and to ensure that others do not interfere with that use (see B. Ziff, *Principles of Property Law* (6th ed. 2014), at p. 6). Without the power of exclusion, the owner is unable to dictate how his or her property will be used. Even a person who has a limited power of exclusion - for example, the power to prevent development of the land - will be able to exercise control over the property and dictate its use to a significant extent.

152 In granting a limited power of exclusion to the Ktunaxa, the Minister would effectively transfer the public's control of the use of over 50 square kilometres of land to the Ktunaxa. This power would permit the Ktunaxa to dictate the use of the land - [page453] namely, preventing any permanent structures from being constructed - so that it does not conflict with their religious belief in the sacred nature of Qat'muk. A religious group would therefore be able to regulate the use of a vast expanse of public land so that it conforms to its religious belief. It seems implicit from the Minister's reasons that permitting a religious group to dictate the use of a large tract of land according to its religious belief - and excluding the public from using the land in a way contrary to this belief - would undermine the objectives of administering Crown land and disposing of it in the public interest. It can be inferred that the Minister found that granting the Ktunaxa such a power of exclusion would not fulfill his statutory mandate. Rather, it would significantly compromise - if not negate - those objectives.

153 As indicated, the Ktunaxa's s. 2(a) claim left the Minister with two options: either to approve the development, or to grant the Ktunaxa a right to exclude others from constructing any permanent development on over 50 square kilometres of public land. This is distinct from a situation where some reasonable accommodation - a "middle ground" - is possible. For example, where a claimant seeks limited access to an area of land, or seeks to restrict a certain activity on an area of land during certain limited time periods, granting an accommodation may not have the effect of undermining the Minister's statutory objectives of administering Crown land and disposing of it in the public interest. As proportionate balancing under *Doré* requires limiting *Charter* protections "no more than is necessary given the applicable statutory objectives" (*Loyola*, at para. 4), in such cases, it may be unreasonable for the Minister not to provide these accommodations.

154 But here, an accommodation that would not compromise the Minister's statutory mandate was unavailable. As indicated, the Minister did make an [page454] effort to provide the Ktunaxa with accommodation to limit the impact on their religious freedom, but the Ktunaxa took the position that no permanent development in the area could be allowed. This placed the Minister in a difficult, if not impossible, position. He determined that if he granted the power of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest. In the end, he found that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over 50 square kilometres of public land.

155 In view of the options open to the Minister, I am satisfied that this decision was reasonable in the circumstances. It limited the Ktunaxa's right "as little as reasonably possible" given the statutory objectives (*Loyola*, at para. 40) and amounted to a proportionate balancing.

III. Conclusion

156 For these reasons, I would dismiss the appeal.

Appeal dismissed.

Solicitors:

Solicitors for the appellants: Peter Grant & Associates, Vancouver; Diane Soroka Avocate Inc., Westmount, Quebec.

Solicitor for the respondent the Minister of Forests, Lands and Natural Resource Operations: Attorney General of British Columbia, Victoria.

Solicitors for the respondent Glacier Resorts Ltd.: Owen Bird Law Corporation, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

[page455]

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the interveners the Canadian Muslim Lawyers Association, the South Asian Legal Clinic of Ontario and the Kootenay Presbytery (United Church of Canada): Stockwoods, Toronto; Khalid Elgazzar, Ottawa.

Solicitors for the interveners the Evangelical Fellowship of Canada and the Christian Legal Fellowship: Vincent Dagenais Gibson, Ottawa; Christian Legal Fellowship, London, Ontario.

Solicitors for the intervener the Alberta Muslim Public Affairs Council: Nanda & Company, Edmonton.

Solicitor for the intervener Amnesty International Canada: Ecojustice Canada, Toronto.

Solicitors for the intervener the Te'mexw Treaty Association: JFK Law Corporation, Victoria.

Solicitors for the intervener the Central Coast Indigenous Resource Alliance: Ng Ariss Fong, Vancouver.

Solicitors for the intervener the Shibogama First Nations Council: Olthuis, Kleer, Townshend, Toronto.

Solicitors for the intervener the Canadian Chamber of Commerce: McCarthy Tétrault, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitor for the intervener the Council of the Passamaquoddy Nation at Schoodic: Paul Williams, Ohsweken, Ontario.

Solicitors for the intervener the Katzie First Nation: Donovan & Company, Vancouver.

Solicitors for the interveners the West Moberly First Nations and the Prophet River First Nation: Devlin Gailus Westaway, Victoria.

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- 1** To be clear, as I have indicated above, it is plain from the Minister's reasons that he assessed the Ktunaxa's s. 35 claim based on their spiritual connection to the land as "weak". However, I am satisfied that the duty to consult and accommodate under s. 35 with respect to this claim was met by the deep consultation engaged in by the Minister.

TAB 7

CITATION: Saugeen First Nation v. Ontario (MNRF), 2017 ONSC 3456
COURT FILE NO.: 367/16
DATE: 20170714

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

NORDHEIMER, D.L. CORBETT and DiTOMASO JJ.

B E T W E E N:)
)
SAUGEEN FIRST NATION and) *Cathy Guirguis and Kaitlin Ritchie, on behalf*
CHIPPEWAS OF NAWASH) of the Applicants
UNCEDED FIRST NATION)
)
Applicants)
)
- and -)
)
ONTARIO MINISTER OF NATURAL) *S. Valair and S. Figliomeni, for the Minister*
RESOURCES AND FORESTRY and)
T & P HAYES LTD.) *Lawrence Hansen, for T & P Hayes Ltd.*
)
Respondents) **HEARD at Toronto:** April 10 & 11, 2017

D.L. Corbett J.:

[1] This application concerns the Crown’s duty to consult with, and accommodate the rights and interests of the Saugeen Ojibway Nation (“SON”) in connection with T & P Hayes Ltd.’s (the “Proponent’s” or “Hayes”) application for a license for a limestone quarry (the “Project”) on the Saugeen/Bruce Peninsula.

[2] The parties agree that the Crown had a constitutional duty to consult SON. They disagree on the scope of that duty and whether it was reasonably discharged.

[3] SON argues that there had to be a “meaningful conversation” proportional to the interests at stake. It argues that, though there were exchanges of information, a “meaningful conversation” did not happen. It seeks a declaration to this effect, an order quashing the decision by the Minister of Natural Resources and Forestry (the “Minister”)¹ to issue a license to the

¹ The Ministry of Natural Resources and Forestry, formerly the Ministry of Natural Resources, is referred to as “MNRF” in these reasons.

Proponent, and an order that the Crown complete a constitutionally sound process of consultation and accommodation before issuing a license for the Project.

[4] The Crown acknowledges that, at times, consultations may have been imperfect. However, it argues that, by the end of the process, material problems had been rectified, a reasonable opportunity was given to SON to provide input and information, and the Crown's duty to consult was reasonably discharged. It asks that SON's application be dismissed.

[5] Hayes just wants to get on with quarrying limestone. It holds title to the Project lands, which have been owned privately for many years and are not part of a reserve or claim by SON. Hayes applied for a quarry license back in 2008, has spent considerable time and money providing MNRF with studies and plans, and does not want to be delayed further in its reasonable exploitation of the resources on its property. It asks that SON's application be dismissed.

Summary and Disposition

[6] I agree with SON that there has not been the "meaningful conversation" required by the constitutional duty to consult. The process followed by MNRF does not pass constitutional muster. From 2008 to 2011, MNRF failed to consult SON in accordance with its own assessment of the scope of that duty. When SON learned of the Project, three and one-half years after its inception, MNRF's approach was reactive and *ad hoc*. MNRF created expectations in SON which were disappointed repeatedly - expectations about the process to be followed and the funding available to SON. And in the end MNRF never followed through on its own designated processes.

[7] MNRF's position – that whatever process failures there may have been along the way, by the end, SON's substantive concerns had been heard and addressed – misses the central thrust of SON's concerns here. SON does not challenge the reasonableness of MNRF's decisions about mitigation measures. SON's objection – and a valid objection it is – is that there has never been a proper consultation process, and that the identification of SON's concerns remains preliminary and subject to review and change through proper consultations.

[8] Hayes argues that the substantive results of consultation are reasonable. One can sympathize with Hayes' sense that it is caught between MNRF and SON. That said, Hayes' frustration and its interests in moving forward with the Project are not valid reasons to defeat SON's constitutional rights. When there are disagreements about consultations, providing a remedy for a First Nation will often cause delay. Thus though the duty to consult is the Crown's, proponents have an interest in facilitating the consultation process. In this case, Hayes refused that role. It was entitled to do this, but one consequence of its decision is further delay to complete adequate consultations.

[9] For the reasons that follow I would set aside the Minister's decision to issue the license for the Project, without prejudice to the Minister approving a license after reasonable consultations with SON.

Part I - General Principles Respecting the Crown's Duty to Consult

[10] In 2004, in *Haida Nation*, a unanimous Supreme Court of Canada undertook the “modest task” of “establishing a general framework for the duty to consult and accommodate” rights and claims of First Nations. This new framework was a start, not an end, to analysis: in future cases “courts... will be called on to fill in details of the duty to consult and accommodate.”²

[11] The duty to consult arises as part of the “process of honourable negotiation” required of the Crown by s.35(1) of the *Constitution Act, 1982*, which states³ that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁴

[12] “The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting those interests are being seriously pursued.”⁵ The duty to consult is a “valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.”⁶ The goal of consultations is vindication of First Nations’ rights and reconciliation with First Nations.

[13] The duty to consult and accommodate applies to both the federal and provincial Crown.⁷

[14] 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...”⁸ The Supreme Court rejected an “either/or” approach of “watertight compartments” and instead held that the “concept of a spectrum may be helpful” which is to be assessed by the Crown:

... [the] scope of duty is proportionate to a preliminary assessment of the strength of the case... and to the seriousness of the potentially adverse effect....⁹

... Every case must be approached individually.¹⁰

[15] The general process to be followed is:

Step 1: the Crown determines whether a duty to consult arises.

² *Haida Nation v. BC (Minister of Forests)*, [2004] 3 SCR 511 (“*Haida Nation*”), para. 11.

³ *Haida Nation*, para. 20.

⁴ *Constitution Act, 1982*, Schedule B to the *Canada Act (UK), 1982*, c.11, s.35.

⁵ *Haida Nation*, para. 27.

⁶ *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 (“*Beckman*”), para. 44.

⁷ *Haida Nation*, para. 59. See also *St. Catharine's Milling and Lumber Co. v. The Queen*, [1887] 13 SCR 577, aff'd. (1988), 14 App. Cas. 46 (P.C.); *Delgamuukw v. BC*, [1997] 3 SCR 1010 (“*Delgamuukw*”), para. 175.

⁸ *Haida Nation*, para. 35. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, para. 34; *Halfway River First Nation v. BC (Minister of Forests)*, [1997] 4 CNLR 45 (BCSC), per Dorgan J.

⁹ *Haida Nation*, paras. 37, 39, 43.

¹⁰ *Haida Nation*, para. 45; *Beckman*, para. 44.

Step 2: the Crown makes a preliminary assessment of the scope of the duty to consult.

Step 3: the Crown then consults with the First Nation.

Step 4: a duty to accommodate may arise during consultation.

[16] The duty to accommodate follows from the duty to consult and may not be excluded from the outset: “[t]he contemplated process is not simply one of giving the [First Nation] an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.”¹¹ The level of consultation required may change over time as the process moves forward and new information comes to light.¹²

[17] “Consultation must be meaningful.”¹³ The Crown “must act with honour and integrity, avoiding even the appearance of ‘sharp dealing’.”¹⁴ On the other hand:

[a]s for Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting...¹⁵

[18] There is “no duty to come to an agreement” and neither side is precluded from “mere hard bargaining”.¹⁶ And even where consultation and accommodation is reached in a particular case, all of this is placed within the broader context of reconciliation, which is not an atomistic event or series of events in isolation. “Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s.35(1) of the *Constitution Act, 1982*.”¹⁷ Thus consultation, and if necessary, accommodation, is part of a process of reconciliation: “[c]onsultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people.”¹⁸

[19] “The honour of the Crown cannot be delegated.”¹⁹ It is “always at stake in its dealings with Aboriginal peoples.”²⁰ This does not mean that third parties (such as the Proponent) cannot be involved in fulfilling the Crown’s duty to consult and accommodate. However, “the Crown

¹¹ *Mikisew Cree First Nation v. Canada*, [2005] 3 SCR 388, para. 54.

¹² *Haida Nation*, para. 45.

¹³ *Haida Nation*, para. 10.

¹⁴ *Haida Nation*, para. 19, quoting *R. v. Badger*, [1996] 1 SCR 771.

¹⁵ *Haida Nation*, para. 42. See also *Beckman*, para. 48; *Halfway River First Nation v. B.C. (Min. Forests)*, [1999] 4 CNLR 1 (BCCA); *Heiltsuk Tribal Council v. BC (Min. Sustainable Resource Mgmt.)*(2003), 19 BCLR (4th) 107 (BCSC).

¹⁶ *Haida Nation*, paras. 10, 42.

¹⁷ *Haida Nation*, para. 32.

¹⁸ *Beckman*, para. 55.

¹⁹ *Haida Nation*, para. 53.

²⁰ *Beckman*, para. 52.

cannot contract out of its duty of honourable dealing with Aboriginal People.”²¹ Where the Crown does delegate to a third party some part of the process of consultation, “that does not relieve the Crown of the responsibility to assess whether the duty has been discharged.”²²

[20] These issues must be approached systematically and comprehensively; the government “may not simply adopt an unstructured administrative regime” in response to the Supreme Court’s conclusion respecting the duties to consult and accommodate.²³

[21] The duty to consult may arise where there is a modern treaty²⁴ or where no treaty has yet been signed.²⁵ Even where there is a modern treaty,

... the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract.²⁶

A treaty is not a commercial contract. A “treaty is as much about building relationships as it is about the settlement of ancient grievances.”²⁷ Signing a treaty – whether a nineteenth or early-twentieth century treaty or a modern treaty – is “not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.”²⁸ These principles have full force where there is an old treaty that does not address in detail the ongoing relationship between the First Nation and the Crown as a modern treaty does.²⁹

[22] The duty to consult often arises where interests of third parties are also at stake. Affected third parties are entitled to be treated fairly and reasonably as well. In *Beckman*, for example, a third party, Paulsen, sought a land grant of 65 hectares of surrendered land for farming in the Yukon. The land was within an area subject to a treaty right of access for subsistence hunting and fishing.³⁰ Paulsen applied for a land grant in 2001 and was still awaiting the outcome of his application eight years later when the case was decided by the Supreme Court of Canada, which noted that Paulsen was “entitled to a decision reached with procedural fairness within a reasonable period of time.”³¹

²¹ *Beckman*, para. 61.

²² *Yellowknives Dene First Nation v. AG Canada*, 2010 FC 1139, para. 99.

²³ *Haida Nation*, para. 51, quoting from *R. v. Adams*, [1996] 3 SCR 101, para. 54.

²⁴ *Beckman*, para. 43.

²⁵ *Rio Tinto Alcan Inc. v. Carrier Sekami Tribal Council*, [2010] 2 SCR 650; *Haida Nation*, paras. 26-38.

²⁶ *Beckman*, para. 10.

²⁷ *Beckman*, para. 10.

²⁸ *Mikisew Cree First Nation v. Canada*, [2005] 3 SCR 388, para. 54.

²⁹ See for example *R. v. Marshall*, [1999] 3 SCR 456 (1760-61 Treaty); *R. v. Badger*, [1996] 1 SCR 771 (Treaty No. 8 [1899]); *Mikisew Cree First Nation v. Canada*, [2005] 3 SCR 388.

³⁰ *Beckman*, para. 4.

³¹ *Beckman*, paras. 3 and 35.

[23] Eventually, “[s]omebody has to bring consultation to an end and to weigh up the respective interests...”³² and make a decision.

[24] Not every case involving the duty to consult is constitutional; the source of the duty is s.35 of the *Constitution Act*,³³ but there is a link between constitutional doctrine and administrative law principles.³⁴ The nature of the consultation and the procedural fairness requirements must be “appropriate to the circumstances”.³⁵ Use of “a forum created for other purposes may nevertheless satisfy the duty to consult if in substance an appropriate level of consultation is provided.”³⁶

[25] The evaluation of consultation and accommodation must be contextual. The “adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether the purpose was, on the facts, satisfied.”³⁷ Thus “[t]here must be more than an available process: the process must be meaningful.”³⁸ Therefore “[i]t cannot be said that offering [a First Nation] an opportunity to participate in fundamentally inadequate consultations preserves the honour of the Crown.”³⁹

[26] To have meaningful participation in consultations, a First Nation must have sufficient expertise and resources. This can lead to disagreement over whether funding is required, and if it is, how much is needed, and what should be done if the Crown and a First Nation disagree on these points. In some cases, First Nations have refused to meet in the absence of “funding to ‘support... meaningful engagement in the issue’...” and when the Crown proposed funding, have “claimed that the funding provided was not adequate to support the [First Nation] in its efforts to consult...”⁴⁰ Sometimes the First Nation has said that it was “unable to review and discuss matters... ‘because of a lack of funding and staff’.”⁴¹ The Crown has sometimes taken First Nations’ positions on these issues as evidence of the First Nation “not approach[ing] the consultation in good faith”.⁴²

³² *Beckman*, para. 84 (emphasis in original).

³³ *Beckman*, para. 44.

³⁴ *Beckman*, para. 46.

³⁵ *Beckman*, para. 46.

³⁶ *Beckman*, para. 39; *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, [2004] 3 SCR 550 (emphasis in original).

³⁷ *Beckman*, para. 72.

³⁸ *Chartrand (Kwakiutl First Nation) v. BC (Forests, Lands and Natural Resources)*, 2015 BCCA 345, para. 79.

³⁹ *Chartrand (Kwakiutl First Nation) v. BC (Forests, Lands and Natural Resources)*, 2015 BCCA 345, para. 77.

⁴⁰ *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, paras. 61, 67.

⁴¹ *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, para. 91.

⁴² *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, para. 269.

[27] “[T]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a ‘level playing field.’”⁴³ Reasonable efforts should be made, on both sides, to avoid funding brinksmanship. Ultimately the decision on funding is the Crown’s, as part of its design and implementation of a consultation process, and its decisions on funding issues will be reviewed on a standard of reasonableness.

[28] The duty to consult and accommodate is prospective, addressing proposed future actions. For example, in *Alcan v. Carrier Sekani Tribal Council*, the issue was the 2007 iteration of a contract under which Alcan sold excess power to BC Hydro from its hydroelectric dam. The dam had been built in 1951. The issue, in 2007, concerned the 2007 agreement, in the context that the dam already existed and had been in place for over 50 years. The propriety of building the dam in the first place, and the operation of the dam between 1951 and 2007, were not matters for consultation at the time of the 2007 agreement. Claims arising from events prior to 2007 were to be taken up in treaty negotiations or separate civil claims.⁴⁴

[29] This is not to say that the duty to consult arises in a historical vacuum. “[H]istorical context”... can be “essential to a proper understanding of the seriousness of the potential impacts...” of a proposed activity on a First Nation’s rights.⁴⁵ Therefore, in *West Moberly*, where past activities had devastated a caribou population, the relatively small impact of the proposed current project had to be placed within the context of the damage that had already been done. In addition, the proposed activity had to be placed in the context of where it was intended to lead. In *West Moberly*, exploratory drilling for coal was proposed with a view to mining coal if it was found: there was no other purpose for the exploratory program. Consideration could be given to the potential impact of the overall project, and not just the current incremental step.⁴⁶

Part II – Perspectives

(a) The Proposed Limestone Quarry

[30] For Hayes, the issue is simple: it owns land on which it wishes to quarry limestone for use as aggregate. It has done what is required by MNRF to obtain a license for this activity and, for Hayes, the Project’s impact on SON’s traditional territories will be minimal or non-existent.

⁴³ *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, para. 269, quoting *Platinex Inc. v. Kitchen Uhmaykoosib Inninuwig First Nation*, [2007] OJ No. 2214, para. 27. See also *Taku River Tlingit First Nation v. BC (Projects Assessment Director)*, 2004 SCC 74.

⁴⁴ *Alcan v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, paras. 45, 53-54.

⁴⁵ *West Moberly First Nations v. BC (Chief Insp. of Mines)* (2011), 333 DLR (4th) 31, 2011 BCCA 247, para. 117.

⁴⁶ *West Moberly First Nations v. BC (Chief Insp. of Mines)* (2011), 333 DLR (4th) 31, [2011] BCCA 247, para. 123. Hinkson JA, who agreed in the result, makes the point that “the duty to accommodate does not include remedying historic wrongs” (at paras. 169-185). One way to reconcile the two views is to agree that while there may be no duty to right past wrongs, accommodation may include not frustrating a First Nation’s reasonable efforts to remedy consequences of past actions.

Hayes has been at this process now for almost a decade and does not wish to be put to any further expense or delay in going about its business.

[31] From MNRF's point of view, there are hundreds of small limestone quarries in southern Ontario, and there is public utility in using these quarries for construction projects and other purposes in southern Ontario. MNRF wishes to respect the realistic and practical interests of First Nations affected by these projects, but it does not want to institutionalize an expensive and duplicative process for assessing environmental and cultural impacts. In particular, MNRF does not accept that multiple sets of expert assessments should be required for every project that may have some incidental impact on First Nations' interests. MNRF has recognized that the process has not gone smoothly in this particular case, but is satisfied that all substantive concerns raised by SON have been addressed reasonably.

[32] From SON's perspective, the Project is part of the broader issues raised by numerous aggregate projects in its traditional territory. The cumulative impact of these projects places strain on SON's resources, both human and financial. The absence of a coherent consultation process aggravates the stress on SON's resources: additional resources are spent to establish SON's right to be consulted and then more are spent to defend SON's view of the proper scope of meaningful consultation. The time and money spent contesting these preliminary issues has, in this case, considerably outstripped the likely reasonable costs of substantive consultations for the Project. This is wasteful of SON's scarce resources. SON has told MNRF of its preliminary concerns but cannot say more, it says, without being able to understand technical reports for which it needs expert advice. Therefore it does not know whether its concerns have been addressed adequately, or if it has fully explained all of its concerns to MNRF.

(b) The Consultation Process

[33] For Hayes, consultation is the Crown's duty. The Crown could impose consultation requirements on a proponent, but Hayes refused to accept a unilateral imposition by MNRF of these requirements in August 2013, more than five years into the license application process. Hayes denies that the Project will have material consequences for SON's interests, and Hayes does not wish to be put to any further expense or delay in a conflict which it sees as being procedural and as between SON and MNRF.

[34] For SON, consultation on the Project was disjointed, inconsistent, and an exercise in frustration. SON has been clear that it needs funding to participate. Funding was agreed⁴⁷ but never delivered. SON continues to be willing to undertake consultation if it receives the

⁴⁷ It could be debated whether funding was "proposed", "offered", or "agreed" or "decided upon" by MNRF. These are distinctions without a difference in the context of these consultations: SON agreed to MNRF's decision/offer subject to a qualification that it would have been unreasonable for MNRF to reject, and which was not rejected in fact by MNRF back in 2011/2012.

promised funding. It also continues to maintain that it may require more funding, which it will address with MNRF after it has completed its preliminary work.

[35] It is difficult to divine a consistent approach to consultation by MNRF except for three points. First, MNRF takes the position that it gave notice of the Project to SON in May 2008 and heard nothing from SON about the Project until September 2011. Second, starting in 2011, MNRF sought concrete information about SON's activities in and near the Project and felt that SON was less than forthcoming on this issue. Third, MNRF was concerned with managing consultation costs. The first point is not one that I accept, as I explain below. The second and third points are both legitimate but have assumed disproportionate importance for MNRF, given the obvious problems in the consultation process in this case. The second point is also of reduced significance now that MNRF has formally recognized a duty to consult in this case, a point that was not entirely clear for most of the discussions between MNRF and SON. The third point, while still relevant, is largely resolved, for now, given the funding MNRF has agreed to provide to SON.

Part III - Background

A. The First Nations: Saugeen First Nation and Chippewas of Nawash Unceded First Nation

[36] SON is made up of two First Nations: Chippewas of Nawash Unceded First Nation and Saugeen First Nation. They are Aboriginal people within the meaning of s.35 of the *Constitution Act, 1982*, and “bands” pursuant to the *Indian Act*.⁴⁸

[37] The two bands make decisions respecting their shared territory through the SON Joint Council. They have established the SON Environment Office through which they engage with government and proponents about projects, decisions or conduct in SON’s traditional territory that could affect SON’s rights, culture, resources, lands and waters.⁴⁹

[38] SON takes the position that its traditional territory includes the Bruce/Saugeen Peninsula, lands to the south of the peninsula and adjacent waters in Lake Huron and Georgian Bay.⁵⁰

[39] SON is a signatory to treaties with the Crown including Treaty 45½ (made in 1836) and Treaty 72 (made in 1854). SON challenges the validity of Treaty 72 in separate proceedings⁵¹ in which SON claims (among other things) Crown lands adjacent to and abutting the Project.⁵² SON also takes the position that Treaties 45½ and 72 do not surrender SON’s rights to fish, hunt, harvest, conduct spiritual ceremonies and engage in other traditional activities throughout SON traditional territory.⁵³

[40] SON takes the position that it has “proven and asserted Aboriginal and treaty rights” in its traditional territory that are protected by s.35 of the *Constitution Act, 1982*, including:

- (a) right to fish commercially;
- (b) rights to hunt, fish and gather traditional medicines;
- (c) rights to protect culturally and spiritually significant species⁵⁴ and cultural resources;⁵⁵ and

⁴⁸ *Indian Act*, RSC 1985, c.I-5, s.2.

⁴⁹ SON Factum, para. 5.

⁵⁰ SON Factum, para. 6.

⁵¹ Ontario Superior Court proceedings commenced in Toronto, Court File Nos. 94-CQ-50872CM and 03-CV-261134CM1.

⁵² SON Factum, para. 8.

⁵³ SON Factum, para. 6.

⁵⁴ Including the Massassauga Rattlesnake, deer and black bear.

⁵⁵ Including burial/grave sites.

- (d) rights to protect the health and integrity of lands, waters and resources throughout SON's traditional territories.⁵⁶

B. The Proponent: T & P Hayes Ltd.

[41] The Proponent, Hayes, is a private company. It and its President own the land on which the Project is located, which is in the Municipality of Northern Saugeen/Bruce Peninsula.⁵⁷

C. The Crown: Represented by MNRF

[42] The Minister has authority to administer the *Aggregates Resources Act*.⁵⁸ MNRF has represented the Crown in dealings with SON and Hayes about the Project.

Part IV - History of Consultations

(a) Hayes' Application for a License

[43] Hayes applied for a license for the Project pursuant to s.7(2) of the *Aggregate Resources Act*⁵⁹ on February 19, 2008.⁶⁰ MNRF advised Hayes that its application was "complete" on February 27, 2008.⁶¹

(b) February 2008 to September 2011: No Notice to SON

[44] MNRF periodically sent SON a running list of outstanding aggregate applications located in SON's traditional territories. Hayes' application was added to this running list in May 2008. SON acknowledges that these lists were emailed to it and included Hayes' application from May 2008 onwards. SON says that it did not know about the Project because it did not realize that the Hayes application had been added to the list.⁶²

[45] For the following reasons, I accept that SON did not know about the Project from the running list and did not learn about it until September 2011.

[46] There were roughly 500 quarries in SON's traditional territory. At any given time there were dozens of license applications pending.⁶³ An application could take years from the time it was requested until final decision. Sometimes applications progressed steadily. Sometimes they

⁵⁶ SON Factum, para. 7.

⁵⁷ Affidavit of Edward K. Hayes sworn December 19, 2016 ("Hayes Affidavit"), para. 2.

⁵⁸ *Ministry of Natural Resources Act*, RSO 1990, c. M.31, ss. 2 and 4; *Aggregates Resources Act*, RSO 1990, c. A.8, ss. 1 and 3(1).

⁵⁹ *Aggregate Resources Act*, RSO 1990, c. A.8, s.7.

⁶⁰ SON Factum, para. 3; Hayes Factum, para. 11.

⁶¹ Hayes Factum, para. 15.

⁶² SON Reply Factum, para. 10.

⁶³ Affidavit of Kathleen Ryan sworn September 12, 2016 ("Ryan Affidavit"), para. 11.

remained on the running list without apparent progress. Sometimes they were withdrawn or otherwise removed from the running list without a license being granted.

[47] In 2008-2011, SON did not have resources to track all quarry applications. In May 2008, it had only one employee in the SON Environment Office and insufficient resources to assess and respond to the many issues that arose for that office. In 2008-2011, SON and MNRF were discussing how aggregate quarry consultations ought to take place, generally, and in respect to “a number of other specific license applications.”⁶⁴ The Hayes application was not flagged or specifically mentioned in these communications. SON notes that its position with MNRF was that it needed funding for general capacity, and SON would have had no motive to ignore the Project; quite the opposite: it would have been further evidence supporting SON’s claim to need general capacity funding.

[48] Hayes had public notice obligations which included posting notices at the site⁶⁵ and running advertisements in a local paper, the *Warton Echo*.⁶⁶ A public information session for the Project was held on May 6, 2008.⁶⁷ No public objection was received through the public notice and consultation process.⁶⁸ MNRF and Hayes ask this court to infer that, even if SON overlooked the Project on the running list, the Project would have and did come to SON’s attention as a result of the public notices given by Hayes.

[49] I do not accept these arguments. First, where there is a duty to consult, the minimum Crown obligation is notice and the Crown must establish affirmatively that notice has been given. General public notice requirements under the *Aggregates Resources Act* do not include notice to an affected First Nation. Second, there is no evidence that the Project did come to SON’s attention as a result of the public notices given by Hayes. Third, it would not be sufficient to show that the Project came to the attention of some member of SON. As noted above, there are hundreds of quarries in the area and dozens of projects under consideration at any given time. A member of SON might hear of a project without realizing that it was not known to the SON Environment Office. Fourth, there was no reason for SON not to respond to Hayes’ application in 2008 deliberately, only to respond in 2011. And fifth, there is no evidence to the contrary.⁶⁹

⁶⁴ SON Factum, para. 10.

⁶⁵ Hayes Factum, para. 17.

⁶⁶ Hayes Factum, para. 16.

⁶⁷ Hayes Factum, para. 18.

⁶⁸ Hayes Factum, paras. 19-20.

⁶⁹ In oral argument, counsel for MNRF advised that the running lists highlighted new projects in yellow. When asked, counsel acknowledged that this information was not in the evidence before us. A party may not add to the record during argument, or rely upon facts not in evidence. The nature of the notice given to SON was impugned in SON’s application materials; if MNRF wished to lead evidence responding to SON’s materials on this point, it had to do so in responding evidence or cross-examinations.

[50] Therefore, I accept that SON did not appreciate that the Project had been added to the running list of projects back in 2008, and did not learn of it until receiving a copy of the zoning amendment for Project lands in September 2011. Although Hayes' application had been underway for Hayes and MNRF since May 2008, it started for SON in September 2011.

(c) MNRF's 2009 Assessment

[51] MNRF says that it completed a preliminary assessment of the Crown's duty to consult in 2009. MNRF says that it assessed the extent of this duty as "low" at this time.⁷⁰ Prior to September 2011, the Crown did not advise SON of these assessments.

[52] On the basis of these preliminary assessments, MNRF says that it concluded that SON was not entitled to more than notice of and information about the Project.⁷¹ The Crown acknowledges that it did not advise SON of this conclusion prior to September 2011.

[53] Aside from placing the Project on the running list of projects, MNRF did nothing to consult with SON about the Project prior to September 2011.⁷²

[54] The Crown was obliged to do an initial assessment. This is a requirement of constitutional stature. This is clear from *Haida Nation*. One would expect that, somewhere in MNRF's records, there would be documents setting out MNRF's initial assessment and explanations for it. There are, apparently, none. The Crown also states that it assessed the scope of its duty to consult SON at the "low end" of the spectrum in 2009, requiring the Crown to give notice and to provide SON with information about the Project. "Scoping" is also a requirement of constitutional stature. This, too, is clear from *Haida Nation*. One would think that there would be some record to support MNRF's 2009 conclusion respecting the scope of the duty to consult. MNRF's witness says in his affidavit that the assessments were made in 2009 but he provides no particulars. He does not say who made the assessments. He does not say what the assessments were based upon. When asked on cross-examination to produce contemporaneous documents setting out or referring to these assessments, the question was taken under advisement. Apparently it was never answered.

[55] Assuming that MNRF did put its mind to the initial assessment, and assuming that it assessed the Crown duty at the "low" end of the spectrum, this "low" level of consultation still required MNRF to give notice and to provide SON with information about the Project. Placing the Project on the running list could be viewed as an unsuccessful, inadequate, but good faith attempt to give notice. But there is no evidence that MNRF did anything at all to provide information to SON about the Project prior to 2011.

⁷⁰ SON Factum, para. 10.

⁷¹ SON Factum, para. 10.

⁷² SON Factum, paras. 10-11.

[56] The improbability of MNRF's account of events between 2008 and 2011 is tempered by SON's approach to this issue. SON has not pressed the obvious conclusion, either during cross-examination of MNRF's witness or by arguing that MNRF should be disbelieved on this point. On the basis of *Browne v. Dunn*⁷³ it would be unfair to proceed on a basis other than that which was put to this court. And therefore I accept that MNRF did conclude in 2009 that it had a duty to consult with SON on the Project.

[57] I have already concluded that placing the Project on the running list did not give SON effective or actual notice of the Project. No other notice was given to SON prior to September 2011. Therefore I find that the Crown failed to discharge its acknowledged duty to give notice of the Project to SON prior to September 2011.

[58] In its materials, MNRF does not provide evidence that it provided any information about the Project to SON prior to September 2011. This omission is problematic in two ways. First, it is hard to understand why MNRF would have failed to provide any information to SON if it had scoped its duty to include providing information. Second, the failure to provide any information to SON prior to September 2011 was a breach of MNRF's acknowledged duty to consult.

[59] It is neither necessary nor practically possible to decide now whether MNRF's assessment of the scope of the Crown duty to consult SON was correct, or reasonable, back in 2009. It is not necessary because (a) MNRF did not consult SON in accordance with the scope it had assessed, and (b) because events have moved on: MNRF has changed its position on scope, and what matters now is whether the Crown has consulted SON sufficiently to discharge the proper scope of its duty, as that duty is assessed today. It is not practically possible because there is no record on which to review MNRF's assessment of the scope of the Crown duty back in 2009. Therefore I decline to decide whether MNRF's assessment of the scope of the Crown's duty to consult SON about the Project was correct or reasonable from 2009 to September 2011.

(d) Hayes' Consultation Activities to September 2011

[60] Between February 2008 (when it submitted its application) to September 2011, Hayes had no direct dealings with SON. Hayes was not responsible for or involved in assisting the Crown to discharge its duty to consult with SON about the Project between 2008 and 2011.

(e) Findings for February 2008 to September 2011

[61] Based on this history, I find:

- (1) MNRF had a duty to determine whether there was a Crown duty to consult SON about the Project.

⁷³ *Browne v. Dunn* (1893), 6 R. 67 (H.L. Eng.).

- (2) In 2009, MNRF decided that the Crown did have a duty to consult SON about the Project. This conclusion was correct.⁷⁴
- (3) MNRF was obliged to advise SON that it had decided that the Crown had a duty to consult SON about the Project. MNRF did not do so and thereby breached the Crown's duty to consult SON.⁷⁵
- (4) Once MNRF found a duty to consult SON, the Crown had a duty to make a preliminary assessment of the scope of this duty. MNRF did this preliminary assessment in 2009 and concluded that the duty to consult lay the "low" end of the spectrum. MNRF did not advise SON of this conclusion, and thereby breached its duty to consult SON.
- (5) I decline to decide whether the Crown's assessment of the scope of its duty to consult was correct, or reasonable, in 2009. The Crown did not discharge this duty, and in any event the Crown subsequently changed its position on scope. Further, there is no record on which to assess the correctness or reasonableness of the 2009 scope assessment.
- (6) MNRF concluded that it had an obligation to give notice of the Project to SON and to provide SON with information about the Project. These conclusions were consistent with MNRF's initial assessment of its scope to consult SON.
- (7) MNRF failed to give notice of the Project to SON prior to September 2011. MNRF failed to provide information about the Project to SON prior to September 2011. Accordingly, as of September 2011, MNRF had failed to do the things that it had determined were required to consult with SON on the Project, thereby failing to discharge the Crown's duty to consult.
- (8) Hayes was not involved in the consultation process prior to September 2011.

(f) SON Asserts Its Right to Be Consulted: September 2011 to August 2013

[62] SON learned of the Project from notice of a zoning change in September. On September 9, 2011, SON's counsel wrote for the first time to MNRF about the Project (with a copy to Hayes' land use planning consultant):

... any activity, approval process, and/or any other decision, such as licenses or permits under the *Aggregates Resources Act*, that impacts those lands or our

⁷⁴ The parties agree on this point, as noted below.

⁷⁵ This conclusion is not at odds with this court's decision in *Wabauskang First Nation v. Ontario (Minister of Northern Development and Mines)*, 2014 ONSC 4424, 324 OAC 341 (Div. Ct.): there is a distinction between disclosure of the results of an assessment, and disclosure of the basis of that assessment.

client's Aboriginal rights cannot proceed without substantive consultation and accommodation.

.... Kindly forward any other relevant information to our office including anticipated timelines for seeking permits and approvals for a quarry operation. We will expect you to be in contact as soon as possible to discuss your intended process for consulting and accommodating SON on this matter.⁷⁶

[63] By letter dated September 19, 2011, MNRF responded that the Project lands are not Crown lands. MNRF ended the letter: "Please feel free to consult our office if you require any further information or have any additional questions.... Thank you for your interest in this application."⁷⁷ The premise of this letter is that MNRF did not consider that consultation with SON was required because the Project is not on Crown lands.

[64] By letter dated September 22, 2011, Hayes' land use planning consultant, Ron Davidson, wrote to counsel for SON enclosing Project documents, including copies of Davidson's planning report, Official Plan amendment, zoning by-law amendment application, quarry license application, site plans, expert hydrogeology opinion, natural environment technical report, Ministry of Culture clearance letter and correspondence about the application back to 2008.⁷⁸

[65] It was clear from the materials sent by Davidson that the Project was well advanced. By letter dated September 23, 2011, counsel for SON wrote to MNRF, with a copy to Davidson, raising this concern and setting out SON's expectations:

It is clear that the operation of the quarry... will have an impact on lands that are claimed [by SON]. Those lands are currently designated as wetland habitat, with identified sensitive species nearby. There is also archaeological potential on those lands....

Despite the fact that there will be impacts on their rights and interests, SON has not been consulted. The case law clearly states that First Nations are entitled to consultation where there are potential impacts to their rights or to their asserted rights, and that consultation should take place at a strategic planning stage. As such, SON is very concerned that there was no consultation prior to the approval of the official plan amendment....

Any future activity or further approval should not proceed until substantive consultation and accommodation is complete....

⁷⁶ Applicant's Record, vol. 2, tab I(1).

⁷⁷ Applicant's Record, vol. 2, tab I(2).

⁷⁸ Applicant's Record, tab I(3).

We will expect you to be in contact as soon as possible to discuss your intended process for consulting and accommodating SON on this matter.⁷⁹

Counsel for SON attached a flowchart setting out a proposed consultation process.

[66] MNRF responded by letter dated October 28, 2011 as follows:

We certainly welcome any information or feedback from [SON] with respect to... the proposed aggregate operation of [Hayes]. A review of our records indicates that MNR notified your clients of this application on December 15, 2008.... [T]o my knowledge [MNRF] has not to date received any feedback or concerns from SON....

Our Ministry welcomes additional detailed information that will aid in our understanding of the potential adverse impacts of this proposal on the SON's Aboriginal or treaty rights....⁸⁰

The premise of this letter is that it is not clear that there are any "potential adverse impacts" on SON's rights.

[67] SON's counsel responded to MNRF on November 18, 2011. She repeated SON's position that "it is clear that the operation" of the quarry "will have an impact on lands that are claimed." She then wrote:

In order to provide more information about the nature of the impacts, further site assessment needs to be completed. SON's position – which has also already been communicated – is the costs of that assessment, and other costs of consultation, i.e. costs for SON's technical experts to peer review studies and other information, and funding for SON staff participation in meetings, must be borne by the Crown and the proponent. We do not yet know the exact amount that is required for a proper consultation and accommodation process to be satisfied. We will not know that before we have completed an initial assessment to determine the scope of the duty to consult and accommodate. We can estimate approximately \$13,000 will be required for initial site assessments and peer review reports and other planning documents that have already been completed.⁸¹

The letter suggested that it was for SON to complete "an initial assessment to determine the scope of the duty to consult and accommodate." That was not correct. It is the Crown's duty to

⁷⁹ Applicant's Record, vol.2, tab I(4).

⁸⁰ Applicant's Record, vol.2, tab I(6).

⁸¹ Applicant's Record, vol.2, tab I(7).

complete the initial assessment. However, MNRF did not correct SON on this point, nor did it advise that an initial assessment had been completed in 2009 or the results of that assessment.

[68] MNRF responded on January 19, 2012. MNRF largely repeated what it had said already: it had not heard from SON despite notice to SON in 2008. MNRF was happy “to share and review with SON the technical reports, studies and reviews conducted as part of [the quarry] application.” MNRF then stated that “we require further details from SON specific to how this aggregate application might adversely affect SON’s aboriginal or treaty rights.”

[69] Counsel for SON responded to MNRF by letter dated January 31, 2012. In it counsel repeated SON’s position that it is clear that the proposed quarry will affect adjacent lands, which are the subject of a claim by SON. Counsel advised that “SON has no record of being notified about this aggregate license application in 2008.” Counsel then stated that, aside from the general description of obvious potential effects of the quarry,

[a]ny further and more specific assessment or determination of impacts is an objective of and is properly the subject of a consultation and accommodation process. Since no consultation has yet occurred, it is impossible for SON to provide any further assessment or detail of those impacts.

Counsel repeated SON’s position that it would need \$13,000 “for initial assessment costs” and then concluded as follows:

SON would like to receive and review the project information and/or provide further details with respect to potential impacts, but SON requires a response from the Crown and from the Proponent with respect to the following:

- agreement on a consultation and accommodation process
- funding for that process, including resources for peer review of existing studies and reports, and independent assessments of impacts; and
- a commitment that no further approvals for the proposed quarry will go ahead before consultation and accommodation is complete.⁸²

[70] By letter dated February 17, 2012, counsel for SON wrote to the Minister expressing concerns about the general failure of MNRF to consult with SON respecting aggregate quarry applications. Counsel pointed specifically to the Project as an example where SON interests had been ignored. Counsel closed the letter as follows:

⁸² Applicant’s Record, vol. 2, tab I(10).

As SON has stated... this repeated disregard for SON's Treaty and Aboriginal rights and your duty to consult is leaving SON with very few options in terms of addressing Ontario's failure in this regard. It is unfortunate that your office appears to view litigation as a preferable option to negotiation, discussion, and proper consultation. This does not satisfy Ontario's "New Relationship" that First Nations have been promised, and does not satisfy the goals of reconciliation that the courts have mandated.⁸³

One side point needs mentioning here. In reference to this letter, MNRF's primary witness mentions a demand by SON, in this letter, for \$70,000 in consultation costs. This evidence is not fairly characterized in the witness' evidence. The \$70,000 was costs incurred in numerous consultations, not just the Project. SON did not demand payment of the \$70,000 as a condition precedent for consultations on the Project. The witness' evidence left a contrary impression and was unfair on this point. The honour of the Crown is always engaged in dealings between the Province and a First Nation; the Province's witnesses should be scrupulous in their efforts to characterize the record and the evidence fairly.

[71] By letter dated March 12, 2012, counsel for SON wrote to MNRF seeking a response to counsel's letter of January 31, 2012. In addition, counsel responded to MNRF's position that SON was given notice of the Project on December 15, 2008. On this point counsel wrote:

As we have previously told you, SON does not have any record of that communication [of December 15, 2008]. **Please provide us with copies of any notifications or correspondence between [MNRF] and SON in relation to... Hayes' application.**⁸⁴

[72] MNRF responded on March 12, 2012, enclosing copies of the running lists sent by email showing the Hayes' application listed as pending. In terms of a substantive response, MNRF stated:

Please be advised that we are in the process of responding to both your January 31st letter addressed to me and the February 17th letter addressed to the Minister.... It is our intention to provide one response that addresses the issues identified in both letters.⁸⁵

[73] MNRF responded to SON substantively by letter dated April 12, 2012. The letter is stated as intended "to provide additional detail as to how we have addressed SON concerns as expressed to date." MNRF repeats its position that notice had been given to SON of the Project by way of emails starting in December 2008. MNRF summarizes SON's position (a) there are

⁸³ Applicant's Record, vol. 2, tab I(11).

⁸⁴ Applicant's Record, vol. 2, tab I(12) (emphasis in original).

⁸⁵ Applicant's Record, vol. 2, tab I(13).

potential adverse impacts from the Project on lands over which SON asserts claims; and (b) for SON to be able to provide any further meaningful information SON would require funding of \$13,000. MNRF responded to this position as follows:

There exists an onus on SON to make their concerns known and it has become apparent from recent correspondence that no further information will be provided without the funding requested above. Unfortunately, we are not in a position to provide the funding requested and as such we have done our best, in the circumstances, to be responsive to those substantive concerns you have raised to date.⁸⁶

MNRF then summarized what it understood SON's specific concerns to be, including wetland habitat, archaeological resources, adverse impact on sensitive species including the Massassauga Rattlesnake. MNRF then described how it had considered these impacts. MNRF then set out further information about these concerns and closed by stating:

We would of course welcome further discussion on this file particularly with respect to our understanding of your concerns and our proposed responses above. Further, as we have previously indicated we would be happy to provide the necessary experts to explain and respond to any further questions or concerns you raise and if needed we would be pleased to provide a space to meet or perhaps travel to your communities to discuss this matter.

As the application has been with the Ministry for some time, we request the SON's response at your earliest convenience....⁸⁷

In this response, MNRF conflated (a) the duty to consult, (b) the required scope of consultation, (c) the process for consultation, and (d) the substantive results of the consultation process. MNRF had still not acknowledged to SON that a duty to consult arose in this case. It still had not advised of its 2009 assessment of the required scope of consultation. And it still had not established a consultation process consistent with the required scope of consultation. In the absence of a structured response, MNRF's position that "[t]here exists an onus on SON to make their concerns known" is problematic. SON's stated concerns, to this point, were that it wished to be consulted properly and needed funding for that to happen. SON's preliminary identification of substantive concerns about the Project was provided to establish that a duty to consult did arise. This preliminary identification of concerns was not intended by SON to be the sum total of substantive consultation with SON.

[74] There was no "onus" on SON respecting the Crown's initial assessments (i) as to whether a duty to consult arises at all; (ii) the scope of that duty; and (iii) the consultation process to be

⁸⁶ Applicant's Record, vol. 2, tab I(14).

⁸⁷ Applicant's Record, vol. 2, tab I(14).

followed. This is not to say that a First Nation should refuse to engage the Crown over these issues: the Crown's assessments will be based upon the information it has. And SON did not refuse to engage on these points: its participation from September 2011 to August 2013 was focused on these preliminary questions. However, instead of dealing with the process issues raised by SON, MNRF seemed to address preliminary and substantive issues all at once. This is a sort of "unstructured administrative regime" against which the Supreme Court of Canada cautioned in *Haida Nation*.⁸⁸

[75] SON's counsel provided a preliminary response to MNRF on April 20, 2012, with more to follow a SON joint council meeting on May 3, 2012. Counsel stated that MNRF's letter provided more information than had been received before and then raised these concerns:

- Counsel referenced MNRF's bald refusal to provide funding and asked if it is "policy that [MNRF] will not require a proponent to fund (or itself fund) technical reviews to assess the impacts on SON's Aboriginal rights...."
- Counsel asked how SON's cultural concerns were addressed "in the absence of any discussion with SON about the cultural impacts involved?"
- Counsel commented on MNRF's willingness to engage in further discussions and then asked if MNRF would commit to consultation and accommodation "before any other approval proceeds?"
- Counsel asked "how [MNRF] considered and analysed cumulative effects in assessing the impact of this project."
- Counsel asked for copies of any studies or records from MNRF respecting the Project (other than the Proponent's materials which had been received already).⁸⁹

[76] Counsel for SON responded further to MNRF by letter dated May 9, 2012. Counsel argued that MNRF must consult substantively with SON and that no such consultation had yet taken place. Counsel advised that SON was willing to meet with MNRF, and then stated "we would like to reiterate that funding must be provided for SON to be able to meaningfully engage in any subsequent consultation process that may follow that initial meeting."⁹⁰ Implicit in this statement is that SON was willing to meet with MNRF before receiving funding.

[77] MNRF responded by letter from the Minister dated June 20, 2012. The Minister advised that it was the Ministry's position that SON was given notice of the quarry application in December 2008. The Minister confirmed that MNRF "is committed to fulfilling any duty to

⁸⁸ *Haida Nation*, para. 51.

⁸⁹ Application Record, vol. 2, tab I(15).

⁹⁰ Application Record, vol. 2, tab I(16).

consult that may arise with respect to decisions contemplated by the ministry under the ARA.” The Minister went on to list what he understood to be the concerns raised by SON. The Minister then stated:

... the ministry is satisfied that the proponent has addressed all outstanding environmental concerns. I understand that [MNRF] has shared details as to how your concerns have been considered and addressed.⁹¹

The Minister then stated that MNRF was “in the process of forwarding the technical reports and comments” related to the application to SON and would be scheduling a meeting with SON, as suggested.

[78] MNRF then provided a further response to SON’s concerns by letter dated July 31, 2012. MNRF noted that in July 2012, MNRF had forwarded all technical reports to SON. In the letter, MNRF stated:

- “At this point in time we are of the view that further technical reviews are not necessary.”
- If SON raises an issue that would require further review, MNRF would consider any request for funding “in the context of [MNRF’s] internal expertise.”
- MNRF understands that SON has received \$200,000 “to improve capacity to engage in consultation.”
- To date MNRF “have attempted to work with what SON has provided [MNRF].”
- MNRF “would welcome any further substantive information relating to possible adverse impacts and proposed mitigation measures.”
- Experts from MNRF and the Ministry of Culture had looked at the project “and with the mitigation measures in place [MNRF] is confident there should be no resulting adverse impacts based on our current understanding of the SON’s concerns.”
- There is no specific requirement under provincial law for a “cumulative effects assessment.”
- MNRF “has made multiple offers” to “either hold a meeting or to share information.”

⁹¹ Application Record, vol. 2, tab I(17).

- MNRF “continues to be committed to considering any substantive concerns the SON may have with respect to the proposed project.... We welcome any further information that may be provided.”⁹²

[79] Counsel for SON responded on August 24 and September 4, 2012. Counsel proposed September dates for a meeting. Counsel also repeated SON’s position respecting funding and responded to points raised by MNRF on this issue:

- “SON cannot meaningfully participate in consultation unless it has capacity funding. That includes funding to engage experts to review the technical reports prepared in relation to the specific application, advise SON on possible adverse impacts, and propose further substantive mitigation measures to address SON’s concerns.”
- Funding received by SON to build consultation capacity is not available to fund experts for a specific project like the Project.
- MNRF seems to be taking the position that it has “sufficiently addressed all of SON’s concerns by meeting their own review standards and without any involvement of or consultation with SON since the Ministry received the application in 2008 through to developing mitigation measures.”

Counsel acknowledged that MNRF was prepared to make provincial experts available to SON. Counsel indicated that SON would accept this approach if these experts signed retainer agreements with SON so that their duties would be owed to SON. Finally, counsel acknowledged receiving some information from Hayes’ consultant, Davidson, and some other information from MNRF, but described its receipt of information as a having “trickled in over time.” Counsel explained that she had initiated a request under the *Freedom of Information Act* in order to be satisfied that she had received all of the pertinent information.⁹³

[80] By letter dated September 13, 2012, MNRF responded, confirming a meeting for September 24, 2012. The letter also states:

As you are aware, there exists an onus on SON to make their concerns of possible adverse impacts to their rights known to the Crown. As we understand from your previous correspondence SON concerns relate to:

- adverse impacts to adjacent land including wetland habitat;

⁹² Applicant’s Record, vol. 2, tab I(18).

⁹³ Applicant’s Record, vol. 2, tabs I(19) and (20). SON raises the sufficiency and timing of disclosure as a sub-issue on this application. In view of my conclusions on the other issues on this application, it is not necessary to delve into those disclosure issues.

- on-site archaeological resources; and
- adverse impacts to sensitive species including massassauga rattlesnakes.

To date SON has not elaborated on how these concerns have the potential to adversely affect their rights. With this in mind, it will be very helpful for the SON to provide specific details on what they feel the adverse impacts are in relation to this application.⁹⁴

[81] MNRF wrote a further letter to SON dated September 21, 2012. This letter essentially repeats information in the letter of September 13, 2012, and adds further discussion about the possible use of Ministry experts by SON. MNRF advises that Ministry experts cannot enter into retainer agreements with SON, but that SON could rely upon the good faith of Ministry personnel.⁹⁵

[82] There are handwritten notes but no formal minutes of the meeting of September 24, 2012.⁹⁶ The concerns of the parties at the meeting were generally consistent with those expressed in the correspondence leading up to the meeting. SON took the position that it was not able to review and respond to the technical reports that had been provided without its own experts. The estimated costs for an initial response by SON experts remained at \$13,000. MNRF did not agree to provide this funding, but did ask SON to send a budget for consideration.

[83] MNRF remained focused on SON's substantive concerns and with identifying SON's interests in the lands in the area of the Project. MNRF continued in its position that it had already provided appropriate ameliorative measures for the concerns raised by SON, all of which could be explained to SON by MNRF's own experts.

[84] For its part, Hayes was anxious to proceed with the Project and wanted MNRF and SON to finish consultations without delay.

[85] On October 3, 2012, SON sent MNRF a proposed budget of \$16,214 for initial consultations.⁹⁷

[86] MNRF responded by letter dated October 22, 2012:

At the September 24th meeting we were hopeful that the SON would provide greater insight or detail about how the proposal may impact traditional rights and activities. While we share the frustration on behalf of the proponent that this did not occur, we acknowledge SON's stated position... [on] the need for funding....

⁹⁴ Applicant's Record, vol. 2, tab I(21).

⁹⁵ Applicant's Record, vol. 2, tab I(22).

⁹⁶ Applicant's Record, vol. 2, tab I(23).

⁹⁷ Applicant's Record, vol. 2, tab I(24).

Both [MNRF] and the proponent remain committed to providing any and all information that SON may require to ensure an efficient review process. We continue to offer the sharing of technical experts for the purpose of providing insight and assistance about how this proposal may impact constitutional rights.⁹⁸

MNRF then offered to fund \$8,514.00 of SON's budget. The reductions in SON's proposed budget eliminated legal fees, costs for a hydrogeologist, and allowances for travel time. MNRF said that "[MNRF] is providing financial assistance for peer review for this situation only, this should not be expected in all circumstances."⁹⁹ It was implicit in this position that MNRF accepted that, for this project only, SON should be able to retain experts to help it assess technical reports provided by Hayes and MNRF.

[87] SON responded by letter dated November 13, 2012, asking MNRF to reconsider its position on reduced funding, making the case that SON needed all of the requested funding "to level the playing field".¹⁰⁰

[88] MNRF responded by letter dated January 4, 2013. In it MNRF provided "feedback on the role of MNRF in the licensing of aggregate operations, on the potential funding for consultation, and on our assessment of the Crown's consultation obligations." In this letter, MNRF sets out, really for the first time, its assessment of potential adverse impacts of the Project on SON:

- "we do not believe there would be an impact to the SON's food/social/ceremonial harvesting activities."
- "we do not believe there would be any impacts on your commercial fishing rights."
- "we do not believe that this application would have an adverse impact on the SON's claim to the waters generally surrounding the Bruce Peninsula."
- "the subject property exhibits a low potential for the discovery of archaeological resources."

MNRF also noted its analysis of the potential impact of the Project on nearby wetlands, and ameliorative requirements connected with a haulage road to be used for the Project. MNRF then commented, near the end of the letter:

We have considered the activities mentioned above based on the information that is currently available to us. If there are additional activities which the SON

⁹⁸ Applicant's Record, vol. 2, tab I(25).

⁹⁹ Applicant's Record, vol. 2, tab I(25).

¹⁰⁰ Applicant's Record, vol. 2, tab I(26).

believes may be affected by this application we would like to know what these are. We will be happy to discuss these concerns to determine next steps including the need for additional studies or resources.¹⁰¹

Up to this point MNRF had not communicated to SON that it had assessed the duty to consult, the scope of that duty, or that it had decided the consultation process to be followed to meet the scope of required consultation. MNRF's letter of January 4, 2013 stated, in effect, that MNRF had concluded that there was no duty to consult, but that it was willing to consider further information from SON about potential adverse impacts on SON's treaty or Aboriginal rights.

[89] SON responded to MNRF by letter dated January 25, 2013. SON noted, correctly, that MNRF's letter of January 4, 2013 failed to respond to SON's letter of November 13, 2012. SON had asked MNRF to reconsider its decision to reduce SON's budget. MNRF's letter of January 4, 2013 had said nothing about this issue. In its letter of January 25th, SON repeated its position that its original budget was necessary to participate properly in consultations. However SON also proposed an intermediate approach:

... if we proceed based on the funding offer you have made thus far, it would have to be without prejudice to our right to require more funding if further study and assessment is necessary to ensure that consultation is complete.¹⁰²

[90] By letter dated February 11, 2013, MNRF purported to terminate consultations:

In previous correspondence, and more specifically in our January 4, 2013 letter, we outlined how the ministry has reviewed the application and considered identified activities, including the land claim and harvesting rights.

Based on our assessment of the information provided to date, we do not feel that consultation to address impacts to these activities is required. In our January 4th letter we did encourage and continue to encourage the communities to advise us if there are other activities that may be impacted.

Please be advised that, subject to hearing from the communities about other activities that may be impacted, Ministry staff will be making a recommendation for the Minister to approve this application. This recommendation will be forwarded within 30 days of the date of this letter.¹⁰³

[91] SON responded by letter dated February 28, 2013. The thrust of the letter is summarized in one paragraph:

¹⁰¹ Applicant's Record, vol. 2, tab I(27).

¹⁰² Applicant's Record, vol. 2, tab I(28).

¹⁰³ Applicant's Record, vol. 2, tab I(29).

We are assuming from your letter that the [MNRF] has unilaterally decided to rescind its previous offer to provide any resources to engage in a proper consultation process, and in fact to provide [SON] with any meaningful opportunity for consultation in accordance with [MNRF's] constitutional duty to consult and accommodate.¹⁰⁴

[92] SON had a strong basis for this position. In October, MNRF offered to fund most of SON's proposed expert costs. When asked to fund the rest, MNRF did not respond but instead advised that it considered that the Project would have no material effects on SON's rights. When SON (i) asked for a response to its request to reconsider the funding issue, and (ii) proposed proceeding without prejudice on the basis of MNRF's October funding decision, MNRF purported to terminate consultations.

[93] The Minister did not immediately approve the Project license, as had been indicated in MNRF's letter of February 11, 2013. Instead MNRF and SON met on March 25, 2013.¹⁰⁵ During this meeting the essential disagreement continued: SON took the position that it did not have funds it required to participate meaningfully in consultations. SON leaders stated that they were not "prepared to spend community money reviewing someone else's project." MNRF pressed questions focused on the basis of SON's claim that the Project could affect SON's treaty or Aboriginal rights. SON indicated that it hunted on adjacent lands. SON indicated that a preliminary review by SON's hydrogeologist led them to be concerned that the hydrogeology report presented by Hayes was not correct. SON expressed concern that there had not been a proper archaeological assessment, and that the letter from the Ministry of Culture was not sufficient, given past errors by that Ministry that had led to disruption of ancient burial sites. Environmentally, SON expressed concern about culturally important medicinal plants and disruption to wildlife corridors that could impact rattlesnakes, deer and other species.

[94] A further meeting was held June 20, 2013 at MNRF offices in Owen Sound among MNRF, SON and Hayes. From the minutes it seems that this meeting was preparatory to formalizing a consultation agreement. A summary comment at the end of the minutes states:

The meeting adjourned with an understanding that SON would submit a draft agreement including a budget to Mr Hayes by July 12th, 2013. Mr Hayes said that he would review the proposed agreement and budget and make a decision on whether the application can move forward or not.¹⁰⁶

The parties' positions on underlying issues appear to have been largely unchanged at this meeting. Hayes was concerned that the application had been pending since February 2008, and Hayes had done everything asked of it by MNRF. SON said that it should have been involved

¹⁰⁴ Applicant's Record, vol. 2, tab I(30).

¹⁰⁵ Applicant's Record, vol. 2, tab I(31).

¹⁰⁶ Applicant's Record, vol. 2, tab I(32).

from the outset, and that now it needed funding to review the work that had been done before it was involved. MNRF continued to doubt the potential adverse impacts on SON treaty and Aboriginal rights. The conclusion was that SON would propose a process and budget to Hayes, which would then consider SON's proposal and make a decision. The nature of that decision was ambiguous: "whether the application can move forward or not."¹⁰⁷

[95] By letter dated July 10, 2013, SON provided a draft agreement for "preliminary assessment" of the Project. SON advised that the draft agreement "details our minimum requirements at this stage that would allow for proper consultation and accommodation to occur in the near future – *before* any quarrying is approved."¹⁰⁸ SON noted that MNRF had indicated that it wanted the agreement to be between SON and Hayes. SON advised that it was prepared to proceed in that fashion provided it was understood that the duty to consult remained that of the Crown. SON ended its covering letter by noting that it believed that it would be helpful if there was a standard process for reviewing quarry applications in future:

The best way to approach consultation and accommodation about all proposed aggregate activities in SON's territory is for [MNRF] to develop a protocol with us about how that can be done. This would provide clarity to both SON and to operators seeking to do business in our territory. If proponents are going to be delegated aspects of the Crown's duty to consult and accommodate, then [MNRF] should make that clear to both operators and to SON. We are pleased to see some progress with respect to this project, but we would like to continue to emphasize that dealing with these matters on a case by case basis has not been effective in ensuring that the Crown's consultation and accommodation obligations to us are met. We hope that the progress we are seeing here is a sign of a different way forward, and remain open to discussing that way forward with both [MNRF] and proponents seeking to operate in SON's territory.¹⁰⁹

[96] By letter of August 28, 2013, from MNRF to Hayes, with a copy to SON, MNRF set out the process to be followed going forward for consultation about the Project with SON. This letter appears to conclude nearly two years of discussions establishing a consultation process.

- (1) In the first paragraph, MNRF confirmed that at the meeting of June 20, 2013, "it was decided that, as the project proponent..., [Hayes] would be best placed to move forward with the discussions with SON to address their outstanding concerns regarding the Application."
- (2) In the second paragraph, MNRF described the nature of the Crown's duty to consult and noted that "although the duty to consult... is a duty of the Crown, the

¹⁰⁷ Applicant's Record, vol. 2, tab I(32).

¹⁰⁸ Applicant's Record, vol. 2, tab I(33) (emphasis in original).

¹⁰⁹ Applicant's Record, vol. 2, tab I(33).

Crown may delegate procedural aspects of this duty to project proponents while retaining oversight of the consultation process.”

- (3) In the third paragraph and a bulleted list following that paragraph, MNRF summarized its account of the history of discussions with SON, including listing “technical information and documents” provided by MNRF to SON.
- (4) In the fourth paragraph, MNRF summarized the purpose of this letter: “to confirm that [MNRF] is now delegating certain procedural aspects¹¹⁰ of the duty to consult to [Hayes]... [and] to clarify the respective roles of the Crown and [Hayes] in fulfilling any duty to consult on the Application that may be required.”
- (5) In the fifth and tenth paragraphs, MNRF indicated that MNRF will monitor Hayes’ consultations with SON and may choose to participate in the consultations. MNRF stated that it would retain responsibility for: “assessing the scope of consultation owed to [SON]” and “assessing the adequacy of consultation and any accommodation, where required.”
- (6) In the sixth to eighth paragraphs, MNRF enumerated SON’s outstanding concerns, and indicated that it expected Hayes “to continue to discuss with SON their concerns” including sharing “pertinent technical information” and “identification and consideration of potential mitigation or other accommodation measures.” MNRF indicated that this consultation could require “retaining additional expertise.” MNRF indicated that it expected Hayes to “bear the reasonable costs” associated with these steps and to “provide reasonable assistance, including financial assistance where appropriate, for SON to participate in the consultation process.”
- (7) In the ninth paragraph, MNRF set out requirements for Hayes to report to MNRF on the consultation process.
- (8) In the eleventh and twelfth paragraphs, MNRF addressed issues related to technical requirements for the consultation process and confirmation by Hayes of its role.

This letter from MNRF is a watershed in the consultation process. From this letter, SON understood that finally, after nearly two years of discussions, its request for a formal consultation process had been accepted, and that it would be dealing directly with Hayes for this process,

¹¹⁰ It is not clear what MNRF meant by “procedural aspects” of consultations. The letter delegates substantive consultations to Hayes, while reserving to the Crown a monitoring and evaluative role. Why this is described as “procedural”, or why that description is significant, is not stated.

including in respect to funding.¹¹¹ Implicit in the letter was an acknowledgement by MNRF that an adequate consultation process had not yet taken place.

(g) Hayes' Consultation Activities September 2011 to August 2013

[97] Hayes' land use planning consultant, Davidson, sent Project documents to SON in the fall of 2011, shortly after SON's first letter to MNRF. Hayes attended two meetings with MNRF and SON – the first in September 2012 and the second in June 2013. Hayes was sent SON's proposed consultation agreement and budget in July 2013, and Hayes was sent MNRF's letter of August 2013, delegating consultation responsibilities to Hayes. Hayes did not otherwise deal with SON between September 2011 and August 2013.

(h) Findings for September 2011 to August 2013

[98] On September 9, 2011, SON came forward to MNRF to assert its right to be consulted about the Project. SON identified the basis of its alleged right to be consulted by stating its preliminary concerns about the Project. SON requested and subsequently received technical reports and other documents related to the Project. SON advised that it was not able to review the technical reports or provide further input without funding for its participation. It made this position clear in October 2011.

[99] In April 2012, MNRF refused to fund SON's participation in consultations. It provided no reasons for this refusal. Subsequently MNRF asked for a budget of consultation costs. SON provided this. In October 2012, MNRF agreed to provide about half the requested budget, after removing costs for a hydrogeological consultant, legal fees, and travel expenses. SON disagreed with MNRF's budget reductions and asked MNRF to reconsider. MNRF did not respond to this request. Then in January 2013, SON proposed going forward with MNRF's agreed funding, without prejudice to seeking further funds later. MNRF did not respond to this suggestion. Instead it purported to terminate consultations and to recommend approval of a license for the Project in February 2013. MNRF then apparently changed its position and met twice with SON, and in June 2013 requested SON to prepare a consultation agreement and budget for consideration by Hayes. And then, in August 2013, MNRF delegated consultation with SON to Hayes, including SON's requests for funding, while retaining oversight of the consultation process.

[100] Based on this history, I find:

- (1) From September 2011 to January 2013, MNRF consistently challenged SON's claims to have material interests that could be affected adversely by the Project.

¹¹¹ Applicant's Record, vol. 2, tab K.

- (2) MNRF either did not assess whether it had a duty to consult SON or concluded on a preliminary basis that it had no such duty between September 2011 and March 2013.
- (3) These positions are inconsistent with MNRF's evidence that it identified and scoped a duty to consult in 2009.
- (4) From September 2011 to January 2013, MNRF did not advise SON:
 - (a) that it had found a duty to consult in 2009;
 - (b) that it had "scoped" that duty at the "low" end of the spectrum;
 - (c) that it had concluded that the scope of the Crown's duty to consult could be discharged by notice to SON and provision to SON of information about the Project;
 - (d) that MNRF was reassessing the Crown's duty to consult; or
 - (e) the results of MNRF's reassessment of the Crown's duty to consult.
- (5) In November 2011, SON asked for funding of \$13,000 for expert assistance to participate in consultations. MNRF rejected this request in April 2012. MNRF gave no reasons for this rejection other than the statement: "[u]nfortunately, we are not in a position to provide the funding requested."
- (6) Following a meeting and further negotiations, in October 2012 MNRF agreed to fund SON \$8514 for peer review of technical reports. This agreement was premised on acceptance of SON's position that SON would obtain peer reviews and then further consultations would take place.
- (7) In January 2013, in the absence of any material change in circumstances since October 2012, MNRF resiled from its position of October 2012. It advised SON that there was no duty on the Crown to consult SON about the Project because SON's rights would not be affected materially by the Project. In so doing, MNRF discharged the Crown's duty to consider whether duty to consult arose, and also for the first time, discharged its obligation to advise SON of its conclusion on this issue. However, MNRF's conclusion was wrong: the parties agree that the duty to consult did arise. In erring on this issue, MNRF breached the Crown's duty to consult.
- (8) In February 2013, in the absence of any material change of circumstances since October 2012, MNRF purported to terminate consultations and told SON that it would recommend that the Minister approve the Project license. This decision continued MNRF's breach of its agreement to fund SON and then conduct further consultations.

- (9) In March and June 2013, MNRF met with SON to discuss ways of moving forward with consultations, contrary to the positions taken by MNRF in its letters of January and February 2013, and in a manner which, though not inconsistent with the funding agreement in October 2012, seemed to ignore it.
- (10) On August 23, 2013, MNRF established a process by which Hayes would consult with SON (including addressing SON's funding requests), and MNRF would monitor the sufficiency of consultations. This letter was premised on the principles that (a) the Project gave rise to a duty on the Crown to consult SON; (b) this duty had not been fulfilled by August 28, 2013; and (c) particulars of the consultation process, including funding, would be worked out between Hayes and SON, with MNRF maintaining oversight to ensure that the duty to consult was discharged.
- (11) Despite the substantial problems in the consultation process between February 2008 and August 2013, the process described in MNRF's letter of August 28, 2013 could have fulfilled the Crown's duty to consult in this case, if it had been completed in a reasonable way before a license was issued to Hayes.

(i) No Consultations from August 2013 to March 2016

[101] The letter of August 28, 2013 established a process for consultations. Then, as far as SON was concerned, nothing happened.

[102] The next correspondence in the file, for SON, was a letter from MNRF to Hayes, copied to SON, dated June 13, 2014.¹¹² It is a "follow-up" to MNRF's letter of August 28, 2013. In it, MNRF asked Hayes to report on the status of consultations with SON:

"The provision of this information is critical for [MNRF] to assess the scope of consultation owed to [SON] as well as assessing the adequacy of consultation and accommodation, where required."¹¹³

¹¹² MNRF's evidence is that status updates were sent from MNRF to SON on February 24, 2014, May 7, 2014 and June 9, 2014. Those "updates" were the running lists of all projects. They showed, in February 2014, that the last event in the Hayes Project had been discussions in June 2013 and MNRF's delegation to Hayes in August 2013. Nothing was noted subsequently. The update of May 7th (the running list dated April 30, 2014) showed no change to the Hayes Project. The update of June 9, 2014 also shows no change to the Hayes Project. The MNRF affidavit baldly states that "updates" were provided, implying that something had happened to be "updated". Only if the reader wades through the attached exhibits (Exhibit "QQ") and manages to find the references to Hayes in the running lists is it clear that MNRF's evidence on this point is the same as SON's: nothing happened between August 2013 and June 2014. This was not the only place where MNRF's evidence was less than entirely frank.

¹¹³ Applicant's Record, vol.2, tab L.

It is not clear what MNRF meant by “assess the scope of consultation owed to [SON].” MNRF says that it made an initial assessment in 2009. In January 2013, MNRF apparently concluded that there was no duty to consult. In February 2013, MNRF purported to terminate consultations. In August 2013, MNRF established a consultation process. And then in June 2014, MNRF suggested that it continued to assess the required scope of consultation. The jurisprudence is clear that the scope of the duty may change as new information comes to light, but at this point in the events, setting out and following a coherent consultation process should have been MNRF’s dominant objective.

[103] SON did not receive a copy of a reply to MNRF from Hayes to MNRF’s letter of June 13, 2014, or any further follow-up letter from MNRF.

[104] The next thing that happened, for SON, is that MNRF approached a well-known archaeologist to assess the Project. SON was not consulted about this assessment, and had recently been told by MNRF staff “that there has been no activity on this application [the Project].” SON wrote to MNRF on December 23, 2014, to ask what was going on:

As of July 2013, and after extensive correspondence and meetings with respect to setting up an adequate consultation process, we had provided a budget and draft agreement to [Hayes], per the direction of [MNRF] that specific aspects of the duty to consult and accommodate were being delegated to the proponent. To date we have received no response from the proponent. So, consultation and accommodation has still not taken place.¹¹⁴

[105] MNRF responded by letter dated January 23, 2015. In it, MNRF confirmed that it had sought estimates for Stage 1 and Stage 2 archaeological assessments of the site. MNRF indicated that it was “also hopeful that we can meet with you and the proponent in the near future in order to share our progress and seek your feedback with respect to resolving outstanding concerns.”¹¹⁵ Subsequently MNRF contacted SON to try to arrange a meeting. This letter carried with it a potential repudiation of MNRF’s letter of August 28, 2013: there had been “progress” since that time which MNRF wanted to “share” because it had not involved SON. MNRF hoped for “feedback” in order “to resolve outstanding concerns” without acknowledging that the agreed premise of consultations since October 2012 involved funding for SON experts, a premise that was fundamental to the meetings in March and June 2013, SON’s proposal of July 2013, and MNRF’s letter of August 28, 2013. It was almost as if MNRF considered that none of that had happened.

¹¹⁴ Applicant’s Record, vol. 2, tab M.

¹¹⁵ Applicant’s Record, vol. 2, tab N.

[106] SON responded in a letter sent February 17, 2015.¹¹⁶ After summarizing the history of the matter, SON wrote:

Now it seems the approach has changed: MNRF has been taking steps itself to address what it believes SON's concerns to be.... We cannot understand why the previous approach articulated in 2013 was abandoned, nor why MNRF is now taking these steps without involving SON. As stated, that simply misses the point.

We have always been clear in our position with respect to consultation generally: you need to involve SON in developing a process for consultation. That must include early engagement and there must be funding for SON's involvement, including SON's independent review of any studies [and] assessments that are done. That remains our position.

Despite making it clear that SON is concerned about aggregates development in its territory, MNRF has not cooperated with SON to create a clear process. That leaves both proponents and SON guessing at what MNRF is going to do to ensure the duty to consult and accommodate is met.¹¹⁷

[107] MNRF responded by letter dated March 9, 2015. MNRF started by summarizing the nature of the license application and then noted:

We understand that the process, with respect to the duty to consult for this application, has been difficult, and hope this letter provides clarification and suggests some clear next steps.¹¹⁸

In respect to the funding issue, MNRF stated "MNRF is prepared to provide SON with \$8514 as proposed in our letter dated October 22, 2012." MNRF states that

[t]his offer was not rescinded and we hope to provide the funding to SON as soon as possible, should you accept the offer. At this time MNRF is not prepared to provide additional funding.

MNRF then proposed a meeting "to discuss SON's concerns, and proposed mitigation as outlined" in the letter. The letter then reviewed what MNRF described as "SON's concerns and proposed mitigation." MNRF then listed four concerns identified by SON and summarized in some detail the "mitigation measures" to be incorporated into the site plans as a response.¹¹⁹ With respect, it was disingenuous to say that the funding offer "was not rescinded." In February

¹¹⁶ Mis-dated February 17, 2014.

¹¹⁷ Applicant's Record, vol. 2, tab N.

¹¹⁸ Applicant's Record, vol. 2, tab O(2).

¹¹⁹ Applicant's Record, vol. 2, tab O(2).

2013, SON accepted the offer, without prejudice to its request for further funding. MNRF did not provide the funding or respond to SON's position. Then in August 2013, MNRF told SON to seek its funding from Hayes.

[108] SON responded by letter dated April 30, 2015, reiterating SON's position that it had not been able to participate meaningfully in consultation because of the lack of funding, and the consequent inability to review technical reports. SON suggested that a substantive meeting would not be fruitful until its experts reviewed the technical reports and mitigation measures, something that could not happen without funding. SON stated:

The funding that will be provided by MNRF of \$8514 is a start and we would be pleased to begin the work that we will need to do upon receipt of this funding. However, we stress the need for reimbursement of all costs incurred to date as well as funding pursuant to a mutually agreed upon budget, which would include hydrogeology and legal....¹²⁰

[109] MNRF responded to SON's letter by letter dated July 9, 2015. In this letter MNRF provides the following history of recent events on the file:

- As of February 11, 2013, MNRF considered that the proposal "had no potential impacts on Aboriginal and treaty rights."
- MNRF attended a meeting with SON on March 25, 2013 after which MNRF "acknowledged that consultation to discuss SON's perceived impacts and potential mitigation measures was required."
- Subsequent to the meeting of March 2013, "MNRF delegated procedural aspects of consultation to the proponent." MNRF wrote that in response to this delegation, the Proponent "has taken steps to address SON's concerns including identification and consideration of potential mitigation or accommodation measures" as outline in MNRF's letter of March 9, 2015.
- MNRF was satisfied that the proposed mitigation measures adequately addressed all the concerns identified by SON other than archaeological concerns. These latter concerns were still the subject of ongoing study which, it was anticipated, would conclude after another round of study.
- MNRF remained "committed to providing the original \$8514" and also, after further consideration, was prepared "to provide an additional \$2400" for hydrogeological expertise, for total funding of \$10,914.

¹²⁰ Applicant's Record, vol. 2, tab O(3).

- MNRF enclosed an invoice from SON to MNRF reflecting the funding MNRF was prepared to pay, which required a signature from SON and delivery back to MNRF. MNRF closed by indicating that it considered the matter now concluded, subject to receipt of the final archaeological report and any follow-up mitigation measures:

Pending any recommendations, and upon implementation of any outstanding mitigation measures, we will be bringing forward a recommendation to direct our Minister to approve this application.¹²¹

[110] SON responded to this letter by letter dated December 18, 2015:

... SON will accept the \$10,914 offered by MNRF in order to complete a technical assessment and determine the impacts of the project on the SON. SON is accepting this funding offer under duress, as our position remains that consultation and accommodation, as required by law, has still not been met with respect to this file.

Your summary of this file disregards SON's efforts (at substantial cost to SON) from 2011 to 2013 to convince MNRF staff that there was a duty to consult and accommodate. You also fail to acknowledge that after your delegation of aspects of the duty to consult and accommodate to the proponent, there was no engagement with SON by either the proponent or the MNRF. Participation in the process that stands to affect our rights is a basic requirement for engagement with SON and to meet the duty to consult and accommodate.¹²²

[111] MNRF responded by letter dated February 3, 2016. In it MNRF thanked SON for its letter in which SON accepted the \$10,914. The letter then stated:

I want to clarify that the provision of these funds is in recognition of costs incurred to date (as stated in our July 9, 2015 letter) and not for future technical assessments regarding this file. In order to provide these funds to SON, MNRF requires that the attached invoice be signed and returned.¹²³

The attached invoice then set out the budgeted amounts for SON's technical experts – costs that (with one possible exception), had not been incurred. No doubt this was not the intention, but this letter added insult to injury. It refused to fund the costs of experts sought by SON to participate in consultations and which had been agreed by MNRF back in 2012,

¹²¹ Applicant's Record, vol.2, tab P(1).

¹²² Applicant's Record, vol. 2, tab P(3).

¹²³ MNRF Record, vol. 2, p.765.

and yet required SON to bill for those costs in order to receive payment “in recognition of costs incurred”. The letter went on:

As stated in our letter dated July 9, 2015, after our meetings on March 25, 2013 and June 20, 2013, MNRF delegated the procedural aspects of consultation to the proponent. In response to this delegation, the proponent took steps to address SON’s concerns including the identification and consideration of potential mitigation or accommodation measures.¹²⁴

This passage repudiated the process set out in MNRF’s letter of August 2013 and at the same time asserted that the process had been followed by Hayes. This assertion is based on Hayes’ position that two of its experts spoke to two of SON’s experts. Apparently MNRF accepted this information from Hayes uncritically or it endorsed a fundamentally flawed approach to consultations by Hayes, as discussed below. The letter went on:

Based on our assessment at this time, MNRF is satisfied that SON’s concerns, as identified in the March 25, 2013 meeting, have been adequately addressed and SON has been provided with the appropriate funding to engage in the process.¹²⁵

It is very difficult to continue to give MNRF the benefit of the doubt and to infer good faith when reading this. SON’s concerns in March 2013 were that it had not been consulted and did not have the funding to participate in consultations. SON was not only not “provided with the appropriate funding”, it was not provided with promised funding or, indeed, any funding at all.

[112] By letter dated February 18, 2016, SON responded to MNRF that it did not consider that meaningful consultation had taken place and that it was not prepared to participate or comment further on the application in the absence of a commitment to a “meaningful and adequate consultation and accommodation process.”¹²⁶ SON returned a signed invoice showing the \$10,914 as a “first instalment” of SON’s consultation costs.

[113] On February 19, 2016, MNRF wrote back to SON indicating that the invoice could not be processed as a “first instalment”, but that if SON wished to resubmit an invoice only for the \$10,914, the payment would be made. This letter also confirmed that a recommendation would be made to the Minister to approve a license for the Project.¹²⁷

[114] The Minister approved a license for the Project on March 8, 2016.¹²⁸ The license permits Hayes to remove more than 20,000 tonnes of aggregate annually. SON was not advised of this

¹²⁴ MNRF Record, vol. 2, p.765.

¹²⁵ MNRF Record, vol. 2, p.766.

¹²⁶ Applicant’s Record, vol. 2, tab P(4).

¹²⁷ MNRF Record, vol. 2, p.777.

¹²⁸ Applicant’s Record, vol. 2, tab S.

approval until July 14, 2016. The absence of timely notice to SON of the approval was an inadvertent mistake by MNRF.¹²⁹

(j) Hayes' Consultation Activities August 2013 to March 2016

[115] It is clear that Hayes became increasingly frustrated by the long delay in the process for approving its application. When, in August 2013, it received the letter from MNRF that said that Hayes would be responsible to consult with SON and to fund SON's participation in those discussions, it balked. Hayes responded firmly to MNRF that consultation was the Crown's obligation, and that MNRF had already said that it would handle First Nations' concerns at no cost to Hayes;¹³⁰ and (c) that Hayes would not, at this late juncture, undertake consultations with SON.

[116] Hayes' President, Ted Hayes, contacted his local Member of the Provincial Legislative Assembly (Bill Walker, MPP for Bruce-Grey-Owen Sound), who in turn contacted the Minister of Natural Resources and Forestry (Hon. Bill Mauro), to bring the slow progress of the application process to the Minister's attention. The goal was to obtain intervention from the Minister to get the license issued.¹³¹ There is some evidence that Mr Walker advised Hayes not to deal directly with SON.¹³²

[117] There was correspondence and there were meetings between Hayes, MNRF and the Minister's office on these issues. SON was not included in or copied with these communications.¹³³

[118] After receiving MNRF's letter of August 28, 2013, Hayes did not deal directly with SON. Hayes did not advise SON that it would not engage in the consultations delegated to it by MNRF. And Hayes did not respond to SON's inquiries after August 2013. Hayes did have dealings with MNRF and others associated with Ontario, but SON was not privy to these other dealings.

[119] Hayes did, however, instruct its hydrogeologist, Flanagan, to speak directly with SON's hydrogeologist, Blackport. Hayes also instructed its archaeological consultant, Golder, to invite SON to "monitor" the Phase II archaeological assessment being done by Golder. None of this was on notice to SON by either Hayes or MNRF. SON's evidence is that it was unaware of the conversation between Flanagan and Blackport.¹³⁴ It is not clear what SON's response was to Golder's invitation, on short notice, to monitor the archaeological assessment.

¹²⁹ Applicant's Record, vol. 2, tab S.

¹³⁰ SON Factum, para. 33(b): email from Ted Hayes to Bill Walker dated July 16, 2014, p.875, Applicant's Record.

¹³¹ SON Factum, para. 33(a).

¹³² SON Factum, para. 33(c), Application Record, p.887.

¹³³ SON Factum, paras. 33-34.

¹³⁴ Affidavit of Janna Cheganho sworn September 8, 2016, para. 9.

[120] What is clear is that these steps to “consult” were taken without any direct contact between Hayes and SON, without any response to SON’s proposed consultation agreement, without any funding provided to SON, and with no established process for consultations. When these events are seen together with Hayes’ refusal to undertake consultations and its communications to the local MPP and the Minister, it is absolutely clear that Hayes wanted nothing to do with direct dealings with SON.

(k) Summary of Events 2013 to 2016

[121] Based on these events I find:

- (1) In its letter of August 28, 2013, MNRF delegated to Hayes the process of consulting SON, including funding SON to participate in consultations.
- (2) Hayes objected to this unilateral delegation. Hayes refused to deal directly with SON and instead took the position that the Crown was responsible for consultations, not Hayes. The stand-off between MNRF and Hayes on this issue continued for over a year, during which time there were no consultations with SON. SON was not told by Hayes or MNRF why consultations were not moving forward.
- (3) Based on the letter of August 28, 2013, SON reasonably understood that MNRF agreed that consultation should include SON’s informed participation in discussions respecting SON’s enumerated areas of concern. SON also reasonably understood that to enable its informed participation, it would receive funding for costs of experts.
- (4) MNRF’s delegation to Hayes was consistent with the Crown’s duty to consult but did not relieve the Crown from ensuring that adequate consultation took place.
- (5) Hayes was not required to undertake the delegated consultation (though one consequence of refusing to undertake this role could have been an adverse decision on its license application).
- (6) The failure of Hayes and MNRF to consult with SON from August 2013 to January 2015 disappointed SON’s reasonable expectations arising from MNRF’s letter of August 2013.
- (7) Once MNRF advised that the process described in its letter of August 2013 would not be followed, MNRF needed to specify an alternate process to discharge the Crown’s duty to consult SON. If that alternate process was to reduce SON’s participation from the process described in the letter of August 2013, MNRF should have so advised SON and should have explained the reason(s) for this change. In view of the troubled history of consultations in this case, it would have been important for MNRF to take care to explain to SON how things would unfold going forward. That is not what happened here. MNRF acknowledged a

duty to consult but never specified a new process for consultation. I conclude that MNRF's failure (a) to replace the process described in the letter of August 2013 with a comparable process; and (b) to explain why the process moving forward would be materially different for SON's participation, were breaches of the Crown's duty to consult with SON.

- (8) MNRF's position in early 2015 was, in effect, that Hayes had adequately addressed SON's substantive concerns. The recognition of the importance of a participatory process, which underscores MNRF's letter of August 28, 2013, is undercut by this change of position. I find that this was a breach of the Crown's duty to consult with SON, and, at its heart, undermined the basic premise of constructive consultations: (i) it rejected the position, previously accepted by MNRF, that SON should receive funding for experts to advise in connection with the consultations; (ii) it rejected the position, previously accepted by MNRF, that further consultations were required to discharge the duty to consult; and (iii) it rejected a constructive consultation process itself by resiling from previous positions with no principled reasons for doing so, and by recasting the history of consultations in a manner that did not fairly reflect what had happened. When it is recalled that the duty to consult is premised on the honour of the Crown, the seriousness of these breaches should be obvious. When it is recalled that the goal of consultation is reconciliation, it should also be obvious that MNRF's conduct, at this point, shaded from inadequate towards destructive of the consultation process.
- (9) MNRF then terminated consultations (a) without providing promised funding to SON to obtain expert assistance; (b) while claiming that the funding had been provided; (c) while offering to still provide the funding, but on the basis that there would be no further consultation after SON obtained expert advice; (d) while asking SON to provide an invoice for expert services that MNRF knew had not been purchased by SON. MNRF did agree to provide promised funds to SON – that much was consistent with the honour of the Crown based on past dealings. Everything else about the way that MNRF dealt with this issue was a repudiation of MNRF's past positions, and on one level, insulting to SON, premised as it seems to be on the idea that SON would sign and return to MNRF a false invoice in order to obtain about \$10,914.
- (10) In repudiating its previous positions, without any principled reasons for doing so, and terminating consultations before providing funding to SON, before SON obtained expert assistance with the promised funding, and before further discussions with SON based on the advice SON received from its experts, MNRF repudiated its own process, failed to replace it with another adequate process, and thereby failed to discharge the duty to consult SON as it had said it would. This repudiation and failure breached the Crown's duty to consult SON.

[122] SON agreed to move forward in January 2013 on the basis of \$8,514 in funding for experts. It was not reasonable for MNRF to have failed to provide this funding shortly after that time. Had that happened, it is probable that initial substantive consultations on all issues other than hydrogeology would have been completed by mid-2013. It is not possible to know now whether SON's substantive concerns would have been addressed to its satisfaction by that point. Just as it is not possible to know now whether current ameliorative measures directed by MNRF will be satisfactory to SON.

[123] The proper process now, is for MNRF to fund SON as it agreed to do, for SON to obtain the expert assistance it requires, and for the parties to then discuss SON's concerns. It will be for the Crown to decide what process to follow if unresolved issues remain after these consultations.

[124] The failure of the Crown, in this case, is primarily a failure to follow its own processes. Consultation processes are not cast in stone, and may change or evolve over time. However, that is not what happened in this case. MNRF changed its positions several times, but not, so far as can be determined from the record, because of material changes in circumstances regarding SON.

[125] This leads to a rather trite observation. It is for the Crown to devise the consultation process. The Crown must assess the scope of consultations correctly, but the adequacy of the consultation process is reviewed on a reasonableness standard. Once the Crown establishes a process, if it decides to change that process in a material way, generally it is not reasonable to effect the change without explaining the change, and the reasons for the change, to the First Nation. Here that was not done. That failure was a breach in the Crown's duty to consult.

(I) SON's Substantive Concerns

[126] SON's stated substantive concerns are and have always been raised on a preliminary basis. This is because SON says that it lacks the technical expertise to review Hayes' and MNRF's technical reports and documents. Until SON had a chance to get advice on those materials, it was not prepared to provide a definitive list of concerns or to comment on ameliorative measures.

[127] It would be open to the Crown, in an appropriate case, to reject a request for funding and to decide that a First Nation did not require expert assistance to participate adequately in consultations. Such a decision would be reviewed in this court on a standard of reasonableness. In this case, however, the Crown did agree to fund the cost of experts for SON. Having agreed to fund those costs, it was unreasonable for MNRF to then fail to do that. No new information emerged that would have borne upon the Crown's agreement to fund these costs. Thus, in finding that the Crown is obliged to provide this funding in this case, I do no more than find that the Crown is obliged to keep its word where there is no basis on which the Crown should be relieved of its agreement.

[128] The "merits" of MNRF's position on SON's "substantive concerns" primarily involves consideration of whether MNRF's views of potentially adverse effects of the Project on SON are reasonable, and whether MNRF's conclusions about reasonable amelioration of those potential

effects are reasonable. My conclusion is that SON has not been consulted adequately on either of these points. My conclusion is that a process had been established and then not followed for those consultations. A review of the reasonableness of MNRF's substantive conclusions is thus, premature. Consultation is a process involving a First Nation. Imposing MNRF's view of what is reasonable, without adequate consultation with SON, would be to endorse a version of paternalism entirely inconsistent with the duty to consult: it would be tantamount to saying "we know what is best for you and we don't need to hear from you on that issue."

Part V - Issues

[129] SON argues that the following issues are raised on this application for judicial review:

- (1) Duty to Consult and Accommodate
 - (a) What is the standard of review?
 - (b) Was the duty to consult triggered in this case?
 - (c) If the duty to consult was triggered, what was the scope of the Crown's duty to consult and accommodate SON in this case?
 - (d) Was the Crown's duty to consult and accommodate met before the Minister issued the License?
- (2) Procedural Fairness
 - (a) What is the standard of review?
 - (b) Did the MNRF meet its duty of procedural fairness it owed to SON in this case?

[130] In view of my conclusions respecting the first set of issues, it is not necessary to decide the procedural fairness issues raised by SON. The issue of an appropriate process for the consultations yet to come is for the Crown to decide, subject to the findings this court, given the history of consultations to date.

[131] There have been many problems with the consultations in this case. These need to be approached constructively. The goal is to get consultations on track in a way that fosters constructive relationships moving forward. And for this court, the measuring stick, whether of correctness or of reasonableness, is applied to the status of consultations as they are at the time of the application before us. And where the court is not satisfied that the Crown has discharged duties owed to a First Nation, the goal is to provide direction to put the parties back on track, not to punish or castigate.

1. Preliminary Issue - Jurisdiction

[132] This court has jurisdiction over this application for judicial review by virtue of ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*.¹³⁵

2. Issue #1 – Duty to Consult and Accommodate

a. Standard of Review

[133] On judicial review, questions of law are reviewable on a standard of correctness. Questions of fact are reviewable on a standard of reasonableness. Questions of mixed fact and law will generally involve some deference towards the decision-maker, based on the extent to which the issue is one of fact or one of law.¹³⁶

[134] Crown decisions as to whether there are duties to consult or accommodate are reviewable on a standard of correctness. The Crown's assessments of the extent of these duties are generally questions of law, reviewable on a standard of correctness, because they define legal duties.¹³⁷ Thus if the Crown misconceives the seriousness of a claim or the impact of infringement, this will be reviewable on a standard of correctness.¹³⁸ That said, "scoping" the duty to consult can involve questions of fact, and where it does, the Crown's factual findings are to be reviewed on a standard of reasonableness.¹³⁹

[135] The "effect of good faith consultation may be to reveal a duty to accommodate."¹⁴⁰ The determination of the process to be followed for consultation and, if necessary, accommodation, are reviewable on a standard of reasonableness.¹⁴¹ Counsel for MNRF in written submissions argues "that the extent and scope of the duty to consult and the adequacy of consultation are questions of mixed fact and law to be assessed on a standard of reasonableness."¹⁴² The Supreme Court of Canada is explicit that the standard of review is different for assessing the scope of the duty to consult and, if there is a duty, for assessing the adequacy of consultations. Combining the two steps of the inquiry into one with a common standard of review is, expressly, not what the Supreme Court of Canada has said.

[136] Process decisions of the Crown may be revisited in light of new information or circumstances. The standard of reasonableness will generally require the Crown to keep the First Nation advised of process changes and reasons for process changes so that the process is coherent and systematic and is seen to be fair and not arbitrary.

¹³⁵ *Judicial Review Procedure Act*, RSO 1990, c. J.1, ss. 2(1) and 6(1).

¹³⁶ *Haida Nation*, paras. 60-63; *Beckman*, para. 48 *Dunsmuir*.

¹³⁷ *Haida Nation*, para. 63. See also *Ka'A'Gee Tu First Nation v. Canada (A.G.)*, 2012 FC 297, para. 89; *Nunatsiavut v. Canada (A.G.)*, 2015 FC 492.

¹³⁸ *Haida Nation*, para. 63. See also *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, para. 26.

¹³⁹ *Haida Nation*, para. 61.

¹⁴⁰ *Haida Nation*, para. 47. See also *R. v. Sioui*, [1990] 1 SCR 1025; *R. v. Cote*, [1996] 3 SCR 101, para. 54.

¹⁴¹ *Haida Nation*, para. 61-62. See also *Enge (North Slave Metis Alliance) v. Mandeville*, 2013 NWTSC 33, para. 27.

¹⁴² MNRF Factum, para. 51.

b. Duty to Consult Was Triggered

[137] SON and the Crown agree that the duty to consult was triggered in this case.

c. Scope of the Duty to Consult and Accommodate

[138] The scope of the duty to consult falls along a spectrum rather than in hermetic categories. The scope is to be based on (i) the nature and strength of the Aboriginal or treaty right (including asserted rights and title), and (ii) the seriousness of the impact on that right.

[139] Although the law in this area is nascent, the jurisprudence is developing a rough typology that describes the duty to consult as at the “low end”, the “middle” and the “high end” of the duty to consult. This seems to result in five general positions – the three just described, and two gradations between “low” and “middle” and between “middle” and “high”. This is fine as a form of shorthand, but these five general positions should not be seen as tight “compartments” carrying with them defined procedural requirements. Otherwise the analysis will quickly devolve into the kind of compartmentalized categories against which the Supreme Court of Canada warned in *Haida Nation*.

[140] In this case, MNRF says the scope is between low and the middle. SON says it is between the middle and high.

[141] In view of the process that was agreed between the parties, I find that:

- (a) the “scope” is in “the middle”;
- (b) this scope requires the Crown:
 - (i) to give notice to SON, by giving formal notice of the Project to the SON Environment office;
 - (ii) to give information to SON about the Project;
 - (iii) to provide SON with the \$10,914 in funding that MNRF agreed to fund, for use by SON for the expert assistance, as described in SON’s budget in October 2012;
 - (iv) to communicate with SON about SON’s concerns regarding the Project after SON has the benefit of its expert advice;
 - (v) to follow a reasonable process thereafter to complete adequate consultations, and, where appropriate, accommodation.

d. Was the Duty to Consult Met

[142] None of the steps required to discharge the duty to consult were met in a timely way. The requirement for notice was met when MNRF confirmed the status of the project in response

to an inquiry from SON in October 2011. Information about the Project was provided on an ongoing basis starting in September 2011.¹⁴³ Steps (iii), (iv) and (v) have not yet taken place.

[143] Delay in performance of steps (i) and (ii) may be cured by subsequent events. The failure to complete steps (iii), (iv) and (v) has not been cured by subsequent events. It therefore follows that the duty to consult has not yet been met by the Crown.

3. Conclusion

[144] During my detailed review of the dealings among the parties I made numerous findings that various acts or omissions by MNRF were “breaches” of the Crown’s duty to consult. As noted above, Treaties are not to be construed like commercial agreements. Similarly, the conduct of the parties during consultations is not weighed on the basis of contract law. The repeated “breaches” rendered the Crown duty to consult undischarged, and nothing more. Thus when an adequate consultation process is completed, any prior failures in the process will have been cured. The only remedy for past problems in the process lies in a request for funding to cover associated costs for SON, a request that the Crown will be obliged to decide reasonably, given all the circumstances.

[145] In the result, based on the foregoing, I conclude that the Crown has failed to discharge its duty to consult SON about the Project.

Part VI – Additional Issues

[146] Several additional points were raised before us:

- (1) admissibility of the affidavit of Todd Fell;
- (2) allegedly improper communications excluding SON;
- (3) SON’s alleged interest in general environmental stewardship
- (4) consideration of Cumulative Effects
- (5) general requirement to fund First Nation consultation costs

(1) admissibility of the affidavit of Todd Fell

¹⁴³ I make no findings on whether SON has received all the information required to meet the Crown’s obligation to provide information: any issue on this point may be addressed between SON and Crown during resumed consultations.

[147] Mr Fell's affidavit is framed as expert evidence relating to ecology/natural heritage issues. MNRF objects to it because (i) it was not before the Minister when he approved the license; and (ii) Mr Fell is not a properly qualified expert.

[148] Mr Fell's affidavit is probative in respect to whether (a) there is a duty to consult; (b) the proper scope of consultation includes an opportunity for SON to obtain independent expert advice. The first issue – whether there is a duty to consult – is admitted. The second issue – scope – is not. I would refuse to strike the affidavit because it is relevant to this second issue: it is evident from reading Mr Fell's affidavit that SON – or any non-expert – could not reasonably be expected to appreciate the ecology/natural heritage issues without expert advice.

[149] I would decide the second issue in favour of SON without relying upon Mr Fell's evidence because I base my decision on the process developed by SON and MNRF, which includes funded experts for preliminary reviews of the Project. It is not necessary to decide if funded experts would be required, in the absence of agreement, and this decision does not decide that issue, one way or the other.

[150] I would not strike the Fell affidavit on relevance grounds because SON was entitled to develop a record to defend all grounds it advanced on this application, not just the one upon which this court rests its decision. The question of whether funded experts is part of the necessary consultation process is an alternative ground for SON, and it remains available to SON for purposes of any appeal that may be pursued from the decision of this court.

(2) Allegedly Improper Communications Excluding SON

[151] SON argued that bilateral discussions between Hayes and MNRF¹⁴⁴ were inconsistent with the honour of the Crown in the Crown's dealings with SON. I do not agree.

[152] It is open to anyone to approach an MPP with their concerns. It is one of the jobs of an MPP to help members of the public in their dealings with government. Likewise, it is part of the role of the Minister and of MNRF to receive and respond to communications from MPP's and from members of the public. Just as it was open to Hayes to go to its local MPP or to approach the Minister, so too it was open to SON to communicate with the Minister and MPP's about SON's concerns. I see nothing improper in the impugned communications.

(3) SON's Alleged Interest in General Environmental Stewardship

[153] SON has enumerated several "interests" it has in potential adverse effects of the Project. One of these "interests" is the right to "protect the health and integrity of lands, waters and resources throughout SON's traditional territories." This decision does not decide whether this alleged interest is a basis on which the Crown is required to consult SON in respect to the Project.

(4) Consideration of Cumulative Effects

[154] SON has raised questions about the cumulative effect of quarries in its traditional territories. The only response from MNRF on this point in the record before this court is that there is no requirement under provincial law to consider cumulative effects when processing an application under the *Aggregates Resources Act*.

[155] Cumulative effects can be a proper matter for consultations: the *West Moberly* decision provides a clear analysis as to why this is so.¹⁴⁵ MNRF's response is not an answer that satisfies the reasoning in *West Moberly*. However, aside from this observation, this court does not decide whether there are (or are not) material cumulative effects requiring consultations in this case.

(5) Requirements to Fund First Nation Consultation Costs

[156] MNRF has agreed to fund preliminary consultation costs and SON has agreed to proceed on the basis of that funding, so it is not necessary to decide whether funding is required in the absence of agreement. It will be for the parties to discuss what further funding, if any, will be provided to SON to complete consultations. There are two related points worth noting, however.

¹⁴⁴ As well as discussions between Hayes and MPP Walker and Hayes and the Minister.

¹⁴⁵ *West Moberly First Nations v. BC (Chief Insp. of Mines)* (2011), 333 DLR (4th) 31, 2011 BCCA 247.

[157] First, SON sought initial funding to help understand the issues raised by the Project, and to address those issues effectively with MNRF. SON did not ask to have all the technical work done over again by its own experts. SON's budget included modest legal costs. MNRF did not explain why it rejected and continues to reject funding for SON's reasonable legal costs to consult.

[158] As noted above, SON is disinclined to spend its "community resources" to review someone else's project. That is a reasonable position.

[159] SON has limited resources. It does not participate in consultations as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead. The Crown should not reasonably expect SON to absorb consultation costs from SON's general resources in these circumstances.¹⁴⁶

[160] Second, clearly the process went "sideways" in this case. SON was put to considerable legal expense to make its case to MNRF that there is a duty to consult and that the scope of that duty includes funded experts. It will be for the parties to decide whether and to what extent the Crown should reimburse these legal expenses on a reasonable basis, taking into account (a) the legal costs to be paid to SON as a result of this decision; (b) the legal and other costs reasonably incurred by SON in its dealings with MNRF and Hayes over the Project to this point.

Part VII – Order and Costs

[161] The application is allowed. The decision of the Minister to issue the Project license is set aside. Hayes' license application is remitted back to the Minister and MNRF pending completion of adequate consultations with SON about the Project. As agreed among the parties, SON shall have its costs of the application from the respondents in the amount of \$80,000 inclusive, payable within thirty days.

D.L. Corbett J.

I agree:

Nordheimer J.

I agree:

¹⁴⁶ For example, it would seem reasonable for MNRF to consider overall capacity funding in assessing SON's expertise in reviewing a Project (and its consequent need for expert advice). It would not seem reasonable to expect SON to fund consultation costs, including legal costs, from general band revenue.

DiTomaso J.

Released: July 14, 2017

CITATION: Saugeen First Nation v. Ontario (Min. Natural Resources), 2017 ONSC 3456
COURT FILE NO.: 367/16
DATE: 20170714

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

**NORDHEIMER, D.L. CORBETT AND
DITOMASO JJ.**

BETWEEN:

SAUGEEN FIRST NATION

Applicant

- and -

ONTARIO (MNRF)

Respondent

DECISION

D.L. Corbett J.

Released: July 14, 2017

TAB 8

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**

Citation: *Nunatukavut Community Council Inc. v. Newfoundland and Labrador
Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD (G) 44

Date: 20110324

Docket: 201101G1093

BETWEEN:

NUNATUKAVUT COMMUNITY COUNCIL INC.

APPLICANT

AND:

**NEWFOUNDLAND AND LABRADOR HYDRO-
ELECTRIC CORPORATION (NALCOR ENERGY)**

FIRST RESPONDENT

AND:

**ENERGY CORPORATION OF NEWFOUNDLAND
AND LABRADOR**

SECOND RESPONDENT

AND:

**HER MAJESTY IN THE RIGHT OF
NEWFOUNDLAND AND LABRADOR**

As represented by the Minister of Environment
And Conservation, and the Minister of Natural
Resources

THIRD RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA on behalf of
HER MAJESTY IN THE RIGHT OF CANADA and
The Minister of Environment

FOURTH RESPONDENT

AND:

**CANADIAN ENVIRONMENTAL ASSESSMENT
AGENCY**

FIFTH RESPONDENT

AND:

LESLEY GRIFFITHS, HERBERT CLARKE,

MEINHARD DOELLE, CATHERINE JONG, and JAMES IGLOLIORTE As panel members of a Joint Review Panel established Pursuant to the *Canadian Environmental Assessment Act*

SIXTH RESPONDENTS

Corrected Decision: The text of the original judgment was corrected on March 29, 2011 and a description of the correction is appended.

Before: The Honourable Mr. Justice Garrett A. Handrigan

Place of Hearing: St. John's, Newfoundland and Labrador

Date(s) of Hearing: March 16th and 17th, 2011

Nunatukavut sued Nalcor, the federal and provincial governments and several other agencies involved in the development of the Lower Churchill River hydroelectricity projects at Muskrat Falls and Gull Island. It asked for a declaration that Nalcor, the two governments and a federal agency breached their duty to consult with Nunatukavut. It wanted the Court to direct the consultations and it sought an order that Nalcor and the Government of Newfoundland and Labrador negotiate an Impact Benefits Agreement with Nunatukavut. Nunatukavut also applied for an ex parte injunction to stop the public hearings until the Court dealt with its claim.

Summary: The Court dismissed Nunatukavut's Interlocutory Application for an injunction. While Nunatukavut's statement of claim raises a potentially serious issue to be tried, it failed to show either that it would suffer irreparable harm if the public hearings proceeded or that the balance of convenience favoured granting the injunction. The Court ordered costs in the cause.

Appearances:

Paul Dicks, Q.C. & Jennifer Gorman

Appearing on behalf of the Applicant

Thomas Kendell, Q.C., Mahmud Jamal &
Thomas Gelbman

Appearing on behalf of the 1st
& 2nd Respondents

Ian Kelly, Q.C. & Joseph Anthony

Appearing on behalf of the 3rd
Respondent

Jake Harms

Appearing on behalf of the 4th
& 5th Respondents

Dan Simmonds & Christian Hurley

Appearing on behalf of the 6th
Respondents

Authorities Cited:

CASES CONSIDERED: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (BCCA); *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

STATUTES CONSIDERED: *Environmental Protection Act* S.N.L. 2002, c. E-14.2; *Canadian Environmental Assessment Act* S.C. 1992, c. 37 – section 3.

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] The Government of Newfoundland and Labrador wants to produce hydroelectricity on the Lower Churchill River in Labrador. It selected two sites on the Lower Churchill for development, Gull Island and Muskrat Falls. The Government plans to develop Muskrat Falls first and has engaged Nalcor, its energy corporation, to plan and oversee the project. At present, the full development of the Lower Churchill River is undergoing environmental assessment; and a Joint Review Panel (the “JRP”), struck by the federal and provincial governments, is holding public hearings in the Town of Happy Valley-

Goose Bay and in neighbouring communities in Labrador to receive public input on the development.

[2] Nunatukavut Community Council Inc. is a corporation which represents the Inuit Aboriginal people of central and southern Labrador. It was formerly known as the Labrador Métis Nation and has its head office in Happy Valley-Goose Bay. On February 25, 2011, Nunatukavut sued the two corporations that are known collectively as Nalcor (the First and Second Respondents), together with the federal and provincial governments, the Canadian Environmental Assessment Agency (the “CEAA”) and the five members of the JRP. Nunatukavut sought various forms of relief in its statement of claim, including: a declaration that Nalcor, the two governments and the CEAA breached their duty to consult with Nunatukavut; directions on how consultations should be conducted; and an order that Nalcor and the Government of Newfoundland and Labrador negotiate an Impact Benefits Agreement with Nunatukavut.

[3] Nunatukavut applied for an *ex parte* injunction when it filed its statement of claim to stop the public hearings until this Court dealt with its claim. These reasons deal only with Nunatukavut’s injunction application.

THE ISSUE:

[4] Is Nunatukavut entitled to the interlocutory relief it is seeking?

THE LAW:

[5] In **RJR-MacDonald Inc. v. Canada (Attorney General)**¹, the Supreme Court of Canada set out the factors courts must consider when deciding applications for interlocutory injunctions. In particular, courts must consider:

1. if the applicant has demonstrated that there is a serious issue to be tried;
2. if the applicant has shown that it will suffer irreparable harm if the relief is not granted; and,
3. the balance of convenience.²

[6] As to the first factor, Cory and Sopinka, JJ.’s said that the “motions judge” should decide whether there is a serious issue to be tried “...on the basis of

¹ [1994] 1 S.C.R. 311.

² Ibid, see pages 44-46 generally.

common sense and an extremely limited review of the case on the merits”³: “Unless the case is...frivolous or vexatious...a judge on a motion for relief must, as a general rule, consider the second and third stages of the...test”⁴.

[7] About “Irreparable harm”, the learned justices said that it is “...harm which either cannot be quantified in monetary terms or which cannot be cured...; and provided examples, including, “...where a permanent loss of natural resources will...result when a challenged activity is not enjoined”⁵. They adopted Beetz, J.’s description of the “third test” from **Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.**⁶, where he said that balancing the convenience is “a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits”⁷; and added that “...the factors which must be considered...are numerous and will vary in each individual case”⁸.

[8] This is the law which I will apply to the issue in this case. I turn now to analyze that issue, starting with the background.

ANALYSIS

Background

[9] Newfoundland and Labrador Hydro, which was Nalcor’s predecessor, registered a project for environmental assessment under the provincial **Environmental Protection Act**⁹ (the “EPA”) on November 26, 2006 and submitted a project description under the **Canadian Environmental Assessment Act**¹⁰ (the “CEA Act”). The proposal covered developing generation sites at Gull Island and Muskrat Falls on the Lower Churchill River in Labrador and erecting interconnecting transmission lines between the two generating sites and Churchill Falls.

[10] The provincial Minister of Environment and Conservation announced that the project was subject to an environmental assessment under Part X of the **EPA** on

³ Ibid, page 44.

⁴ Ibid, page 45.

⁵ Ibid, page 37. They drew the example from **MacMillan Bloedel Ltd. v. Mullin**, [1985] 3 W.W.R. 577 (BCCA).

⁶ [1987] 1 S.C.R. 110.

⁷ The quotation is at page 129 of **Metropolitan Stores** or page 38 of **RJR-MacDonald**.

⁸ Ibid, page 38.

⁹ S.N.L. 2002, c. E-14.2.

¹⁰ S.C. 1992, c. 37.

January 26, 2007 and the federal Minister of Environment announced on June 5, 2007 that the project was also subject to an environmental assessment by an independent review panel. The same ministers signed an agreement on January 8, 2009 to establish the JRP to conduct the environmental assessment on behalf of both governments. They established the Terms of Reference for the Panel at the same time and set the Guidelines for the environmental assessment.

[11] The Terms of Reference included, as to “Aboriginal Rights Considerations”:

The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.

The Panel shall include in its Report:

- information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.
- any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

The Panel will not have a mandate to make any determinations or interpretations of:

- the validity or the strength of any Aboriginal group’s claim to aboriginal rights and title or treaty rights;
- the scope or nature of the Crown’s duty to consult Aboriginal persons or groups;
- whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the Constitution Act, 1982; and
- The scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

[12] The Proponent of the Project, which was Newfoundland and Labrador Hydro at the time (now Nalcor), was directed to submit an environmental impact

statement (“EIS”) to the JRP, prepared according to the Guidelines which both Ministers issued on January 8, 2009. The Panel would then subject the EIS to public commentary for a 75-day period after which the Panel would decide if additional information was required before setting public hearings. If the Panel decided the information it received was deficient, it could call upon the Proponent to provide clarification, explanation or additional technical analyses and then decide if the public should be allowed a further 30-day period to comment on the additional information the Proponent provided. Finally, after it received all relevant information, the JRP would then decide if the EIS was sufficient to proceed to public hearings.

[13] Section 4.8 of the EIS Guidelines obliged Nalcor to consult with specified Aboriginal groups, including Nunatukavut; and Nalcor was also required to demonstrate by its EIS that it understood the “...interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project”. More particularly, the Guidelines directed Nalcor to consult with Aboriginal groups for the purposes of:

- a) Familiarizing the group with the Project and its potential environmental effects;
- b) Identifying any issues of concern regarding potential environmental effects of the Project; and
- c) Identifying what actions the Proponent is proposing to take to address each issue identified, as appropriate.

[14] In the meantime, the provincial and federal governments kept Nunatukavut abreast of all developments leading up to the EIS, and sought their input. For example, on December 4, 2006, a little over a month before Newfoundland and Labrador Hydro registered the Project, the provincial Department of Environment and Conservation sent the registration documents to Nunatukavut and invited their comments on the registration.

[15] Registration of the Project triggered a series of meetings and the exchange of correspondence between the Department and the CEAA and Nunatukavut which carried on with regularity until the JRP took over supervision of the Project and continued under the JRP’s auspices. The details of this correspondence are set out in the affidavit which Basil Cleary filed on behalf of the provincial government and the affidavit which Stephen Chapman filed on behalf of the CEAA:

- January 15, 2007: Chris Montague, President of Nunatukavut¹¹, wrote to the Department saying that Nunatukavut would monitor the EA process and would work with the Department to design a consultation process.
- October 11, 2007: Department representatives met with Nunatukavut officials in Happy Valley-Goose Bay to discuss the draft EIS Guidelines for the Project and to begin discussions on a consultation agreement.
- October 11, 2007: Kirk Lethbridge, Interim President of Nunatukavut, wrote to the Department thanking it for the meeting.
- October 19, 2007: The provincial Minister of Environment and Conservation sent a copy of the draft EIS Guidelines to Nunatukavut before they were released for public review and asked for Nunatukavut's comments on them.
- December 19, 2007: The Minister and the CEAA made a public announcement inviting public comment on the Guidelines by January 28, 2008.
- January 21, 2008: Provincial departmental representatives and CEAA representatives met with Nunatukavut officials in Halifax, NS to discuss the joint environmental assessment process and to identify crucial points on which Nunatukavut could provide input.
- January 25, 2008: Nunatukavut wrote to the Department stating they required a "much larger process for consultation" than they had been advised about at the Halifax meeting and asking for funding to facilitate their consultation.
- January 25, 2008: The Department advised Nunatukavut that the 40-day public review period for the draft EIS Guidelines had been extended by an additional 30 days, to February 27, 2008.
- February 1, 2008: The Department and the CEAA wrote to Nunatukavut to outline in detail how Nunatukavut would be consulted at each stage of the EA process and affirmed an earlier offer which the CEAA made to Nunatukavut to provide \$13,000 to assist Nunatukavut in its review of the draft EIS Guidelines.

¹¹ I will refer to Nunatukavut generally in these reasons because the Applicant is formally known by that name now, although it was previously known as the Labrador Métis Nation and would have been actually known under that name at the time of Mr. Montague's letter and much of the subsequent correspondence.

- February 7, 2008: Nunatukavut wrote to the Department indicating it would comment on the draft Guidelines and requested a further extension of the public review period from February 27, 2008 to March 27, 2008.
- February 12, 2008: The Department responded to Nunatukavut's January 23, 2008 letter pointing out the limitations on the consultation process and reiterating its concern that Nunatukavut had not accessed the \$13,000 that was available from the CEAA to assist it in reviewing the draft EIS Guidelines.
- February 12, 2008: The Department and the CEAA refused to extend the public review period from February 27, 2008 since Nunatukavut had the draft Guidelines in hand for two months prior to the beginning of the public review period and still had not sought the CEAA funding about which it had been advised on August 27, 2007.
- February 27, 2008: Nunatukavut submitted its comments on the draft EIS Guidelines.
- May 7, 2008: The Department and the CEAA wrote to Nunatukavut to formally provide it with a copy of the Joint Review Panel Agreement and the Panel's Terms of Reference and asked for Nunatukavut's comments on both by July 5, 2008. Nunatukavut submitted no comments on either document.
- May 13, 2008: The Department and the CEAA wrote to Nunatukavut to ask for its three nominees for the JRP.
- June 6, 2008: The Department and the CEAA wrote to Nunatukavut to thank it for the comments on the draft EIS Guidelines and to note that significant changes were made in the Guidelines to accommodate Nunatukavut's interests. The Department and the CEAA also offered to meet with Nunatukavut to provide additional explanation.
- June 18, 2008: Nunatukavut requested an extension of the deadline to provide its nominees for the JRP and the request was granted.
- July 15, 2008: The Department and the CEAA issued the final Guidelines to Nalcor and publicly announced the delivery of the Guidelines to Nalcor on July 17, 2008.
- July 25, 2008: Nunatukavut applied for \$120,000 in funding to assist its review of the EIS, to participate in the JRP public hearing process and to allow for Crown consultation activities.

- August 29, 2008: Nunatukavut provided one nominee for the JRP¹².
- January 9, 2009: The Department and the CEAA announced that the JRP had been established and a Joint Panel Agreement had been signed between the two governments. The federal Minister and officials of the provincial Department appointed the five panel members of the JRP.
- March 9, 2009: The JRP provided the public and specified groups, including Nunatukavut, with an opportunity to comment on the EIS and other documents which Nalcor provided.
- April 8, 2009: The CEAA awarded Nunatukavut the \$120,000 in funding it requested in July, 2008.
- January 6, 2010: The CEAA met with Nunatukavut to discuss the EA process and Nunatukavut's role in it.
- June 3, 2010: Nunatukavut provided comments on the EA hearing procedures and related documents.
- June 8, 2010: Nunatukavut wrote to the provincial Department to say it had no direct knowledge of how the provincial government proposed to consult and accommodate its interests on the Project.
- June 18, 2010: The CEAA held a teleconference with Nunatukavut concerning participant funding, the JRP process and how Aboriginal consultation could occur through the EA process.
- June 25, 2010: The Department replied to Nunatukavut's June 8, 2010 letter reciting details of Nunatukavut's involvement in the EA process and, in particular, its role in formulating the EIS Guidelines and nominating a member for the JRP.

[16] Nalcor also maintained ongoing contact with Nunatukavut, independently of the meetings that Nunatukavut held and the correspondence it exchanged with the provincial Department, the CEAA and the JRP. Gilbert Bennett, Vice President of Nalcor, provided a log of all correspondence, telephone calls and meetings which took place between Nunatukavut and Nalcor about the Project from March 22, 2005 to March 1, 2011, comprising some eighteen pages.

¹² Nunatukavut nominated Edmund Montague, a lawyer practicing in St. John's, NL at the time. Nunatukavut identified Mr. Montague as its "in-house" counsel when it submitted his name and the CEAA concluded that the close relationship between Mr. Montague and Nunatukavut would make Mr. Montague ineligible for membership on the Panel under section 33 of the **CEA Act**.

[17] Nalcor and Nunatukavut also entered into two agreements to consult about the Project, the first dated December 11, 2009, entitled “Community Consultation Agreement”. It provided funding of \$103,800 to Nunatukavut for a three and a half month term which Nunatukavut used to conduct a community consultation process, employ a full-time community consultation coordinator and prepare a report which Nunatukavut submitted to the JRP.

[18] The second agreement dated January 19, 2011 provided funding of \$180,400 to Nunatukavut to gather information about potential socio-economic impacts of the Project, to record Nunatukavut’s contemporary land uses and to avail of the traditional ecological knowledge held by Nunatukavut’s members. The second agreement runs to April 15, 2011, the last day of the JRP public hearings; the information gathered will be submitted to the Panel. As late as March 3, 2011, the day the JRP hearings began, Nalcor confirmed in a press release that it was “committed to continued engagement and consultation with all interested parties, including Nunatukavut, during the public hearings...”.

[19] The federal Government finalized a Federal Aboriginal Consultation Framework (the “Framework”) for the Project on August 13, 2010. A copy of the Framework was provided to Chris Montague, President of Nunatukavut and it describes in detail how future consultation would occur within the JRP process, which it identified as “...a key part in the federal government’s consultation with Aboriginal groups”¹³. The Framework specifies five distinct phases for consultation between the federal government and Aboriginal groups during the JRP process:

- Phase I: Initial agreement and consultation on the draft Joint Review Panel Agreement, the appointment of the joint review panel members and the Environmental Impact Statement Guidelines.
- Phase II: Joint review panel process leading to hearings.
- Phase III: Hearings and preparation of the Joint Review Panel Environmental Assessment Report.

¹³ See page 1, second main paragraph of the Framework dated August 13, 2010. It is attached to an undated letter from Steve Burgess of the CEAA to Chris Montague, which may be available at other places too; Exhibit “F” to the Affidavit of Gilbert John Bennett dated March 10, 2011.

- Phase IV: Consultation on the Joint Review Panel¹⁴ Environmental Assessment Report.
- Phase V: Regulatory Permitting.

[20] In fact, Bill Parrott, Assistant Deputy Minister (Environment), of the provincial Department of Environment and Conservation had already written to Mr. Montague on February 1, 2008 setting out in detail how he foresaw that the consultations between the provincial and federal governments and their respective agencies (e.g., the CEAA, Nalcor) would be conducted with Nunatukavut during the environmental assessment process. Mr. Parrott's letter followed the meeting that provincial departmental representatives and the CEAA representatives had with Nunatukavut officials in Halifax, NS on January 21, 2008.

[21] On the whole, Nunatukavut claims that despite the frequent contacts it has had with the two levels of government, with Nalcor, with the CEAA and with the JRP, it has never been meaningfully consulted or accommodated about the Lower Churchill Project. I will return to that claim later in these reasons, but will first provide the factual context for Nunatukavut's other major complaint about the environmental assessment process: the JRP has not abided by its Terms of Reference in dealing with information which the Panel sought and received from Nalcor in the months leading up to public hearings.

[22] I will provide a timeline for the Panel's activities and its interactions with Nunatukavut, starting when Nalcor delivered the EIS to the Panel and continuing to the start of these proceedings:

- March 6, 2009: Nalcor delivered the EIS to the JRP and the Panel initiated the 75-day comment period and provided a copy of the EIS to Nunatukavut and invited its comments.
- May 1, 2009: The JRP delivered its first series of information requests to Nalcor.
- June 19, 2009: Nunatukavut submitted a first response to the JRP entitled "Response to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement".
- June 22, 2009: The JRP delivered a second series of information requests to Nalcor.

¹⁴ In the Framework the word "Process" appears here, but that seems to be an error and "Panel" fits the context better.

- July 24, 2009: The JRP delivered a third series of information requests to Nalcor.
- October-November, 2009: Nalcor responded to information requests from the JRP.
- November 18, 2009: The JRP advised Nunatukavut and the public at large that it will conduct a 30-day comment period on Nalcor's responses to its information requests.
- December 18, 2009: Nunatukavut submitted a report entitled "Response to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement", commenting on the supplemental information which Nalcor provided.
- January 19, 2010: The JRP advised Nalcor that the information it received was not sufficient to go to public hearings.
- January 26, 2010: The JRP delivered a fourth series of information requests to Nalcor. It is called Information Request JRP.151 and addresses Aboriginal consultation and traditional land and resource uses.
- February 5, 2010: The JRP instructed Nalcor to provide the Panel with monthly updates on its consultation activities with Aboriginal groups.
- February 15, 2010: The JRP wrote to Nunatukavut advising that the information it had received from Nalcor was not sufficient for public hearings and encouraged Nunatukavut to assist Nalcor by making the information Nunatukavut had in its possession available to Nalcor in a timely manner. The JRP also encouraged Nunatukavut to provide information to the Panel on the potential adverse impacts of the Project on Aboriginal rights and titles in the development area.
- May, 2010: Nalcor provided the JRP with monthly updates on its consultation activities with Aboriginal groups.
- May 5, 2010: The JRP circulated planning documents for public hearings to Nunatukavut and requested its response.
- June 3, 2010: Nunatukavut responded to the planning documents.
- August 9, 2010: The JRP received Nalcor's response to Information Request JRP.151.
- August 23, 2010: The JRP notified Nunatukavut that Nalcor responded to JRP.151 and provided a means for Nunatukavut to get access to it. The

JRP also set a 30-day comment period for the response, to run until September 23, 2010.

- August 23, 2010: Nunatukavut submitted a document entitled “A Socioeconomic Review of Nalcor Energy’s Environmental Impact Statement regarding the Proposed Lower Churchill Hydro Electric Generation Project” to the JRP.
- September 2, 2010: Nunatukavut submitted a copy of a land claim document entitled “Unveiling Nunatukavut” which it had distributed to the federal and provincial governments and to Nalcor, to the JRP.
- September 23, 2010: Nunatukavut provided the JRP with its comments on Nalcor’s response to JRP.151.
- September 27, 2010: Nalcor provided the JRP with a report on Aboriginal consultations, supplemental to its response to the information request. The JRP provided a copy of the report to interested parties, including Nunatukavut, and requested comments on it, allowing a 21-day comment period, ending on October 21, 2010.
- October, 2010: Nunatukavut provided its response to Nalcor’s aboriginal consultation report.
- October 28, 2010: Nunatukavut wrote to the JRP asking for the Panel’s views as to its role in discharging the Crown’s duty to consult with and accommodate Aboriginal interests.
- November 2, 2010: The JRP submitted further information requests (JRP.165 & JRP.166) to Nalcor.
- November 19, 2010: The JRP requested that Nalcor provide “additional information” to what it asked for in JRP.165 and JRP.166, covering twelve subjects, “to allow the Panel and interested parties to better prepare for the hearings, but not for the purpose of determining sufficiency”.
- November 22, 2010: The JRP replied to Nunatukavut’s letter of October 28, 2010 indicating it was bound by its Terms of Reference and that the Crown’s duty to consult and accommodate had not been delegated to it.
- December 2, 2010: The JRP wrote to Nalcor indicating it had reviewed its Aboriginal consultation report from September, 2010 and asked Nalcor to respond no later than January 31, 2011 to comments the Panel received from Aboriginal groups on Nalcor’s response.
- December 3, 2010: The JRP wrote to Nunatukavut advising it had contacted Nalcor to review and respond to comments from Aboriginal

groups about Nalcor's consultation report; the Panel also encouraged Nunatukavut to work with Nalcor to resolve their differences about current lands and resource use for traditional purposes.

- December 7, 2010: Nalcor responded to the JRP's December 2, 2010 letter and undertook to provide a comprehensive response addressing comments received by the Panel and to provide a copy to interested parties, including Nunatukavut, by January 30, 2011.
- December 22, 2010: The JRP released the final public hearing procedures.
- January 7, 2011: Nalcor submitted its response to Information Requests JRP.165 and JRP.166 and urged the Panel to proceed to public hearings. Nalcor also undertook to provide the additional information the Panel requested in its letter of November 19, 2010 to Nalcor, by January 31, 2011.
- January 14, 2011: The JRP announced it had received sufficient information to proceed to public hearings which would begin on March 3, 2011 in Happy Valley-Goose Bay.
- January 24, 2011: Nunatukavut sent the JRP an e-mail questioning its decision to proceed to public hearings when there were still Information Requests outstanding to Nalcor.
- January 28, 2011: Nalcor responded to comments made by Aboriginal groups on its consultation report.
- January 31, 2011: Nalcor provided the supplemental information the Panel asked for in its letter of November 19, 2010.
- February 1, 2011: The JRP responded to Nunatukavut's e-mail of January 24, 2011 explaining why it had sufficient information from Nalcor to proceed to the public hearings it announced on January 14, 2011.
- February 11, 2011: The JRP wrote to Nunatukavut encouraging it to participate in the public hearings.
- February 25, 2011: Nunatukavut started an action against several parties, including Nalcor and the JRP, asking for various forms of relief including an injunction to halt the public hearings until this Court decided whether the defendants in its action had discharged their duty to consult with them and accommodate their Aboriginal rights and title.
- February 25, 2011: Nunatukavut filed an Interlocutory Application for an ex parte injunction.

- March 3, 2011: The JRP began public hearings.
- March 4, 2011: Chris Montague, President of Nunatukavut appeared before the JRP to advise the Panel that Nunatukavut would not be participating in the hearings until its injunction application was resolved.
- March 10, 2011: The JRP wrote to Nunatukavut advising that it would provide time to hear from Nunatukavut during public hearings if it did not obtain an injunction halting the hearings.

[23] I turn now to consider against this background Nunatukavut's claim for an injunction to halt the JRP hearings.

Injunctive Relief

[24] There is, as I noted earlier in my discussion of the law, a three-stage test for interlocutory injunctions. The stages are conjunctive and the applicant bears the burden of proof to a balance of probabilities at each stage of the test. Thus, if the applicant for an interlocutory fails to meet its burden at any stage of the test, no injunction will be granted. The applicant must, again as I have already noted, prove (1) that there is a serious issue to be tried, (2) that it will suffer irreparable harm if the injunction is not granted and (3) that the balance of convenience favours granting the injunction.

[25] I will decide this application mainly on the second stage of the test; although I have some brief comments to make about the first and third stages to which I will attend before I focus more closely on the overarching question which pertains to the second stage: Has Nunatukavut proved that it will suffer irreparable harm if I do not enjoin the JRP public hearings until this Court decides whether the defendants in its action have discharged their duty to consult with Nunatukavut and accommodate its Aboriginal rights and title?

Serious Issue to be Tried

[26] None of the parties who responded to Nunatukavut's Interlocutory Application for an *ex parte* injunction submitted that Nunatukavut's statement of claim did not raise a serious issue to be tried. Most, to their credit, took no position on the issue, although Nalcor, without elaborating simply said that Nunatukavut

“...has failed to meet *all* these pre-conditions”¹⁵ for an interlocutory injunction (Emphasis in original).

[27] Let me say that the statement of claim raises a serious issue to be tried: Nunatukavut asserts a claim to all of the land which will be affected by the Lower Churchill River development. Nunatukavut’s claim to that land is currently under active consideration by the federal and provincial governments. Nunatukavut is looking for both a land claims agreement and an impacts benefits agreement with the two governments. It also claims that the Crown has failed to discharge its duty to consult and to accommodate the interests that will be affected by the development. An allegation of this kind, simply put, is a serious contention that deserves fitting consideration.

Balance of Convenience

[28] Balancing the convenience of an interlocutory injunction involves considering which of the two parties will suffer the greater harm from granting or refusing the injunction, pending a decision on the merits. The inquiry is fact-based and case specific and may involve numerous factors.

[29] Nunatukavut concedes that the balance of convenience will generally favour developers of large public works like the Lower Churchill River project. That is especially true where the party seeking the injunction does not oppose the overall development in principle but simply seeks redress for associated issues. And so it is with Nunatukavut: It does not oppose the proposed hydroelectric developments at either Muskrat Falls or Gull Island; it is, however, quite concerned about the impact those developments will have on the lands adjacent to the river, the downstream effects of the developments and the impact the project may have on their traditional way of life. It looks to Nalcor to mitigate inevitable losses and for appropriate remediation and redress.

[30] But most of all, Nunatukavut wants to obtain land claims and impact benefits agreements with the federal and provincial governments, similar to the “New Dawn Agreement” which the province, Nalcor and the Innu Nation signed on September 26, 2008. While such agreements may provide for land claim settlements, they are largely economic agreements which compensate Aboriginal groups for the loss of their lands with lump sum payments and annual payments, sometimes in

¹⁵ See paragraph 42, page 15, of Nalcor’s Memorandum of Fact and Law filed March 11, 2011.

perpetuity. Thus, Nunatukavut’s potential loss is a compensable one which can await the outcome of its action.

[31] On the other hand, the losses which Nalcor, the province and the public at large will incur if the Lower Churchill development is halted will be substantial and Nunatukavut cannot provide recompense. Gilbert Bennett sets out the known and anticipated losses to Nalcor and third parties in paragraphs 69 to 93 of his affidavit dated March 10, 2011. I will not repeat them here; it is enough for me to say that the harm would likely be so substantial that the balance of convenience would be uncomfortably tilted against Nunatukavut.

Irreparable Harm

[32] Nunatukavut claims that it will suffer irreparable harm if the JRP hearings are not enjoined until this Court can decide if the Crown has breached its duty to consult with it and accommodate its Aboriginal rights and title during the EA process for the Lower Churchill development. In particular, it says that irreparable harm will flow from:

- A general failure to consult and accommodate its rights during the EA process; and
- An excess of jurisdiction by the JRP.

[33] Let me consider each of these claims in more detail.

Failure to Consult and Accommodate

[34] The Supreme Court of Canada articulated the Crown’s duty to consult with Aboriginal groups and accommodate their interests in **Haida Nation v. British Columbia (Minister of Forests)**¹⁶. McLachlin, C.J.C., noted that the “...content of the duty...varies with the circumstances”, but this much was generally applicable: “...the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed”¹⁷.

[35] As to pre-proof claims, of the kind that the Haida Nation (and Nunatukavut) had made, she had this to say:

¹⁶ [2004] 3 S.C.R. 511.

¹⁷ Ibid, paragraph 39.

At all stages, good faith on both sides is required. 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. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.... Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.¹⁸

[36] Thus, Nalcor and the federal and provincial governments owe Nunatukavut a duty to consult in good faith, and accommodate where necessary. Sharp dealing is unacceptable but hard bargaining is allowed; and although the consultations must be meaningful and the parties must act reasonably, there is no duty to agree.

[37] Earlier in these reasons I set out several timelines detailing the contact between Nunatukavut, Nalcor, the provincial Department of Environment and Conservation, the CEAA and the JRP. The process started in earnest in January, 2007 shortly after Newfoundland and Labrador Hydro registered the Lower Churchill Project and continued unabated until March 10, 2011, even after Nunatukavut declined to participate in the public hearings and applied to this Court to enjoin them.

[38] Each of the parties engaged Nunatukavut as all milestones approached and so Nunatukavut was provided with the draft EIS Guidelines and the EIS in its turn, the planning documents which the JRP issued for public hearings and all Nalcor's submissions to the JRP, including Nalcor's responses to the JRP's information requests. Nunatukavut was invited to nominate a person for the JRP (and did) and to comment on the JRP's Terms of Reference (but did not).

[39] Nunatukavut submitted a comprehensive document to the JRP entitled "Unveiling Nunatukavut" which it described as "...a foundation treatise to the Federal Department of Justice and Indian and Northern Affairs Canada" in September, 2010 and several "Responses to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement". It also submitted "A Socioeconomic Review of Nalcor Energy's Environmental Impact Statement regarding the Proposed Lower Churchill Hydro Electric Generation Project" to the

¹⁸ Ibid, paragraph 42.

JRP in August, 2010. And Nunatukavut was given eight opportunities to appear before the JRP in the public hearings before it declined to appear.

[40] Nunatukavut does not deny any of the preceding, of course. However, it distinguishes between being provided with information and being engaged in meaningful consultation; and it says that its interactions with the two levels of government and the agencies involved in EA process, including the JRP, went no further than the exchange of information. In particular, it says that it did not receive adequate funding to respond appropriately to Nalcor's submissions to the JRP. It compares the limited funding it did get (only \$103,800 it says) to the generous allotments (in excess of \$9,000,000 it claims) that the Innu Nation received, to illustrate its point.

[41] First of all, I do not accept that Nunatukavut was not consulted appropriately. Perhaps more could have been done to hear and address their concerns but I cannot say what it would have been. I am not sure how much funding was actually allotted to either Nunatukavut or the Innu Nation specifically for the Lower Churchill EA process, but I do know that Nunatukavut received more than \$2,000,000 to research and write "Unveiling Nunatukavut", its land claim document, which it did present to the JRP. My review of the massive amount of documents filed for this application indicates that Nunatukavut was involved at each stage of the EA process starting when the Project was registered and continuing until public hearings began four years later. It was accommodated to the extent that was appropriate and participated as fully as it wished.

[42] In fact, Nunatukavut's complaint with the EA process for the Lower Churchill River Project derives from another source than the EA process itself: Nunatukavut does not have lands claim and impact benefits agreements with Nalcor or the federal and provincial governments. It is developing its claims and "Unveiling Nunatukavut" is an important contribution to that process but the lands claim and impact benefits initiative is a separate stream to the EA process for the Lower Churchill River. It may be that Nunatukavut has not been consulted as fully or accommodated as appropriately in its lands claim exercise as it has been for the EA process but the consultation and accommodation for the latter have been fulsome and generous.

[43] Nunatukavut has proceeded as though the EA process is complete and it will have no other opportunity after the JRP public hearings are finished to influence the character of the development that will take place on the Lower Churchill River. That, of course, is a false premise. It is true that the EA process has reached a

critical juncture with the public hearings but the assessment will be far from finished when the hearings end. The Consultation Framework developed by the federal Government in August, 2010 shows that the EA process has only reached Phase III with the public hearings. There are two phases to follow the hearings, during which both the provincial and federal governments have committed to continue their extensive consultations with Nunatukavut.

[44] Aside from the fact that it is premature to say Nunatukavut will suffer irreparable harm because of the lack of consultation and accommodation when the process is unfinished, Nunatukavut risks losing an important opportunity to influence the development of the project by declining to participate in the public hearings before the JRP.

[45] Overall, I reject Nunatukavut's claim that it will suffer irreparable harm if the public hearings are not enjoined because it has not been properly consulted or accommodated. As I have already said, I do not agree that the consultation and accommodation to date have been deficient; and there is still much to be done yet before the process is completed during which Nunatukavut will continue to be involved if it chooses.

Role of the Joint Review Panel

[46] Nunatukavut claims that the JRP has abrogated Nunatukavut's rights and acted outside of its own Terms of Reference by scheduling public hearings before it received all responses from Nalcor to its information requests and by not providing Nunatukavut and other interested parties a further 30-day comment period when it did receive Nalcor's responses. I do not agree. Let me explain.

[47] The JRP made it clear when it wrote to Nalcor on November 19, 2010 asking for information on twelve subjects in addition to what it sought in JRP.165 and JRP.166 that it required the additional information "...to allow the Panel and interested parties to better prepare for the hearings, but not for the purpose of determining sufficiency". So when the Panel determined on January 14, 2011 that it had sufficient information to proceed to public hearings, even though Nalcor had not responded to its November 19, 2010 letter, it was acting consistently with its declared purpose for that information. As well, it had received Nalcor's responses to JRP.165 and JRP.166 a week earlier and those responses grounded its decision on sufficiency.

[48] It may be noted here that the JRP's Terms of Reference conferred a broad discretion on the Panel to determine both the sufficiency of the information it

received and the need for additional 30-day comment periods. Nunatukavut chose not to comment on those same Terms of Reference when the provincial Department of Environment and Conservation and the CEAA wrote to it on May 7, 2008 to invite its comments.

[49] But Nunatukavut's criticism of the JRP casts the Panel in a poor light and unfairly so. In fact, the Panel quite vigorously, if not aggressively, insisted that Nalcor take its duty to consult and accommodate Nunatukavut and the other Aboriginal groups seriously. I note, for example, the four series of comprehensive information requests which it directed to Nalcor between May 1, 2009 and November 2, 2010, one of which related specifically to Nalcor's consultation with Aboriginal groups. I also note here the letter the JRP sent to Nalcor on February 5, 2010 instructing Nalcor to provide monthly updates to the Panel on its consultation activities with Aboriginal groups and the JRP's decision in January, 2010 that the information it had received from Nalcor by then was not sufficient to go to public hearings.

[50] The JRP has been an important advocate for Aboriginal consultation and accommodation throughout the EA process. And it has, to the extent that its mandate will permit, sought and received information about the potential adverse impacts that the Project will have on asserted or established Aboriginal rights or title, including those of Nunatukavut. Nunatukavut has not and will suffer no harm, irreparable or otherwise, because of the Panel's actions. It does risk harm, though it will not likely be irreparable, if it declines the JRP's outstanding invitation to participate in public hearings and otherwise engage in the remaining phases of the EA process.

[51] There are two further considerations that are relevant to Nunatukavut's claim that it will suffer irreparable harm if the public hearings are not enjoined: I said earlier in these reasons when discussing the balance of convenience that any potential losses Nunatukavut will suffer if the Project proceeds are compensable. That is so, simply because Nunatukavut does not oppose the Project in principle but is primarily concerned with the costs of mitigation, rectification and remediation that Nalcor will be responsible for if harm results. "Irreparable harm" as the Supreme Court of Canada defined it in **RJR-MacDonald** is "...harm which either cannot be quantified in monetary terms or cannot be cured". Harm which can either be quantified monetarily or cured is not, by definition then, irreparable.

[52] Otherwise, Nunatukavut wants to enjoin the JRP hearings, not the Lower Churchill development *per se*. The JRP is limited in its role to gathering

information and submitting a report with recommendations to the federal and provincial governments which ultimately decide if the Project proceeds. The harm that Nunatukavut alleges it will suffer will come, if it comes at all, when the Project proceeds after the governments have approved it. Nothing the JRP will do could possibly cause the harm that Nunatukavut fears. Enjoining the public hearings, as Nunatukavut wants, will not serve its interests or protect it from the harm it anticipates.

[53] For all of these reasons, I find that Nunatukavut will not suffer irreparable harm if the JRP hearings proceed and they will not be enjoined. I dismiss its application for an interlocutory injunction.

COSTS

[54] Ordinarily, costs follow the cause. I decline to make such an order here other than to say that costs are in the cause.

SUMMARY AND DISPOSITION

[55] Nunatukavut sued Nalcor, the federal and provincial governments and several other agencies involved in the development of the Lower Churchill River hydroelectricity projects at Muskrat Falls and Gull Island. It asked for a declaration that Nalcor, the two governments and a federal agency breached their duty to consult with Nunatukavut. It wanted the Court to direct the consultations and it sought an order that Nalcor and the Government of Newfoundland and Labrador negotiate an Impact Benefits Agreement with Nunatukavut. Nunatukavut also applied for an *ex parte* injunction to stop the public hearings until this Court dealt with its claim.

[56] The Court dismissed Nunatukavut's Interlocutory Application for an injunction. While Nunatukavut's statement of claim raises a potentially serious issue to be tried, it failed to show either that it would suffer irreparable harm if the public hearings proceeded or that the balance of convenience favoured granting the injunction. The Court ordered costs in the cause.

ORDER

[57] In the result:

1. I dismiss Nunatukavut's Interlocutory Application for an injunction to halt public hearings of the Joint Review Panel.

2. I order that costs are in the cause.

GARRETT A. HANDRIGAN
Justice

APPENDIX

Corrections made on March 29, 2011:

1. Thomas Gelbman was added as co-counsel for the 1st and 2nd Respondents.
2. The spelling of Jamal was changed from Jamel to Jamal, which is the correct spelling of Mr. Jamal's name.

TAB 9

Federal Court



Cour fédérale

Date: 20121220

Docket: T-2060-11

Citation: 2012 FC 1520

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

**GRAND RIVERKEEPER, LABRADOR INC.
SIERRA CLUB OF CANADA, AND
NUNATUKAVUT COMMUNITY COUNCIL INC.**

Applicants

and

**ATTORNEY GENERAL OF CANADA,
MINISTER OF NATURAL RESOURCES,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT, AND
NALCOR ENERGY**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, by which the Applicants challenge the lawfulness of the *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador* (“the Report”). The Report was issued by a Joint Review Panel

(JRP or “the Panel”) as the culmination of its environmental assessment (“EA”) of the Lower Churchill Hydroelectric Generation Project (“the Project”). The Applicants seek prerogative remedies under section 18 to prohibit the various federal Respondents from issuing permits, authorizations or financial assistance relating to the Project, and to quash the Governor in Council’s Response to the Report (“the Response”), which was made under subsection 37(1.1) of the *Canadian Environmental Assessment Act*, SC 1992, c 37 (CEAA).

I. Background

A. *The Parties*

(i) The Applicants

[2] The Applicants are: (1) Grand Riverkeeper, Labrador Inc. (“Grand Riverkeeper”), a federally-registered non-profit corporation with the object of protecting and preserving Grand River, which is otherwise known as Churchill River; (2) the Sierra Club of Canada (“Sierra Club”), a federally-registered non-profit corporation with environmental protection and conservation objects; and (3) NunatuKavut Community Council, Inc. (“NunatuKavut”), a Labrador Aboriginal organization registered as a society under the laws of Newfoundland and Labrador. NunatuKavut was previously named Labrador Métis Nation.

[3] All three groups participated throughout the EA process for the Project, and each was awarded funds through the Canadian Environmental Assessment Agency’s (“the Agency”) Participant Funding Program to facilitate its participation in the different phases of the assessment.

(ii) The Respondents

[4] The Respondents consist of: (1) the Attorney General of Canada (AGC), named in lieu of the Governor in Council, whose consent is required under subsection 37(1.1) of CEAA to issue the Response; (2) the Minister of Fisheries and Oceans, who, together with (3) the Minister of Transport and (4) the Minister of Natural Resources, constitute the Responsible Authorities (“RAs”) related to the Project; and (5) Nalcor Energy (“Nalcor” or “the Proponent”).

[5] Fisheries and Oceans Canada (DFO) and Transport Canada (TC) identified themselves from the outset as RAs with respect to the proposed Project. DFO determined that components of the Project would result in the harmful alteration, disruption or destruction of fish habitat and would consequently require authorizations under subsection 35(2) of the *Fisheries Act*, RSC 1985, c F-14. TC, for its part, determined that the Project would require formal approval under subsection 5(1) of the *Navigable Waters Protection Act*, RSC 1985, c N-22 (NWPA) because the Project’s dams constitute named works under the NWPA.

[6] Natural Resources Canada became a responsible authority in August 2011, when the Government of Canada agreed to provide financial assistance to the Proponent in the form of a loan guarantee for a portion of the Project.

[7] The Proponent, Nalcor, is a Crown Corporation incorporated pursuant to the *Energy Corporation Act*, SNL 2007, c E-11.01. It is wholly owned by the Government of Newfoundland and Labrador (“the Province”), and was created to “engage in and carry out activities pertaining to

the Province's energy resources, including hydro-electric generation" (Application Record of the Respondent Nalcor Energy, vol 1, page 3). Nalcor is mandated to implement the Province's energy policy, and is governed in this regard by: the *Energy Corporation Act*, above; the Province's long-term energy policy, *Focusing Our Energy* ("the Energy Plan"); and the *Electrical Power Control Act, 1994*, SNL 1994, c E-5.1.

B. *The Project*

[8] Nalcor's proposed Project involves the construction and operation of two hydroelectric generation facilities on the lower section of Churchill River in Labrador – one at Gull Island and the other at Muskrat Falls. The Project further proposes the construction of transmission lines and access roads connecting the two sites to each other, and to the existing Labrador electricity grid.

[9] The Gull Island facility would have a generation capacity of 2,250 MW, necessitating the creation of a dam, a 232 km-long reservoir, and the flooding of an 85 km² area. The Muskrat Falls facility would have a generation capacity of 824 MW, with a dam, a 60 km-long reservoir, and a 41 km² flooded area.

[10] Three different versions of the Project were attempted, starting with the initial proposal made in 1978 by Nalcor's corporate predecessor. For various reasons, these earlier forms of the Project were not pursued. The current proposal was defined and registered for environmental assessment in November 2006.

C. *The CEAA Environmental Assessment Process*

[11] The Supreme Court recently described CEAA as “a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed” (*Mining Watch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] SCJ No 2 at para 1). The basic framework for EAs under CEAA involves four broad components. First, the RAs determine whether CEAA applies to the project and what type of assessment it will conduct. There are three main types of assessment: screening, comprehensive study, and panel review. While panel reviews are the most involved, screenings and comprehensive studies are the most common types employed by RAs. Second, the assessment itself is conducted – in this case, by the JRP – according to the parameters set by the appropriate authority under CEAA. Third, the RAs determine whether, based on the assessment, the project should proceed. Fourth and finally is the post-decision phase, in which notice is given to the public about the RAs’ decisions, mitigation measures are monitored and potential follow-up programs are carried out.

[12] As previously mentioned, the Project in this case was registered with the federal authorities late in 2006. In February 2007, TC and DFO determined that an environmental assessment was required pursuant to CEAA. The Minister of the Environment subsequently referred the assessment to a review panel under the federal legislation in June 2007 and, as the Province concurrently determined that a public hearing was required for provincial environmental approvals, the two Governments established the JRP. To this effect, the “Agreement for the Establishment of a Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project” (“the JRP Agreement”) was concluded in January 2009, and the five-member panel was jointly

appointed by the provincial Ministers of Environment and Conservation and Intergovernmental Affairs, and the federal Minister of the Environment.

[13] The JRP Agreement set out the Terms of Reference for the Panel's EA, which provided, in part, as follows (see Application Record of the Applicants Sierra Club Canada and Grand Riverkeeper, Labrador, Inc, vol 5, tab 7, page 1488):

The Panel shall consider the following factors in the EA of the Project/Undertaking as outlined in Sections 16(1) and 16(2) of the CEAA and Sections 57 and 69 of the EPA:

1. Purpose of the Project/Undertaking;
2. Need for the Project/Undertaking;
3. Rationale for the Project/Undertaking;
- ...
5. Alternatives to the Project/Undertaking;
- ...
10. Any cumulative Environmental Effects that are likely to result from the Project/Undertaking in combination with other projects or activities that have been or will be carried out;
11. The significance of the Environmental Effects as described in items 9 and 10;
- ...

[14] Prior to the conclusion of the final JRP Agreement, drafts that included the Terms of Reference were subject to public consultations.

[15] In July 2008, the Governments issued the Final Guidelines for the preparation of the Proponent's Environmental Impact Statement (EIS). Draft guidelines had been subject to public consultations between December 2007 and February 2008. Nalcor submitted its EIS, along with the component studies that had been carried out in conjunction therewith, to the Panel in February 2009.

In March of that same year, the JRP invited comments from the public and both federal and provincial governmental agencies on the adequacy of the EIS. Based on those comments and the Panel's own questions, five rounds of information requests were sent to Nalcor. In January 2011, the Panel determined that it had sufficient information to proceed to the public hearing phase of the EA.

[16] The JRP held thirty days of hearings in various communities between March 3 and April 15, 2011. Some of the hearings were issue-specific, while others were general sessions, in which the Panel invited participants to share their overall views and conclusions on the Project. Still others were community hearings, in which participants were invited to share their views on the impacts the Project might have on their specific communities. After the final hearing on April 15, the Panel declared the proceedings closed, determining that no further information would be considered. It issued the Report on August 23, 2011.

[17] The Applicants filed this application for judicial review on December 20, 2011. Pursuant to subsection 37(1.1) of CEAA, the RAs, with the approval of the Governor in Council, issued their Response to the Report on March 15, 2012. The Response included the RAs' course of action decision under section 37 of the same Act. While the parties debated the relevance of the Response in their oral submissions, I am not prepared to consider it for the purposes of this judicial review in light of the fact that it was issued subsequent to the notice of application. I am not convinced that it is needed to "complete the picture" as the Applicants suggest.

II. The Impugned Report

[18] The Panel's Report sets out the Proponent's and the public participants' views on a range of subjects, and gives over 80 recommendations. Overall, the Panel determined that the Project was likely to have significant adverse effects in the areas of fish habitat and fish assemblage; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville should consumption advisories be required; and culture and heritage (the "loss of the river") (Report at page 269). It further identified that there was a range of potential benefits stemming from the Project. The Panel, in the final chapter of its Report, gave its thoughts on whether the proposed Project would create net benefits in a range of areas, including economics, social and cultural benefits, and benefits to future generations, to the Province, and to areas beyond the Province.

[19] The portions of the Report in dispute are those recommendations related to the: (i) need for (Recommendation 4.1), (ii) alternatives to (Recommendation 4.2), and (iii) cumulative effects of (Recommendations 16.1 and 16.2, though the cumulative effects of specific components were considered throughout the Report) the Project.

(i) Need

[20] With respect to the need for the Project, the Panel came to two conclusions at page 25 of the Report:

The Panel concludes that, in light of the uncertainties associated with transmission for export markets from Gull Island, Nalcor has not

demonstrated the justification of the Project as a whole in energy and economic terms.

The Panel further concludes that there are outstanding questions for each of Muskrat Falls and Gull Island regarding their ability to deliver the projected long-term financial benefits to the Province, even if other sanctioning requirements were met.

[21] In response to these conclusions, the JRP recommended that, if the Project were to be approved by the RAs, the Province undertake a “separate and formal review of the projected cash flow” of the relevant Project component to confirm whether it would, in fact, provide “significant long-term financial returns to the Government for the benefit of the people of the Province” (Recommendation 4.1).

(ii) Alternatives

[22] The Panel determined that Nalcor’s analysis showing that the Muskrat Falls component of the Project was the best and least cost option for meeting domestic energy demands was “inadequate.” As such, it recommended that an “independent analysis of economic, energy and broad-based environmental considerations of alternatives” be carried out (Recommendation 4.2, at page 34 of the Report). The Panel outlined what it thought would be appropriate parameters for such an independent study, suggesting that the following question be analysed:

What would be the best way to meet domestic demand under the “No Project” option, including the possibility of a Labrador-Island interconnection no later than 2041 to access Churchill Falls power at that time, or earlier, based on available recall?

(iii) Cumulative Effects

[23] Finally, the Panel allotted a chapter to the discussion of the cumulative effects of the Project. As previously stated, other chapters addressed the cumulative effects related to “specific valued ecosystem components and key indicators of the biophysical and socio-economic environments” (see Report at page 265). The Panel defined “cumulative effects” in Chapter 16 as “changes to the environment due to the Project where those overlap, combine or interact with the environmental effects of other existing, past or reasonably foreseeable projects or activities” (Report at page 265).

[24] The JRP concluded that Nalcor’s approach to cumulative effects was “less than comprehensive” and that public participants “raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project” (Report at page 267). It further noted that the Proponent’s approach “illustrates the limitation of project-specific cumulative effects” (Report at page 267). The Panel gave the following recommendation on this point (Recommendation 16.1, Report at page 268):

The Panel recommends that, if the Project is approved, the provincial Department of Environment and Conservation, in collaboration with the provincial Department of Labrador and Aboriginal Affairs and other relevant departments, identify regional mechanisms to assess and mitigate the cumulative effects of current and future development in Labrador.

III. Issues

[25] The principal issues raised in this application can be framed as follows:

A. What is the applicable standard of review?

- B. Did the JRP fulfill its mandate with respect to the:
- i. need for and alternatives to the Project; and
 - ii. cumulative effects of the Project?

[26] NunatuKavut also claims that the JRP breached principles of procedural fairness or violated its right to be heard.

IV. Analysis

A. *Standard of Review*

[27] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 requires that the Court first assess whether the existing jurisprudence has satisfactorily determined the degree of deference to be afforded to the category of question at issue (at para 62; see also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] SCJ No 53 at paras 16-17). Should the jurisprudence be found wanting, the Court must then assess the factors set out by the Supreme Court in *Dunsmuir*, above, including: (1) the existence of a privative clause; (2) the purpose of the tribunal as determined by interpreting the enabling legislation; (3) the expertise of the tribunal; and (4) the nature of the question at issue (*Dunsmuir*, above, at para 64). In light of the recent trend in Canadian jurisprudence on the standard of review, I find that, while instructive, cases that pre-date *Dunsmuir*, above, such as *Alberta Wilderness Association v Express Pipelines Ltd*, [1996] FCJ No 1016 (*Express Pipelines*), *Alberta Wilderness Association v Cardinal River Coals, Ltd*, [1999] FCJ No 441, [1999] 3 FC 425 (*Cheviot*), are not determinative. As such, an analysis of the *Dunsmuir* factors is required.

(1) Privative Clause

[28] While there is no privative clause in CEAA, the presence or absence of a privative clause is no longer determinative of whether a particular body will be afforded deference (*Canadian Human Rights Commission*, above, at para 17; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at para 25; *Dunsmuir*, above, at para 52). The remaining factors will be weighed more heavily in accordance with this pronouncement by the Supreme Court.

(2) & (3) Panel's Purpose and Expertise

[29] A JRP is established to fulfill an information gathering and recommending function under CEAA (section 34 of CEAA; *Express Pipelines*, above, at para 14). The Panel does not render any final decisions with respect to the Project, nor does it make absolutely binding recommendations. Rather, its primary goal is to assist the RAs – the ultimate decision-makers – in obtaining the information they need to make environmentally informed decisions. It is one piece of the decision-making process mandated by CEAA.

[30] As the courts found in both *Cheviot* and *Express Pipelines*, above, it is expected that a joint review panel boast a “high degree of expertise in environmental matters” (*Cheviot*, above, at para 24; *Express Pipelines*, above, at para 10). The JRP in this case was no exception, featuring five highly qualified members. The Panel was co-chaired by Ms. Lesley Griffiths, co-principal of a consulting firm that provides services in environmental impact assessment, among other things, and

Mr. Herbert Clarke, who has experience with aboriginal affairs and impacts and benefits agreements, and who has been involved with fisheries resource conservation. The other Panel members were: Dr. Meinhard Doelle, an environmental law professor at Dalhousie University and environmental Counsel to a private Atlantic Canada firm; Ms. Catherine Jong, a consultant in the health care and education sectors, based in Happy Valley-Goose Bay; and Mr. James Igloliorte, a former judge at the Provincial Court of Newfoundland and Labrador.

[31] The Panel's information gathering and recommending functions, along with its expertise in the matters before it, point towards a reasonableness standard of review.

(4) Nature of the Question at Issue

[32] The parties' contest as to what constitutes the appropriate standard of review stems primarily from their disagreement about the proper characterization of the issues raised in the application. The Applicants posit that the Panel's alleged failure to comply with the duties mandated by CEAA constitutes an error of law or a question of jurisdiction, both relating to the Panel's interpretation of CEAA. As such, they argue, they are reviewable on the standard of correctness.

[33] The Proponent, for its part, prefers to frame the issues raised by the Applicants as attacks on the quality of the evidence before the Panel and on the correctness of its consequent conclusions, and thus reviewable on the standard of reasonableness.

[34] The federal Respondents propose that the question of whether the Panel was required to make firm conclusions with respect to the need for, and alternatives to, the Project is a question of law, reviewable on the standard of correctness. All other issues, they assert, should be reviewed on the standard of reasonableness, as put forth by the Proponent.

[35] This dispute over the nature of the question is not a new one. This Court and the Federal Court of Appeal have both held, consistent with the contentions of the parties, that “it is important to appropriately characterize a perceived failure to comply as a question of law or merely an attack on the ‘quality’ of the evidence and, therefore, the ‘correctness’ of the conclusions drawn on that evidence” (*Cheviot*, above, at para 24; *Express Pipelines*, above, at para 10). The former characterization attracts review on the correctness standard, while the latter “must not lightly be interfered with” (see *Cheviot*, above, at para 24).

[36] In the case at hand, the Applicants do not challenge the Panel’s determinations on the sufficiency of the evidence before it; in fact, they agree with the Panel’s statements that there was inadequate information on the need for, alternatives to, and cumulative effects of the Project. The heart of the Applicants’ challenge lies instead in their disagreement with the recommendations made pursuant to such determinations. They argue that the Panel ought to have taken a different course of action when faced with the information – or purported lack thereof – before it. This is evidence that the Applicants challenge the “correctness” of the conclusions drawn on the evidence before the Panel, and not a failure to exercise its jurisdiction.

[37] This characterization of the issues is particularly apt given the recent trend in the jurisprudence. As Justice David Stratas highlighted in *Fort McKay First Nation Chief and Council v Mike Orr*, 2012 FCA 269, [2012] FCJ No 1353 at para 10, the Supreme Court has both suggested that characterizing a legislative provision as “jurisdictional” for the purposes of judicial review should be avoided (see *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] SCJ No 10 at para 34) and questioned the very existence of “true questions of jurisdiction” (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] SCJ No 61 at para 34). The Federal Court of Appeal followed suit in *Fort McKay*, above, and so should this Court.

[38] Furthermore, the Applicants’ arguments that the JRP failed to provide a rationale for its conclusions must be read in conjunction with *Dunsmuir*, above, and *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] SCJ No 62. In that case, the Supreme Court opined that *Dunsmuir* does not stand “for the proposition that the ‘adequacy’ of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result...It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes” (para 14). The Supreme Court further cemented its view on this point in *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] SCJ No 65:

[3] The Board did not have to explicitly address all shades of meaning of these provisions. This Court has strongly emphasized that administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable. [...]

[39] While the JRP is not a judicial or quasi-judicial body, I find that such a decision maker's "reasons" are akin to the "rationale" requirements imposed on the JRP by CEAA and its Terms of Reference, and are thus owed deference.

Conclusions

[40] Thus, in accordance with the recent jurisprudence, and given the purpose and expertise of the JRP, and the nature of the questions before it, I am satisfied that the entirety of issue (B) should be reviewed on the standard of reasonableness.

[41] The Federal Court of Appeal noted in *Iverhuron & District Ratepayers' Association v Canada (Minister of the Environment)*, 2001 FCA 203, [2001] FCJ No 1008 at para 40 that a reasonableness review requires merely that the Court be able to perceive a rational basis for the Panel's conclusions. This Court elaborated on the point in *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302, [2008] FCJ No 324 (*Pembina*), stating that "deference to expertise is based on the cogent articulation of the rationale [*sic*] basis for conclusions reached" (para 75). This view is consistent with *Dunsmuir*, above, in which the Supreme Court held that reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 47).

[42] Finally, it is well-established that questions of procedural fairness are to be assessed on the standard of correctness (*Khosa*, above, at para 43). NunatuKavut's arguments related to their right to be heard will thus be assessed on this standard.

B. *The JRP's Mandate*

Purpose and Role of the JRP in the EA Process

[43] The basic goals of the EA process writ large are to ensure "(1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; [and] (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation" (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] SCJ No 1, [1992] 1 SCR 3 at para 95). Section 4 of CEEA sets out the purposes of the Act:

<u>Purposes</u>	<u>Objet</u>
4. (1) The purposes of this Act are	4. (1) La présente loi a pour objet :
(a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;	(a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;
(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy	(b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

economy;

[44] Review panels exist to fulfill the first goal. To this effect, CEAA imposes certain information gathering and reporting requirements on panels (see also *Express Pipelines*, above, at para 14), which are set out in section 34:

Assessment by review panel

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;

(c) prepare a report setting out

(i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public; and

(d) submit the report to the Minister and the responsible authority.

Commission d'évaluation
environnementale

34. La commission, conformément à son mandat et aux règlements pris à cette fin :

(a) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès;

(b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;

(c) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public;

d) présente son rapport au ministre et à l'autorité responsable.

[45] Section 16 of CEAA includes a number of factors a review panel is mandated to consider:

<u>Factors to be considered</u>	<u>Éléments à examiner</u>
16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:	16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :
(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;	(a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;
(b) the significance of the effects referred to in paragraph (a);	(b) l'importance des effets visés à l'alinéa a);
(c) comments from the public that are received in accordance with this Act and the regulations;	(c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;
(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and	(d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and	(e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du

alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any follow-up program in respect of the project; and
- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and

projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

Éléments supplémentaires

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

- (a) les raisons d'être du projet;
- (b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;
- (c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;
- (d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)a, b) et d) et (2)b), c) et d) incombe :

(d) shall be determined

(a) by the responsible authority; (a) à l'autorité responsable;
or

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel. (b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

[46] Section 57 of the provincial *Environmental Protection Act*, SNL 2002, c E-14.2 sets out the requirements for an “environmental impact statement,” the term defined as the “report that presents the results of an environmental assessment” (section 45(e)) for the purposes of that act:

Environmental impact statement

57. An environmental impact statement shall be prepared in accordance with the guidelines, and shall include,

- (a) a description of the undertaking;
- (b) the rationale for the undertaking;
- (c) the alternative methods of carrying out the undertaking, and the alternatives to the undertaking;
- (d) a description of the
 - (i) present environment that will be affected or that might reasonably be expected to be affected, directly or indirectly, by the undertaking, and
 - (ii) predicted future condition of the environment that might reasonably be expected to occur within the expected life span of the undertaking, if the undertaking was not approved;

- (e) a description of
 - (i) the effects that would be caused, or that might reasonably be expected to be caused, to the environment by the undertaking with respect to the descriptions provided under paragraph (d), and
 - (ii) the actions necessary, or that may reasonably be expected to be necessary, to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment by the undertaking;
- (f) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;
- (g) a proposed set of control or remedial measures designed to minimize any or all significant harmful effects identified under paragraph (e);
- (h) a proposed program of study designed to monitor all substances and harmful effects that would be produced by the undertaking; and
- (i) a proposed program of public information as required under section 58.

[47] As previously introduced, the JRP's Terms of Reference further defined its mandate, reflecting the factors described in both the federal and provincial statutes:

The Panel shall consider the following factors in the EA of the Project/Undertaking as outlined in Sections 16(1) and 16(2) of the CEAA and Sections 57 and 69 of the EPA:

1. Purpose of the Project/Undertaking;
2. Need for the Project/Undertaking;

3. Rationale for the Project/Undertaking;
- ...
5. Alternatives to the Project/Undertaking;
- ...
10. Any cumulative Environmental Effects that are likely to result from the Project/Undertaking in combination with other projects or activities that have been or will be carried out;
11. The significance of the Environmental Effects as described in items 9 and 10;
- ...

[48] This Court has held that, in order for the JRP to fulfill its “consideration” requirement pursuant to section 16 of CEAA, it must “perform to a high standard of care” (*Cheviot*, above, at para 36).

[49] The JRP’s information gathering function was also laid out in *Cheviot*, above. Justice Douglas Campbell underlined that the Terms of Reference in that particular case amplified the requirement under section 34(a) of CEAA, obligating the panel “to obtain all available information that is required to conduct the environmental assessment” (at para 39). He went on to determine that “required information” is that which will meet the high standard of care owed by the JRP with respect to its consideration requirements. Justice Campbell also determined that the JRP must make use of the production of evidence powers accorded to it under section 35 of CEAA to the full extent necessary to obtain and make available all information required for the conduct of its review (at para 48). It is important to note that in *Cheviot*, above, the applicable Alberta legislation that formed part of that panel’s mandate required it to determine whether a proposed energy development was in the public interest – in other words, to determine whether it was justified

(see *Cheviot*, above, at para 28). There is no equivalent requirement in the JRP's mandate in this case.

[50] Finally, the JRP's reporting obligations require it to state its recommendations clearly, including the evidence it has relied upon in reaching each recommendation (see *Cheviot*, above, at paras 43-51). In other words, the JRP must substantiate the recommendations it makes for the purposes of CEAA. This substantiation allows the public, government decision-makers, and courts to identify the rational basis upon which the Panel must make its recommendations (see *Iverhuron*, above, at para 40).

[51] The parties' main dispute in the case at hand is about the extent to which the JRP was mandated to consider and reach conclusions with respect to each of the factors listed in section 16 of CEAA and in its Terms of Reference. The general requirements for panel review set out in *Cheviot*, above, offer an instructive framework with which to assess the Panel's Report. As such, I will address three main issues with respect to each of (i) the need for and alternatives to the Project, and (ii) its cumulative effects, namely whether the Panel reasonably fulfilled its mandate to:

(a) consider; (b) gather information; and (c) report.

[52] As a preliminary note, there is no dispute between the parties about the scope of the JRP's mandate to make findings on justification. They agree that the Panel was not required to make such findings. Additionally, I do not find it necessary to rule definitively on the question of the weight to be afforded to the affidavit of Mr. Stephen Chapman in these proceedings.

(i) “Need for” and “Alternatives to” the Project

(a) Consideration

[53] The Respondents propose that the Panel’s requirement to consider should be informed by the ordinary meaning of that word. They cite the Oxford English Dictionary definition of “consider” as “to contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of” (Factum of the Respondent, Nalcor Energy at para 65). The federal Respondents frame the requirement as meaning that the JRP “simply had to turn its mind to these issues without reaching hard conclusions” (federal Respondents’ Memorandum of Fact and Law at para 66). Additionally, they posit that, once the Panel met the minimum requirement to turn its mind to the issues before it, it then had the discretion to determine the parameters of the consideration required.

[54] While the Applicants champion a more purposive conception, arguing that the Panel’s failure to assess need and alternatives properly impeded its ability to reach conclusions on whether the Project was justified, I agree with the Respondents’ position. It is clear that the JRP turned its mind to the issues of need and alternatives. These questions were at the center of at least one issue-specific public hearing, and were included in numerous information requests and responses throughout the EA process. Indeed, the extent to which the Panel requested further information was a matter for its judgment, judgment with which this Court is loath to interfere. It does not appear to me that the Panel misconceived of its responsibilities relating to need and alternatives. I find that the Panel considered the need and alternatives questions in a manner that is transparent, justifiable and intelligible. As such, it falls within an acceptable range of outcomes and is reasonable.

(b) Information Gathering

[55] There are two parts to the parties' contentions relating to the Panel's information gathering requirement: (1) whether the JRP's determination that there was "insufficient evidence" meant insufficient evidence for the purposes of its EA or for the ultimate decision maker's purposes; and (2) whether the JRP's referral of additional "information gathering" to (i) the Province and (ii) an independent study panel was reasonable.

[56] On the first part, the Applicants agree with the Panel's determination that there was insufficient evidence on need and alternatives, but posit that, given the paucity of evidence, it should have both obtained, through the use of its subpoena powers, and then assessed the requisite information. However, there is no evidence provided by the Applicants that such information existed for the Panel to obtain and utilize.

[57] Further, I agree with the federal Respondents' argument that the Panel's subpoena power cannot be used to compel the creation of new information. In essence, the Applicants contend that the Panel must use the subpoena power to engage in a fishing exercise for further information that may exist. However, as I already mentioned, there is no evidence in this matter that such information did, in fact, exist during the Panel's deliberations. Otherwise, the Applicants submit that the subpoena power is to be used to compel, in an ongoing fashion, the creation of new information prior to the Panel concluding its Report. In my view, neither of these arguments have merit. There is no evidence that information was withheld from the Panel during its deliberations.

Further, the Panel clearly drew upon its expertise to conclude that the information it had on hand was sufficient to fulfill its mandate. Such a conclusion should not lightly be interfered with by the Court.

[58] It then follows that the Proponent's characterization of the JRP's conclusions with respect to the further information to be collected in accordance with Recommendations 4.1 and 4.2 is correct. Rather than relating to the sufficiency of the evidence for the purposes of completing the EA, these conclusions were items the Panel thought the government decision-makers might find useful in determining whether the Project should proceed.

[59] Thus, to address the second part of the issue, it was entirely reasonable for the Panel to recommend that the Province and an independent study panel augment at a later time the information gathered with respect to the questions of need and alternatives. Indeed, this is expected behaviour from the Panel given the "ongoing and dynamic" nature of these large projects (*Pembina*, above, at para 24; *Union of Nova Scotia Indians v Canada (Minister of Fisheries and Oceans)*, [1996] FCJ No 1373 at para 65). As this Court held in *Pembina*, above, environmental assessment is "not to be conceptualized as a single, discrete event" (at para 24).

[60] This is particularly so given the uncertainty of the process and the early phase in the process at which the EA occurs. Subparagraph 5(2)(b)(i) of CEEA states that RAs "shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made."

[61] The Federal Court of Appeal explored this point in *Express Pipelines*, above:

[14] Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

[62] I am in accord with the Federal Court of Appeal's analysis in *Express Pipelines*, above, and find that the Panel reasonably fulfilled its information gathering mandate in this case.

(c) Reporting

[63] Finally, I am satisfied that the Panel adequately substantiated its conclusion that further study was needed in two areas. It explained in its conclusions on the need for the Project that there was insufficient information on the long-term financial viability of the Project, and, as such, that further study was recommended. Similarly, insufficient information was the reason cited as the basis for the Panel's recommendation that further study be conducted with respect to potential alternatives to the Project. These explanations each provide the rational basis that fulfills the Panel's reporting requirements for these items.

(ii) Cumulative Effects

(a) Consideration and (b) Information Gathering

[64] The Applicants allege that, apart from an evaluation of the cumulative effects stemming from the Project on the Red Wine caribou, the Panel failed to conduct any cumulative effects assessment. It is clear, however, in looking at the Report that the JRP turned its mind to the question. There is an entire chapter dedicated to the Proponent's approach to cumulative effects, and the notion is built into many other chapters dealing with more specific issues. The Panel requested further information specifically relating to cumulative effects from the Proponent on at least two occasions, and gathered information on this point from public participants. It stated specifically that public participants had "raised valid concerns that contributed to a broader understanding of the potential cumulative effects of the Project" (Report at page 267). I am thus satisfied that the Panel met its consideration and information gathering requirements with respect to cumulative effects.

(c) Reporting

[65] The main issue with respect to cumulative effects is the reporting requirement, more specifically the requirement to state conclusions clearly and substantiate them with evidence. The Applicants posit that the Panel's reliance on future regional processes within the control of provincial agencies in Recommendation 16.1 constitutes a failure to state a conclusion with respect to this specific Project. I disagree. The Panel dealt with cumulative effects in various parts of their Report. It also clearly considered and concluded in the Report that further future works were

required with respect to cumulative effects. The Panel recommended a possible mechanism for this work to proceed, which, in my view, was entirely reasonable given the ongoing and dynamic nature of this large Project (see *Pembina*, above, at para 24). It is not logical to expect that the Panel would have finalized all informational aspects of possible cumulative effects prior to reporting to the RAs. Its conclusions on cumulative effects are grounded in a rational basis and, as such, I find that the Panel reasonably fulfilled its reporting mandate with respect to cumulative effects.

NunatuKavut: Procedural Fairness and the Right to be Heard

[66] NunatuKavut argues that the Panel's failure to consider the need for, alternatives to, and cumulative effects of the Project effectively denied it its right to be heard. As I have already found that the Panel fulfilled its section 16 mandate to consider, this argument must be rejected.

[67] I must also reject NunatuKavut's arguments based on the Panel's purported duty to consult the group on all matters, and to compel evidence from them on all three issues in dispute in these proceedings. The Panel's mandate was not as expansive as NunatuKavut posits. Its Terms of Reference stated as follows:

The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title (see Terms of Reference, Schedule 1 to JRP Agreement).

[68] The mandate to invite information cannot be said to include a mandate to compel evidence.

[69] Moreover, the Panel fulfilled its mandate by inviting, and accepting, on several occasions written submissions from NunatuKavut. In addition, the Panel heard from the group in the General Hearing Sessions it held in Happy Valley-Goose Bay and in St. John's. Indeed, the group received over \$130,000 through the Participant Funding Program to participate in the EA process. NunatuKavut's choice not to participate in a portion of the hearings by virtue of its injunction proceedings, regardless of how good the group's intentions, cannot impose a duty on the Panel to compel evidence from it.

[70] For all of these reasons, I find that there was no infringement of NunatuKavut's right to be heard or of any other principle of procedural fairness with respect to the group's participation in the EA process.

V. Conclusion

[71] In light of my findings that the Panel reasonably fulfilled its mandate to consider, gather information, and report on the need for, alternatives to, and cumulative effects of the Project, the Applicants' prayer for relief is denied. Given the nature of the subject matter and the questions at issue, there will be no award as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no order as to costs.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2060-11

STYLE OF CAUSE: GRAND RIVERKEEPER, LABRADOR INC. ET AL v AGC ET AL

PLACE OF HEARING: OTTAWA

DATE OF HEARING: NOVEMBER 26 & 27, 2012

REASONS FOR JUDGMENT AND JUDGMENT BY: NEAR J.

DATED: DECEMBER 20, 2012

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TAB 10

Nunatukavut Community Council Inc. v. Canada (Attorney General), [2015] F.C.J. No. 969

Federal Court Judgments

Federal Court

Halifax, Nova Scotia

Strickland J.

Heard: February 2-4, 2015.

Judgment: August 18, 2015.

Docket: T-1339-13

[2015] F.C.J. No. 969 | [2015] A.C.F. no 969 | 2015 FC 981 | 2015 CarswellNat 3714 | 260 A.C.W.S. (3d) 651 | 96 C.E.L.R. (3d) 211

Between Nunatukavut Community Council Inc. and Todd Russell, on their own behalves and on behalf of the members of Nunatukavut Community Council Inc., Applicants, and The Attorney General of Canada and Nalcor Energy, Respondents

(318 paras.)

Case Summary

Aboriginal law — Aboriginal lands — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Application by Nunatukavut Community Council for judicial review dismissed — Minister of Department of Fisheries and Oceans issued authorization to Nalcor permitting impact to fish and habitat arising from proposed construction of hydro-electric generating station — Issuance did not result from inadequate consultation and accommodation — No breach of duty of fairness established — Joint review process canvassed impact, compensation, and incorporated reasonable conditions to satisfy identified uncertainties and risks — Issuance of authorization was informed and reasonable.

Environmental law — Jurisdictional and constitutional issues — Aboriginal lands — Duty to consult — Application by Nunatukavut Community Council for judicial review dismissed — Minister of Department of Fisheries and Oceans issued authorization to Nalcor permitting impact to fish and habitat arising from proposed construction of hydro-electric generating station — Issuance did not result from inadequate consultation and accommodation — No breach of duty of fairness established — Joint review process canvassed impact, compensation, and incorporated reasonable conditions to satisfy identified uncertainties and risks — Issuance of authorization was informed and reasonable.

Natural resources law — Fishing — Conservation and management — Application by Nunatukavut Community Council for judicial review dismissed — Minister of Department of Fisheries and Oceans issued authorization to Nalcor permitting impact to fish and habitat arising from proposed construction of hydro-electric generating station — Issuance did not result from inadequate consultation and accommodation — No breach of duty of fairness established — Joint review process canvassed impact, compensation, and incorporated reasonable conditions to satisfy identified uncertainties and risks — Issuance of authorization was informed and reasonable.



Application by the Nunatukavut Community Council for judicial review of issuance of a construction authorization to Nalcor Energy by the Minister of the Department of Fisheries and Oceans. The authorization under review, issued pursuant to ss. 32(2)(c) and 35(2)(b) of the Fisheries Act, permitted an impact to fish and fish habitat arising from Nalcor's proposed construction of a hydro-electric generating station on the lower Churchill River. The Applicants sought review on the basis that they were not adequately consulted or accommodated, that the Minister breached her duty of procedural fairness, and, that her decision to issue the authorization was incorrect or unreasonable and an improper use or an abuse of her discretion.

HELD: Application dismissed.

The standard of review of the extent of the duty of consultation was correctness. The standard of review of the adequacy of the consultation process was one of reasonableness where the Crown had correctly identified the legal parameters of the content of the duty to consult to properly identify what comprised adequate consultation. The decision to issue the authorization was reviewable on a standard of reasonableness. The content of the duty to consult and accommodate was at the low and middle range of the spectrum given the unresolved status of the applicant's land claim, and considering the seriousness of the potentially adverse effects of the authorization on the right or title claimed. There was no infringement of the right to be heard or any other principle of procedural fairness. The applicants failed to establish that funding during the final phase of the joint review process was inadequate, or contrary to their legitimate expectations, and thereby prevented fair and meaningful consultation. No absence of good faith or lack of meaningful consultation by Canada was established. The joint review process canvassed the impact upon fish habitat, compensation, and incorporated reasonable conditions to satisfy the identified uncertainties and risks. The issuance of the authorization was informed and reasonable.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act, SC 1992, c 37, s. 2(1), s. 5(1)(d), s. 11, s. 25(a), s. 37, s. 37(1), s. 37(1.1), s. 37(1.1)(a), s. 37.1

Energy Corporation Act, SNL 2007, c E-11.01,

Federal Courts Act, RSC, 1985, c F-7, s. 18, s. 18.1

Fisheries Act, RSC 1985, c F-14, s. 32(2), s. 32(2)(c), s. 35(2), s. 35(2)(b)

Navigable Waters Protection Act, RSC 1985, c N 22, s. 5, s. 5(1)

Newfoundland and Labrador Environmental Protection Act, SNL 2002, c E-14.2,

Counsel

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Reinhold M. Endres, Q.C., James Klaassen, for the Respondent, the Attorney General of Canada.

Maureen Killoran, Q.C., Thomas Gelbman, for the Respondent, Nalcor Energy.

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JUDGMENT AND REASONS

STRICKLAND J.

1 This is an application for judicial review brought pursuant to ss 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, by which the Applicants challenge the decision of the Minister ("Minister") of the Department of Fisheries and Oceans ("DFO") to issue Authorization No. 13-01-005 ("Authorization") to Nalcor Energy ("Nalcor"). The Authorization was issued on July 9, 2013 and, pursuant to ss 32(2)(c) and 35(2)(b) of the *Fisheries Act*, RSC 1985, c F-14 ("*Fisheries Act*"), permits impacts to fish and fish habitat arising from the construction of the Muskrat Falls hydro-electric generating station proposed by Nalcor for the lower Churchill River as part of the Lower Churchill Hydroelectric Generation Project in Labrador.

2 The Applicants claim that they were not adequately consulted or accommodated, that the Minister breached her duty of procedural fairness; and, that her decision to issue the Authorization was incorrect or unreasonable and an improper use or an abuse of her discretion.

Background

3 The NunatuKavut Community Council Inc. describes itself as the self-governing organization representing the interests of the Inuit descendants (sometimes referred to as Inuit-Metis) of central and southern Labrador. The NCC was formed in 2010 and at all relevant times Mr. Todd Russell ("Russell") was its President. The Applicants will be referred to, collectively, as "NCC" in this decision.

4 In 1991, the NCC's predecessor, the Labrador Metis Association (later known as the Labrador Metis Nation), filed a land claim document with the government of Canada ("Canada"). It filed additional research in 1996 and did so again in 2010 in the form of a document entitled "*Unveiling NunatuKavut, Describing the Lands and People of South/Central Labrador, document in Pursuit of Reclaiming a Homeland, NunatuKavut, 2010*" ("*Unveiling NunatuKavut*"). Although the NCC has asserted a land claim in the region it describes as overlapping the project area, this has not currently been accepted for negotiation by either Canada or the government of the Province of Newfoundland and Labrador ("Province").

5 Nalcor was incorporated pursuant to the *Energy Corporation Act*, SNL 2007, c E-11.01, its predecessor being Newfoundland and Labrador Hydro. Nalcor was created to engage in and carry out activities pertaining to the energy resources of the Province, which is its sole shareholder.

6 Nalcor proposed to develop two hydro-electric generation facilities on the lower Churchill River in central Labrador with a combined capacity of 3,047 megawatts ("MW"). The project ("Project") would consist of dams located at Muskrat Falls (824 MW) and at Gull Island (2,250 MW), and would include reservoirs, transmission lines, access roads, temporary bridges, construction camps, borrow pits and quarry sites, diversion facilities and spoil

areas as described in the *Report of the Joint Review Panel Lower Churchill Hydroelectric Generation Project*, dated August 2011 ("JRP Report").

7 Given the nature of the NCC's claim, it is necessary to set out, in some detail, the factual background of this matter.

8 On November 30, 2006, Nalcor registered the Project with the Newfoundland and Labrador Department of Environment and Conservation ("NL DEC") and the Canadian Environmental Agency ("Agency") to initiate the provincial and federal environmental assessment processes pursuant to the *Newfoundland and Labrador Environmental Protection Act*, SNL 2002, c E-14.2 ("NL EPA") and the *Canadian Environmental Assessment Act*, SC 1992, c 37 ("CEAA").

9 In January 2007, Nalcor was advised by NL DEC that, pursuant to the NL EPA, an Environmental Impact Study ("EIS") was required for the Project. In February 2007, the Minister advised the Minister of the Environment that DFO had determined that an environmental assessment ("EA") was required because, to proceed, the Project would require approval of Transport Canada ("TC") pursuant to s 5(1) of the *Navigable Waters Protection Act*, RSC 1985, c N 22 ("NWPA") as it involved dam construction, and, an authorization by DFO pursuant to s 35(2) of the *Fisheries Act*, as it would likely result in the harmful alteration, disruption or destruction of fish habitat, thereby triggering s 5(1)(d) of the CEAA. The Minister requested that the Project be referred to a review panel in accordance with s 25(a) of the CEAA.

10 TC and DFO each identified themselves as a "responsible authority" ("RA") as defined in the CEAA, that is, a federal authority that is required to ensure that an environmental assessment is conducted (CEAA, ss 2(1) and 11).

Consultation Framework

11 Canada, in its written submissions, divides the consultation process into five phases, based on the *Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project*, dated August 13, 2010 ("*Consultation Framework*").

12 The *Consultation Framework* sets out additional details as to how the federal government would rely on the joint review panel ("JRP" or "Panel") process, to the extent possible, to assist it in fulfilling its legal duty to consult Aboriginal groups with respect to the proposed Project. The JRP process was identified as the primary mechanism for Aboriginal groups to learn about the Project and present their views, including with respect to their traditional knowledge, the environmental effects of the Project, effects on their land use, the nature and scope of their potential or established treaty rights, the impact the Project would have on them, and appropriate measures to mitigate. It identified the Agency as being responsible for coordinating federal Aboriginal consultation during the EA. As such, the Agency would ensure that the activities described in the *Consultation Framework* were carried out and that the Aboriginal groups were kept well informed. It divided the consultation process into five phases, which are adopted below for convenience:

- * Phase 1 -- Initial engagement and consultation on the draft Joint Review Panel Agreement ("JRP Agreement"), the appointment of the JRP panel members and the development of EIS Guidelines;
- * Phase 2 -- JRP process leading to hearings;
- * Phase 3 -- Hearings and preparation of the JRP Report;
- * Phase 4 - Consultation on the JRP Report; and
- * Phase 5 - Regulatory permitting.

Phase 1 -- Initial Engagement and consultation on the draft JRP Agreement, the appointment of the JRP Panel members and the development of EIS Guidelines

13 On October 19, 2006, DFO representatives met with representatives of the NCC, and other Aboriginal groups, in Goose Bay to discuss DFO's role with respect to the EA for the Project and to ascertain their early positions and perspectives. The NCC, amongst other things, stated that it looked forward to formal consultation and noted its land claim. On August 8, 2007, DFO and TC wrote to the NCC advising that the Project would require an EA pursuant to the *CEAA* and that DFO and TC would be arranging consultation with Aboriginal groups concerning how they may be affected by the granting of authorizations and approvals permitting harmful alteration, disruption or destruction of fish habitat.

14 In October 2007, the Agency and NL DEC jointly issued draft Environmental Impact Statement Guidelines ("EIS Guidelines") to Aboriginal groups, including the NCC, for comment. The draft EIS Guidelines were made available to the public for review on December 19, 2007. More than fifty interested parties responded, including the NCC, which provided comments on February 27, 2008.

15 The NCC's *Comments on the Lower Churchill EIS Guidelines*, addressed various issues including reservoir preparation (tree stump removal to reduce methylmercury accumulation), cumulative effects, downstream effects on the entire downstream environment, timing and adequacy of fish habitat compensation programs, and, Aboriginal rights or title. It also addressed the gathering and funding of this information, the consultation or accommodation process, the use of Aboriginal Traditional Knowledge and a comprehensive environmental agreement. The NCC noted its limited time and funding in preparation of its comments.

16 The final EIS Guidelines were issued by Canada and the Province in July 2008. The purpose of the EIS Guidelines was described as a process for identifying the Project's potential interactions with the environment, predicting environmental effects, identifying mitigation measures and evaluating the significance of residual environmental effects. The document also stated that if the Project proceeded, the EA process would provide the basis for setting out the requirements for monitoring and reporting to verify compliance with the terms and conditions of approval and the accuracy and effectiveness of predictions and mitigation measure (EIS Guidelines, s 2.1).

17 Further, Aboriginal and public participation, Aboriginal traditional and community knowledge, the precautionary principle (EIS Guidelines, ss 2.2, 2.3 and 2.5) and other matters were identified as basic principles of an EA. Regarding consultation with Aboriginal Groups, the EIS Guidelines stated:

4.8 Consultation with Aboriginal Groups and Communities

The EIS shall demonstrate the Proponent's understanding of the interest, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project. The Aboriginal groups and communities to be considered include, in Newfoundland and Labrador, the Innu Nation, the Labrador Metis Nation and the Nunatsiavut Government and, in Quebec, the Innu communities of Uashat Mak Mani-Utenam, Ekuanitshit, Nutaskuan, Unamen Shipu, Pakua Shipi and Matimekush-Lake John.

18 On May 7, 2008, the Province, with the consent of the Agency, provided the NCC with the draft JRP Agreement and its Terms of Reference ("TOR") in advance of making these publicly available for comment. The NCC was invited to provide comments and advised that these would be given full and fair consideration and that a written response would be provided prior to the execution of the JRP Agreement and TOR. The NCC could also request a meeting in an effort to resolve any related issues. The NCC did not provide comments on the draft JRP Agreement and TOR.

19 The JRP Agreement and TOR were finalized and released in January 2009. The JRP Agreement was subsequently amended to extend the consultation period for Aboriginal groups and to provide for translation of certain JRP documents into Aboriginal languages.

20 The JRP Agreement and TOR required the Panel to conduct the EA in a manner that discharged the requirements of the *CEAA* and the *NL EPA*. All JRP hearings were to be public and to provide for the participation of Aboriginal groups, the public, governments, Nalcor and other interested parties. Upon completion of the EA, the JRP was required to prepare a report which would address the factors to be considered under s 16 of the *CEAA* and s 65 of the *NL EPA*, set out the rationale, conclusions and recommendation of the JRP relating to the EA, including any mitigation measures and follow up programs, and include a summary of issues raised by the Aboriginal groups, the public, governments and other interested parties (JRP Agreement, ss 4.2, 4.3 and 6.3).

21 The TOR specifically addressed Aboriginal rights as follows:

Aboriginal Rights Considerations

The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.

The Panel shall include in its Report:

1. information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.
2. any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

The Panel will not have a mandate to make any determinations or interpretation of:

- * the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
- * the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
- * whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
- * the scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

Phase 2 -- JRP Process leading to Hearings

22 On February 17, 2009, Nalcor submitted its EIS to the JRP. The EIS comprised over 10,000 pages, including over sixty supporting component studies. On March 9, 2009, the JRP initiated a 75 day public consultation process on the EIS.

23 In April 2009, the Science Branch of DFO reviewed sections of the EIS and component studies related to the aquatic environment for the purpose of offering advice with respect to the scientific reliability of the EIS, including an opinion on the accuracy of Nalcor's predictions regarding environmental impacts. The NCC was invited to attend the review, conducted by way of a Regional Advisory Process, but did not participate. In June 2009, the Science Advisory report (entitled *Science Evaluation of the Environmental Impact Statement for the Lower Churchill Hydroelectric Project to identify Deficiencies with respect to Fish and Fish Habitat*) identified deficiencies in the EIS, including the exclusion of the environment below Muskrat Falls, including Lake Melville, from the study area; a lack of detail in the monitoring programs; and, that additional effort was required to document local knowledge of fish habitat, especially in the area below Muskrat Falls.

24 The JRP invited the public, Aboriginal groups and governments to review the EIS received from Nalcor and to provide comments as to the adequacy of the additional information, as measured against the EIS Guidelines, and

the technical merit of the information presented. Based on the comments received and the JRP's own questions, between May 1, 2009 and January 7, 2011, the JRP issued one hundred and sixty-six information requests ("IR") to Nalcor regarding the EIS. The IRs required Nalcor to provide additional information or analysis in respect of the questions raised. In response, Nalcor submitted approximately 5000 pages of additional documentation by way of information request replies ("IRR").

25 On January 14, 2011, the JRP announced that it had sufficient information to proceed to public hearings.

Phase 3 -- Hearings and Preparation of the JRP Report

26 The hearings commenced on March 3, 2011. Between then and April 15, 2011, the JRP held thirty days of hearings in nine locations in Newfoundland and Labrador and in Quebec. DFO participated in the various sessions of the hearings.

27 On March 4, 2011, the NCC advised the JRP that it would be seeking an injunction to enjoin the public hearings based on its belief that there were unanswered questions that must be resolved before the JRP Panel hearings could continue.

28 By letter of March 10, 2011, the JRP expressed its disappointment that the NCC would not participate in the hearings but stated, if an injunction were not granted, that there would be time and opportunity in the remaining portion of the hearings for the JRP to hear from the NCC regarding its asserted claim to Aboriginal rights and title and how the Project may impact these. This information could supplement the information already provided by the NCC, including the "*Unveiling NunatuKavut*" report.

29 The injunction was brought in the Supreme Court of Newfoundland and Labrador. In addressing the NCC's claims "that despite the frequent contacts it has had with the two levels of government, with Nalcor, with the CEA and with the JRP, it has never been meaningfully consulted or accommodated about the Lower Churchill Project", the Court stated that it did "not accept that Nunatukavut was not consulted appropriately" (*NunatuKavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD(G) 44 at paras 21 and 41 [*NCC* ¶]). The Court further found that the NCC would not suffer irreparable harm if the hearings proceeded, and that the NCC could face harm if it did not engage in the remaining phases of the EA process (*NCC* / at paras 50 and 52-53). The injunction was denied on March 24, 2011.

30 In October 2012, the NCC conducted a protest which blocked access to a preliminary work site for the Project. The NCC asserted that Nalcor and the Province had failed to comply with their obligations to consult with it in respect of the Project. An interim injunction sought by Nalcor was initially granted, followed, in November 2012, by a permanent injunction (*Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NLTD(G) 175). However, this was subsequently vacated on appeal (*NunatuKavut Community Council Inc v Nalcor Energy*, 2014 NLCA 46).

31 On April 5, 2011, the NCC made a presentation to the JRP. This addressed consultation with Nalcor, a lack of funding to gather and present Aboriginal Traditional Knowledge, land use data gaps and issues with IR# JRP-151 (Aboriginal Consultation and Traditional Land and Resource Use), concerns about the status of Nalcor's work on downstream effects, cumulative effects, and methylmercury contamination. Two PowerPoint presentations were made, one including reference to "*Unveiling NunatuKavut*". On April 13, 2011, the NCC submitted a paper entitled "*A brief paper to the Joint Review Panel on the Lower Churchill Hydroelectric Generation Project*" which also addressed its concerns.

32 The JRP Report was issued on August 25, 2011. It is a comprehensive, 392 page document (including the appendices) which describes the process leading to its issuance, and, for each topic addressed in the report, sets out Nalcor's views, the views of the participants and the JRP's conclusions and recommendation(s) concerning that topic. In total, the JRP made 83 recommendations, should the Project be approved. Of particular note to this matter is Chapter 6, Aquatic Environment. There, the JRP identified the key issues that emerged from the review process which included: the effects of reservoir preparation; the fate of methylmercury in reservoirs; downstream effects

below Muskrat Falls and the likelihood that Project effects, including the bioaccumulation of mercury, would be seen in Goose Bay or Lake Melville; and, follow-up monitoring.

33 In the concluding comments of Chapter 17, and as summarized in the executive summary, the JRP reported that it had determined that the Project would be likely to have significant adverse effects on: fish habitat and fish assemblage in reservoirs; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville, should consumption advisories be required; and, culture and heritage. It also identified a range of potential benefits including economic, social and cultural benefits to future generations, and, identified crucial additional information required before the Project should proceed in the areas of long-term financial return, energy alternatives to serve island needs, and, to reduce the uncertainty about downstream effects. The JRP noted that it did not make the final decision about whether the Project should proceed but that government decision-makers would have to weigh all effects, risks and uncertainties in order to decide whether the Project was justified in the circumstances and should proceed in light of the significant adverse environmental effects identified by the JRP.

Phase 4 -- Consultation of the JRP Report

34 Phase 4 concerned consultation on the JRP Report.

35 On September 16, 2011, the Agency met with the NCC to discuss the JRP Report and Aboriginal consultation. On November 9, 2011, the NCC submitted its comments on the JRP Report. Among these comments, the NCC submitted that the JRP had discriminated against NCC communities, that it did not exercise its TOR as it had failed to insist that Nalcor or government(s) provide funding for studies so that the proper information from the NCC was forthcoming and that proper work be carried out with respect to Aboriginal Traditional Knowledge. Further, that more consultation was needed to address land and resource work in the footprint area, that Nalcor had not been candid with the NCC throughout the process, and that the JRP had failed to address the cumulative effects of the Project.

36 On January 24, 2012, the Agency prepared an internal report entitled *Lower Churchill Hydro Electric Generation Project: Report on Aboriginal Consultation Associated with the Environmental Assessment ("Aboriginal Consultation Report")* which states that it describes how the federal government consulted with Aboriginal groups in the context of the EA, in particular, how it had relied on the JRP process, to the extent possible, to assist in discharging its legal duty to consult. The report states that it describes the positions of the Aboriginal groups with respect to how the potential adverse environmental effects of the proposed Project may impact their potential or established Aboriginal or treaty rights, which was derived from presentations the Aboriginal groups made to the JRP and from comments made by the groups directly to federal government department officials.

37 By Order-in-Council dated March 12, 2012, the Governor-in-Council, on the recommendation of the Minister, pursuant to s 37(1.1)(a) of the *CEAA*, approved Canada's response to the JRP Report.

38 The *"Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador"* ("Canada's Response") describes the Project, the federal regulatory approvals and involvement, the EA process, the JRP Report and Canada's conclusions. Canada's Response states that DFO and TC, as the RAs under the *CEAA*, as well as other interested parties, such as Natural Resources Canada ("NRC"), reviewed the JRP Report, a subsequent independent supply report commissioned by Nalcor, an economic analysis of the Project that was conducted by Canada, and comments submitted by Aboriginal groups and other stakeholders during and following the JRP process.

39 In considering whether the significant adverse environmental effects of the Project could be justified in the circumstances, Canada's Response stated that it accounted for the potential adverse effects of the Project and the commitments that had been made by the federal government related to the recommendations provided in the JRP Report, and those made by Nalcor in its EIS and during the panel hearings. Canada would require certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as

additional studies on downstream effects. This would be done through inclusion of requirements in federal authorizations and approvals. Canada's Response stated that ensuring that those commitments were carried out would minimize the negative effects of the Project and reduce the risks associated with the uncertainty about the success of mitigation measures.

40 Further, that the potential social, economic and environmental benefits for the Province, communities and Aboriginal groups, as well as benefits beyond the Province that are associated with the Project, were also considered, as was an economic analysis of the Project by Canada.

41 Canada determined that the expected significant energy, economic, socio-economic and environmental benefits outweighed the "significant adverse environmental effects" of the Project that were identified in the JRP Report:

Therefore the Government of Canada concludes that the significant adverse environmental effects of the Lower Churchill Hydroelectric Generation Project are justified by the benefits of the Lower Churchill Hydroelectric Generation Project.

(Canada's Response, p 8)

42 On March 16, 2012, in conformity with the Governor-in-Council's approval of Canada's Response, TC and DFO issued their course of action decision pursuant to ss 37(1) and 37(1.1) of the *CEAA* ("Course of Action Decision"). The Course of Action Decision noted that a follow-up program to verify the accuracy of the EA and/or determine the effectiveness of any mitigation measures was required for the Project, and that the estimated dates of the follow-up program were October 1, 2012 to October 1, 2037.

Phase 5 -- Regulatory Permitting

43 Phase 5 of the consultation process concerned regulatory permitting leading to the issuance of the Authorization.

44 By letter of April 23, 2012, the Agency advised the NCC that the consultation process was moving into Phase 5, regulatory permitting, as set out in the *Consultation Framework*. Accordingly, responsibility for leading and coordinating the consultation for the federal government was being transferred from the Agency to DFO. DFO sent a similar letter on July 9, 2012.

45 Around this time, the NCC, Grand Riverkeeper, Labrador Inc. and the Sierra Club of Canada, sought judicial review of the JRP Report and Canada's Response and "to prohibit the various federal Respondents from issuing permits, authorizations or financial assistance relating to the Project, and to quash the Governor in Council's Response to the Report" (*Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520 at para 1 [*Grand Riverkeeper*]). Justice Near (then of this Court) found that Canada's Response was not properly before the Court, as it had been released after the notice of application had been filed. As such, the judicial review in *Grand Riverkeeper* was limited to the JRP Report (*Grand Riverkeeper* at para 17). Ultimately, Justice Near dismissed the application for judicial review on December 20, 2012, concluding that the JRP reasonably considered the need for and alternatives to the Project (*Grand Riverkeeper* at para 54), reasonably recommended that the Province and an independent study panel augment the information gathered (*Grand Riverkeeper* at paras 59 and 62), and turned its mind to questions regarding the cumulative effects of the Project (*Grand Riverkeeper* at paras 59 and 64).

46 By letter of May 4, 2012, the NCC wrote to the Minister stating that because of the ongoing judicial review, any participation by it in Phase 5 would be under protest. Further, that it had not been provided with sufficient information regarding the regulatory permits that were to be granted and, therefore, it could not identify which of its Aboriginal rights and title may be impacted by the permitting process. The NCC also stated that it had a number of outstanding concerns not dealt with during the EA process and that it had not been provided with information regarding the process that DFO intended to follow in fulfilling its constitutional duty to consult. The NCC described what it considered that duty to entail, which included funding for participation in the consultation process, for

research on cultural and environmental impacts of the Project and for relevant scientific, technical and, if necessary, legal advice.

47 On May 9, 2012, at the NCC's request, its representatives met with DFO representatives to discuss the regulatory permits.

48 On May 12, 2012, the NCC wrote to DFO describing the May 9, 2012 meeting. The NCC stated that DFO had advised that permitting would be by way of authorizations under ss 32 and 35 of the *Fisheries Act*; that a Letter of Advice had been issued on a portion of the Project; and, that DFO could provide the NCC with no funding for the Phase 5 consultations. The NCC stated that it had previously been advised that a *Consultation Framework* was being developed; that it had no resources to review or respond to permitting and that DFO had advised that it could not provide such resources; that the NCC wanted to be consulted in a meaningful way regarding mitigation, compensation and accommodation; that the permitting process had begun without consultation; that the NCC should be provided with a copy of the Letter of Advice, which should be rescinded; and, that all further authorizations should be held in abeyance until an adequate consultation process was effected. The NCC formally requested a copy of the Letter of Advice on May 28, 2012.

49 On June 1, 2012, DFO provided copies of two Letters of Advice issued to Nalcor concerning stream fording and explained that these were not regulatory permits. Further, that prior to the issuance of a *Fisheries Act* authorization, DFO would consult with Aboriginal groups, including the NCC, and that an Aboriginal consultation protocol governing that process was under development and would be provided to the NCC for comment.

50 By letter of June 4, 2012, the NCC stated that the EA did not account for Aboriginal Traditional Knowledge of the NCC and that its members might hold very site-specific knowledge that would inform better decisions as to the placement of the culverts and stream fording which were addressed by the Letters of Advice. Further, that the NCC had sought resources to present that knowledge, but had been refused by Nalcor.

51 DFO responded on June 14, 2012, noting that Letters of Advice are not regulatory instruments, encouraging the NCC to share information they may have on any site-specific stream and review crossings in the area at issue, and, stating that DFO would be formally consulting with the NCC, and other Aboriginal groups, with respect to *Fisheries Act* authorizations for the Project.

52 On July 9, 2012, DFO wrote to the NCC stating that, pursuant to the *Consultation Framework*, the federal government was entering the regulatory permitting phase (Phase 5) for the Project and wished to continue consultations respecting specific regulatory decisions, approvals or actions that may have potential adverse impacts on their asserted Aboriginal rights or title. DFO advised that the federal government anticipated issuing three kinds of approvals: the s 35(2) and s 32(2) *Fisheries Act* authorizations from DFO and, the s 5 approval under the *NWPA* from TC. DFO proposed to conduct consultations during the regulatory phase in accordance with an attached proposed *Protocol for Regulatory Phase Aboriginal Consultation Lower Churchill Generation Project ("Regulatory Phase Protocol")* and sought comments on that process within 14 days.

53 The NCC responded by way of email of August 8, 2012. This requested that a protocol be put in place to share the NCC's Aboriginal Traditional Knowledge, that more emphasis be placed on Aboriginal Traditional Knowledge and that a clear definition of the Project footprint area be provided. By letter of February 21, 2013 DFO stated that comments not directly related to the draft protocol would be addressed by follow-up letter and that the comments on the protocol had been fully and fairly considered and were reflected in the final version of the protocol, which was attached.

54 The final *Regulatory Phase Protocol* stated that in Step 1, upon receipt of the Fish Habitat Compensation Plan ("FHC Plan") or the Environmental Effects Monitoring Program ("EEM Program" or "EEM Plan"), both conditions of the *Fisheries Act* authorization, a condensed Fish Habitat Compensation Report or condensed Environmental Effects Monitoring Program Report with a link to the full plan/program would be provided to the NCC. The NCC would then have 45 days for review and comment.

55 In Step 2, within 10 days of receiving the application, the NCC could request a meeting with the RA, to be held within the 45 day period, to discuss the application/document. If no comments were received, then the RA would notify the NCC that the 45 day timeframe had ended and that the approval or authorization would be considered and, if appropriate, granted. If comments were received, then the RA would give them full and fair consideration and provide a written response. In Step 4, the RA would incorporate changes as appropriate and, in Step 5, within 5 days of issuance to Nalcor, copies of the *Fisheries Act* Authorization and the *NWPA* Approval would be provided to the NCC.

56 Nalcor provided the FHC Plan to the NCC on December 21, 2012, and invited it to a public information session, which would provide a technical briefing on the FHC and EEM Plans, to be held in Goose Bay on January 16, 2013. Representatives of the NCC attended that session. The letter also extended an offer to meet with representatives of the NCC to brief them on the FHC and the EEM Plans. The NCC did not respond to Nalcor's offer of a meeting.

57 A February 5, 2013 DFO memorandum for the DFO Regional Director General addressed the status of Aboriginal consultations for Phase 5. Amongst other things, it noted that comments received on the proposed protocol indicated that some Aboriginal groups still had concerns about the EA that they felt had not been addressed. The majority of these related to impacts on Aboriginal rights and title, caribou, cumulative impacts, and the lack of land and resource use studies. "Close the loop" letters to the groups were being drafted addressing the outstanding issues prior to finalizing the *Regulatory Phase Protocol*.

58 A February 21, 2013 memorandum for the Deputy Minister for DFO again summarized the status of Aboriginal consultations for Phase 5. It anticipated the DFO would complete the consultations by mid-May and should be in a position to issue a *Fisheries Act* authorization by June 2013.

59 On February 28, 2013, DFO wrote to the NCC advising that it was preparing to issue a *Fisheries Act* authorization and provided the draft FHC and EEM Plans, as received from Nalcor, and sought comments on the two plans within 45 days as per the *Regulatory Phase Protocol*. The letter also noted that the NCC could, within the first 10 days of receiving the plans, request a meeting with DFO to discuss the documents. DFO stated that it would give full and fair consideration to the comments and respond in writing. A follow-up reminder letter was sent to the NCC on April 5, 2013.

60 The NCC responded on April 15, 2013. Its letter did not provide comments on the FHC Plan or the EEM Plan. It stated that there had been an absence of procedural engagement with the NCC in preparing the plans; that the *Regulatory Phase Protocol* was unacceptable; that a meeting was sought with the official most directly involved in advising the Minister, or the Minister's delegate, regarding the Authorization to discuss non-compliance by Nalcor and the inadequacies of consultation and accommodation to date; that the 45 day review period of the *Regulatory Phase Protocol* was not acceptable; that the NCC's concerns on impoundment remained unaddressed; that no resources had been provided for the Phase 5 consultation and accommodation efforts; that there had been no direct consultation with the NCC in relation to the proposed authorizations; and, that a 60 day extension was required. The letter attached a table listing JRP Recommendations 6.6, 6.7, 6.9, 7.1, 7.2, 7.3, 8.4 and 9.3, the governments' responses, and the steps taken by Nalcor and the regulator which the NCC deemed deficient.

61 On May 31, 2013, DFO responded to the NCC's letter of April 15, 2013 addressing twelve issues. These included that Nalcor had advised DFO that the NCC was provided with an opportunity to meet with Nalcor to discuss the FHC Plan, but that such a meeting did not take place. DFO stated that this fulfilled Canada's commitment in this regard. As to the advisory letters, because DFO had determined that the proposed activities would not cause harmful impacts and did not require the issuance of a *Fisheries Act* authorization, it was not required to consult with the NCC. As to Recommendation 6.7, Canada's Response stated that Nalcor would be required to collect additional baseline data on methylmercury accumulation in fish and on fish habitat downstream of Muskrat Falls in advance of reservoir impoundment. The EEM Plan provided for review of the detailed information that Nalcor would collect. Finalization and implementation of the EEM Plan as a condition of the Authorization would fulfil commitments of Canada in this regard. As to Recommendation 6.9, DFO referred to

Canada's Response agreeing with the intent of the Recommendation and stated that Nalcor had carried out public information sessions in Goose Bay on January 16, 2013 and had advised DFO that the NCC had been provided with an opportunity to meet with Nalcor to discuss the FHC Plan and EEM Plan, which meeting had not taken place. Canada had accordingly fulfilled its commitments in this regard.

62 By email of May 31, 2013, DFO provided Nalcor with a draft of the Authorization and advised that it had completed its Aboriginal consultation related to the conditions of the Authorization, specifically the FHC and EEM Plans, and would be sending a letter outlining minor changes/clarifications needed prior to plan approval. On June 7, 2013, DFO sent Nalcor an email advising that there would be a requirement for some additions to the plans, in particular to EEM Plan, based on DFO's consultation.

63 On June 17, 2013, AMEC Environmental and Infrastructure ("AMEC"), as consultants for and on behalf of Nalcor, provided DFO with a revised EEM Plan. The accompanying email stated that the method sections of the 2011 and 2012 baseline studies had been incorporated, where applicable, into the EEM document. Sample sizes had also been added, particularly pertaining to mercury. An addendum on sampling locations within Lake Melville was also added.

64 Following further discussions, the EEM Plan was revised by AMEC and resubmitted to DFO on June 21, 2013. DFO responded on June 25th stating that the additional details added went a long way to clarifying specifics of the EEM Plan to address concerns raised during consultations. Two further clarifications were requested along with some edits.

65 Nalcor submitted its revised, final EEM and FHC Plans on June 26, 2013 and DFO advised Nalcor the next day that these were acceptable to DFO and would be attached as conditions to the Authorization.

66 On June 28, 2013, DFO responded to the NCC's submissions of November 9, 2011 and email of August 8, 2012 addressing the concerns raised therein on a point by point basis. These included the NCC's concern that more emphasis should be put on Aboriginal Traditional Knowledge and that a protocol should be put in place to share such knowledge. In response, DFO noted that the *Regulatory Phase Protocol* had been developed in collaboration with Aboriginal groups and provided the opportunity for meetings at which Aboriginal groups could share Aboriginal Traditional Knowledge for review and consideration in the issuance of permits or approvals. DFO had offered such meetings to the NCC on February 28, 2013 for the authorizations being prepared for Muskrat Falls. Further, prior to submitting a FHC Plan and EEM Plan, Nalcor may offer to meet with Aboriginal groups, at which time such knowledge could be shared for incorporation into the plans.

67 As to the concern that a clear definition of the Project and the footprint area had not been provided, DFO stated that this was done during the EA. As to the NCC's concern that the federal and provincial governments had a duty to engage separately with the NCC before the JRP process which had not been done, nor had there been adequate consultation or accommodation of the NCC's interests, DFO stated that the JRP provided various opportunities for participation during the JRP process. The public hearings provided Aboriginal persons and groups with the opportunity to be heard and for the JRP to gather such information. Further, DFO and TC had been and would continue to consult with the NCC in accordance with the *Regulatory Phase Protocol*, which would give the NCC the opportunity to provide input and have discussions with those departments on related conditions.

68 On July 9, 2013, the Authorization for the Project was issued to Nalcor pursuant to ss 32(2)(c) and 35(2)(b) of the *Fisheries Act*, for the harmful alteration disruption or destruction of fish habitat, and the killing of fish. The Authorization was provided to the NCC on the same date. It is this Authorization that the NCC has sought to have judicially reviewed.

69 The Authorization is ten pages in length and lists six detailed Conditions of Authorization. These include Condition 1.1, which states that if, in DFO's opinion, the authorized impacts to fish and fish habitat are greater than previously assessed, then DFO may suspend any works, undertakings, activities and/or operations associated with the proposed development to avoid or mitigate adverse impacts to fish and fish habitat. DFO can also direct Nalcor

to carry out any modifications, works or activities necessary to avoid or mitigate further such adverse impacts. If DFO is of the view that greater impacts may occur than were contemplated by the parties, then it may also modify or rescind the Authorization.

70 Nalcor is also required to undertake the Project in accordance with the EIS, the Project Wide Environmental Protection Plan and the FHC Plan (1.4), and, to implement mitigation techniques set out in such plans (2.1). It also requires that Nalcor monitor mitigation measures (3.0) and lists conditions concerning compensation for the authorized impacts to fish and fish habitat (4) and relating to monitoring and reporting of compensation habitat. Condition 6 requires Nalcor to undertake an EEM Program, as outlined in the EEM Plan, to monitor and verify the predicted impacts of the Project from a fish and fish habitat perspective, including Project-related downstream effects, methylmercury bioaccumulations in fish, and fish entrainment at the Muskrat Falls facility, in accordance with Conditions 6.1-6.5. This includes annual monitoring of methylmercury bioaccumulation to determine levels in resident fish species, including seals, both within the reservoir and downstream as per the established monitoring schedule, to record and report peak levels and subsequent decline to background levels (6.3).

Issues

71 In my view the issues can be framed as follows:

1. What is the standard of review?
2. What is the content of the duty to consult and accommodate?
3. Did Canada satisfy its duty to consult and accommodate?
4. Was the decision to issue the Authorization reasonable?

Issue 1: What is the standard of review?

The NCC's Position

72 As to consultation and accommodation, the NCC argues that both the standards of correctness and reasonableness may apply. The NCC relies on *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2012 FCA 212 at paras 33-34, referring to *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 61-62 [*Haida*], for the proposition that the determination of the existence and extent of the duty to consult or accommodate is a question of law and reviewable on a standard of correctness. Once the extent of the duty to consult or accommodate has been satisfactorily determined by the Crown, its decision will only be set aside if the ensuing process of consultation and accommodation is unreasonable.

73 For the grounds of review relating to the abuse of the Minister's discretion, the NCC submits that the standard of review is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62 [*Baker*]).

Canada's Position

74 Canada agrees with the Applicant that the standard of review for the content of the duty to consult is correctness (*Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 at para 97 [*Ekuanitshit FC*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Little Salmon*]). The question of whether Canada's efforts satisfied its duty to consult is reviewable on the reasonableness standard (*Ekuanitshit FC* at para 97; *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458 at paras 126-127 [*Katlodeeche*]; *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at paras 37-38 [*Cold Lake*]).

75 As to the Minister's decision to issue the Authorization, Canada submits that the Court is to determine whether the Authorization rests on a reasonable basis, and not whether its measures will be effective. The standard of

review on this question is, therefore, reasonableness (*Ekuanitshit FC* at para 94; *Grand Riverkeeper* at paras 27-39).

Nalcor's Position

76 Nalcor's view is that questions regarding the extent of the duty are reviewable on the correctness standard only if they are questions of pure law. Where the extent of the duty depends on findings of fact within the expertise of a decision-maker, the reasonableness standard applies (*Haida* at para 61). The Crown has discretion as to the structure of the consultation process and whether the consultation process was adequately discharged involves determinations of mixed fact and law. These determinations are entitled to deference and are reviewed on a standard of reasonableness (*Cold Lake* at para 39; *Taku Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 40 [*Taku River*]; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at paras 91 and 92 [*Ka'a'Gee Tu #1*]). Further, the applicable standard of review for the adequacy of accommodation is also reasonableness (*Haida* at paras 47-50, 62 and 63; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 66 [*Mikisew Cree*]; *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45 at para 60, aff'd 2008 FCA 113).

77 As to the Minister's decision to issue the Authorization, Nalcor submits that considerations involving the destruction of fish habitat and relevant mitigative measures fall within DFO's expertise and that discretionary decisions under s 35 are to be reviewed on a reasonableness standard. This is consistent with the general principle that discretionary decision-making powers of the Minister under the *Fisheries Act* are reviewable on that standard (*Prairie Acid Rain Coalition v Canada (Fisheries and Oceans)*, 2006 FCA 31 at para 11; *Malcolm v Canada (Fisheries and Oceans)*, 2013 FC 363 at para 57 [*Malcolm*]).

78 To further this point, Nalcor contends that the NCC attacks the reasonableness of the decision by questioning the quality of the evidence relied upon by the Minister, therefore, no question of law arises and the decision demands deference. Otherwise the Court would usurp the role of the Minister and become an "academy of science". Similarly, qualitative decisions should not be disturbed unless they are made in bad faith or on the basis of irrelevant considerations (*Vancouver Island Peace Society v Canada (TD)*, [1992] 3 FC 42 at paras 7 and 12; *Alberta Wilderness Assn v Express Pipelines Ltd*, 137 DLR (4th) 177 at para 10; *Alberta Wilderness Assn v Cardinal River Coals Ltd*, [1999] 3 FC 425 at paras 24-26).

Analysis

79 A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the Court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 38 [*Ekuanitshit FCA*]).

80 The standard of review applicable to the duty to consult was addressed by the Supreme Court of Canada in *Haida* which stated that:

[61] On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. 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. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the

standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[62] The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, [1996] 2 S.C.R. 723 *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, [1996] 1 S.C.R. 1013 *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

[63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

81 Until the Supreme Court's subsequent decision in *Little Salmon*, the above reference in *Haida* was consistently interpreted as meaning that the scope or extent of the duty to consult (its content) should be reviewed on the standard of correctness whereas the adequacy of the process of consultation requires an analysis of the factual context and should be reviewed on a standard of reasonableness (*Katlocheeche* at paras 126-127; *Ka'a'Gee Tu #1* at paras 92-93; *Ka'A'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 at para 89 [*Ka'a'Gee Tu #2*]).

82 In *Little Salmon* the Supreme Court addressed the standard of review in one paragraph:

[48] In exercising his discretion under the *Yukon Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. *The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law.* Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

[Emphasis added]

83 In discussing the content of the duty to consult, the Supreme Court stated in part:

[72] The adequacy of the consultation was the subject of the First Nation's cross-appeal. The adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

84 At the hearing of this matter, I asked the parties to address the standard of review with respect to the adequacy of the process in light of *Little Salmon* and the Federal Court of Appeal's finding in *Ekuanitshit FCA*, as described below. The NCC submitted that the Courts appear to be struggling with the question. While the bulk of the jurisprudence contemplates a reasonableness standard, the Federal Court of Appeal in *Ekuanitshit FCA* appeared to accept the correctness standard. Canada submitted that while the Federal Court of Appeal's reasons appear confusing, they must be read in context. Further, that *Little Salmon* did not change the *Haida* test. *Haida* held that if constitutional or legal matters were at issue then the correctness standard applied. However, within the limits of the law, the adequacy of consultation is reviewable on the reasonableness standard. This has not changed (*Cold Lake* at para 39). And, approached on a principled basis, as the Minister's decision is discretionary, the standard must be

reasonableness. Nalcor submitted that the Minister's decision is a discretionary one, accordingly, the standard is reasonableness (*Malcolm* at para 35).

85 In my view, although it has been suggested that the effect of these paragraphs from *Little Salmon* is to alter the standard of review with respect to the adequacy of the consultation process from reasonableness to one of correctness, for the reasons I have set out in detail in *Nunatsiavut Government v Attorney General of Canada (DFO)*, 2015 FC 492 at paras 105-120 [*Nunatsiavut*], I do not understand this to be the case.

86 There, I noted that in *Ekuanitshit FC* at para 126, and with respect to this Project, this Court has previously dealt with a challenge to the lawfulness of the March 12, 2012 Order-in-Council approving Canada's Response to the JRP Report and the related March 15, 2012 Course of Action Decision. In addressing the question of whether the Innu of Ekuanitshit had been properly consulted and accommodated, Justice Scott, relying on *Haida*, found that the consensus in the case law was that a question regarding the existence and content of the duty to consult is a legal question that attracts the standard of correctness. A decision as to whether the efforts of the Crown satisfied its duty to consult in a particular situation involves assessing the facts of the case as against the content of the duty which is a mixed question of fact and law to be reviewed on the standard of reasonableness (*Ka'a'Gee Tu #1* at para 91). The standard of reasonableness was not stated to be in error by the Federal Court of Appeal in *Ekuanitshit FCA*.

87 Further, in *White River First Nation v Yukon (Minister of Energy, Mines and Resources)*, 2013 YKSC 66 [*White River*], the Yukon Supreme Court referenced paragraphs 61 to 63 of *Haida*, as well as paragraph 48 of *Little Salmon*, and concluded:

[92] The standard of review may be correctness if the issue relates to the legal and constitutional obligations of the Director, i.e., the existence and extent of the duty to consult and accommodate. On the other hand, the process of consultation, because it depends on the government's reasonable efforts to inform and consult, is reviewed on a reasonableness standard.

88 And, the Alberta Court of Appeal in *Cold Lake*, leave to appeal to the Supreme Court of Canada refused, 35733 (May 15, 2014), [2014] S.C.C.A. No. 62, considered the above provisions of *Little Salmon* but concluded that the standard of review applicable to the issue of adequacy of the consultation process was to be reviewed on a reasonableness standard (at paras 36-40). The British Columbia Court of Appeal came to a similar conclusion in *West Moberly First Nations v British Columbia (Minister of Energy, Miners and Petroleum Resources)*, 2011 BCCA 247 [*West Moberly*], leave to appeal to the Supreme Court of Canada refused, 34403 (February 23, 2012), [2011] S.C.C.A. No. 399, although the three separate judgments reached this conclusion in different manners (at paras 141, 174, 196-198) (see also *Dene Tha First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 at paras 104-108; and *Adam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1185 at paras 65-66, 87 [*Adam*]).

89 It is clear from the above jurisprudence that the existence and extent of the duty to consult or accommodate is to be assessed on the correctness standard. However, even there, where the extent of the duty is premised on an assessment of the facts, deference may be owed and the standard of review is likely to be reasonableness (*Haida* at para 61).

90 As to the adequacy of the process, based on *Haida*, *Ekuanitshit FCA*, *White River* and *Cold Lake*, I am not convinced that *Little Salmon* was intended to alter, in every case, the standard of review with respect to the question of whether the Crown adequately consulted and accommodated to one of correctness.

91 In determining the extent of the duty to consult, the Crown is obliged to identify the applicable legal and constitutional limits, such as the specific treaty rights, legislative rights, common law rights and the administrative and constitutional law applicable to that case. That is, the Crown must correctly identify the legal parameters of the content of the duty to consult in order to also properly identify what will comprise adequate consultation. To proceed without having done so would be an error of law. However, if those parameters are correctly identified, then the

adequacy of the subsequent process of consultation employed would remain a question of reasonableness. This view can be seen as consistent with both *Haida* and *Little Salmon*.

92 Where the standard of review is correctness, as is the case with respect to the extent of the duty, no deference is owed to the Crown (*Dunsmuir* at para 34; *Little Salmon* at para 48).

93 Where the standard of review is reasonableness, as is the case with respect to the adequacy of the consultation and accommodation, this Court's review is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paras 47-48; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59). As stated by Justice de Montigny in *Ka'a'Gee Tu #2*, perfection is not required when assessing the conduct of Crown officials. If reasonable efforts have been made to consult and accommodate and the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, there will be no justification to intervene. Further, the focus should not be on the outcome but rather on the process of consultation and accommodation (*Ka'a'Gee Tu #2* at paras 90- 92; *Haida* at para 42).

94 As to the Minister's decision to issue the Authorization, in *Ekuanitshit FCA*, the Federal Court of Appeal held that while reviewing courts must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme, "a reviewing court must show deference when reviewing the exercise of power delegated by the Act to the Governor in Council or to a Minister" (*Ekuanitshit FCA* at paras 41 and 44) (see also *Malcolm* at paras 30-34; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 50 [*Agraira*]; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 at paras 40-42 [*Kandola*]). While the reasonableness review in *Ekuanitshit FCA* related to a challenge to the lawfulness of the Order-in-Council approving Canada's Response and the related Course of Action Decision, made pursuant to s 37(1.1) and s 37(1) of the *CEAA* respectively, I see no reason why a different standard should apply to the decision to issue the Authorization under s 35(2)(b) of the *Fisheries Act*. Further, there is a presumption that decisions of Ministers and their delegates are to be reviewed deferentially (*Agraira* at para 50; *Kandola* at para 42). And, the reasonableness standard has previously been applied to the decisions of the Minister of Fisheries (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 30). Accordingly, in my view, the decision to issue the Authorization is a matter to be reviewed on the standard of reasonableness.

Issue 2: What was the content of the duty to consult and accommodate?

The NCC's Position

95 In its written submission, the NCC referred to *Haida*, stating that the Supreme Court of Canada held that the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects on the right or title claimed (at para 39). The NCC did not put forward a view as to where the content of the duty to consult fell in this case in terms of a spectrum analysis. However, when appearing before me, counsel for the NCC stated that their position was that this matter falls from the middle to the high end of the spectrum.

96 The NCC also submitted that the Minister's duty to consult and accommodate should be read in light of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) ("UNDRIP"), which Canada endorsed on November 12, 2010. Values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review (*Baker* at para 70) and, although not binding, international law informs the interpretation of domestic law pursuant to the presumption of conformity (*R v Hape*, 2007 SCC 26 at paras 53-55). The Supreme Court has relied on UNDRIP to interpret Aboriginal rights (*Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 80-83 [*Mitchell*]) and, since its endorsement, this Court has accepted that UNDRIP applies to the interpretation of domestic human rights legislation and the interpretation of administrative manuals directed at Aboriginal peoples

(*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350-354; aff'd 2013 FCA 75; *Simon v Canada (Attorney General)*, 2013 FC 1117 at para 121 [*Simon*]).

Canada's Position

97 Canada refers to the *Haida* spectrum analysis which it submits depends, in part, on the strength of the potential claim and the seriousness of the potential adverse impact of the proposed activity on the claimed Aboriginal right. In this case, the NCC's claim falls at the low end of the consultation spectrum as their claim to the Project area is not strong and the adverse impact on them was found by the JRP to be adverse but not significant. Thus, the only duty on the Crown was to give notice, disclose information and discuss any issues raised in response to the notice (*Haida* at para 43).

98 Alternatively, if the Court should find the NCC's claim to be more compelling but accepts the JRP's impacts finding, then a mid-range consultation standard would be appropriate. This would require notice of the matter to be decided, an opportunity to discuss with decision-makers the potential adverse impacts of the decision and how they might be mitigated, and, that the decision-maker take the expressed concerns into account when making the decision (*Katlocheeche* at para 95; *Yellowknives Dene First Nation v Canada et al*, 2013 FC 1118 at para 59; *Cold Lake* at para 33). In any event, the NCC was consulted in a manner that far exceeded either the low or mid-range consultation requirements.

99 As to UNDRIP, Canada submits that it was adopted by a non-binding resolution of the United Nations General Assembly and has no legal effect in Canada; it does not override or alter Canada's existing constitutional and domestic legal framework; and, questions of whether an alleged duty to consult is owed are to be determined solely in relation to the test enunciated by the Supreme Court of Canada in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31 [*Rio Tinto*] (see also *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at para 51 [*Hupacasath*]). UNDRIP does not, therefore, assist the NCC in defining the duty to consult.

Nalcor's Position

100 Nalcor submits that three factors trigger the Crown's duty to consult and accommodate -- i) the existence of an Aboriginal claim or potential right; ii) the Crown's knowledge of the claim or right, and iii) the proposed Crown action that may adversely affect the claim or right (*Haida* at para 35; *Taku River* at para 25; *Rio Tinto* at para 31). Consultation can be fulfilled through an appropriately executed statutory or regulatory review process and failure on the part of an Aboriginal group to participate in such a process does not justify a claim of inadequate consultation (*Taku River* at para 40; *Ka'a'Gee Tu #2* at paras 91, 121; *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at para 42). The Aboriginal group to whom the duty is owed has a reciprocal duty to cooperate with the Crown's efforts (*Mikisew Cree* at para 65; *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161 [*Halfway River First Nation*]; *Nalcor Energy v NunatuKavut Community Council Inc*, 2012 NLTD(G) 175 at para 97), to make their concerns known, respond to attempts to meet those concerns and to try to come to a mutually satisfactory solution (*Cheslatta Carrier Nation v British Columbia (Environmental Assessment Act, Project Assessment Director)*, 53 BCLR (3d) 1 (SC) at paras 71 and 73; *Upper Nicola Indian Band v British Columbia (Environment)*, 2011 BCSC 388 at para 128). Further, the duty to consult does not imply a duty to agree and is not an outcome dependent obligation (*Haida* at para 42; *Ekuanitshit FC* at para 126). Nalcor does not dispute that the duty to consult exists in this case, but argues that it has been met.

101 The Authorization is not an approval of the Project, which Nalcor had already obtained. Rather, it establishes conditions that address the anticipated harm to fish and fish habitat. The consultation process must focus on the terms of the Authorization, not on broader issues related to the Project or prior approvals.

102 Nalcor submits that UNDRIP was not ratified by Parliament and does not create substantive rights. The question of whether a duty to consult has been discharged must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. This Court has rejected the application of UNDRIP in the context of the duty to consult

(*Hupacasath* at para 51). And, although UNDRIP may inform the contextual approach to statutory interpretation, there is no issue of statutory interpretation in this case.

Analysis

(a) *UNDRIP*

103 I agree with the NCC's general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.

104 That said, in *Hupacasath*, Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.

105 While the NCC refers to *Mitchell*, it is of little relevance. There Justice Binnie, in concurring reasons, at para 81 referred to Article 35 of a draft of UNDRIP to illustrate the difficulties Aboriginal peoples had in freedom of movement across borders, however, the declaration did not play a significant part of the interpretational analysis in that case.

106 Most significantly, in this matter the NCC does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case.

(b) *Content of the Duty to Consult*

107 In this matter there is no dispute as to whether the Crown owed a duty to consult to the NCC with respect to the Project, this is acknowledged by Canada and Nalcor.

108 The seminal decision concerning the scope of the duty to consult remains *Haida*. There the Supreme Court of Canada held that the content of the duty to consult and accommodate varies with the circumstances. Generally speaking, the scope of the duty is proportional to a preliminary assessment of the strength of the case supporting the existence of the right or title claimed, and the seriousness of the potential adverse effects on that right or title (*Haida* at para 39). At all stages, good faith is required by both sides. The Crown must have the intention of substantially addressing Aboriginal concerns as they are raised through a meaningful process of consultation, however, there is no duty to agree. Further:

[43] ... the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for

mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

[44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[45] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations...

[47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

[49] This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

(See also *Taku River* at para 29).

109 Thus, the first step in this case is to consider the strength of the NCC's claim.

110 The Affidavit of Todd Russell sworn on December 6, 2013 in support of the NCC's application for judicial review ("Russell Affidavit") states that in 1991 the NCC filed a comprehensive land claim document with Canada. Additional research information was filed in 1996 and in 2010 additional substantive research on its claims was submitted by way of "*Unveiling NunatuKavut*". Further, that in *The Labrador Metis Nation v Her Majesty in Right of Newfoundland and Labrador*, (2006) 258 Nfld & PEIR 257; aff'd 272 Nfld & PEIR 178; leave to appeal to the

Supreme Court of Canada refused, 32468 (May 29, 2008) [*Labrador Metis Nation*], [2008] S.C.C.A. No. 134, the Newfoundland and Labrador Court of Appeal found that NunatuKavut had a credible rights claim in the area of the Trans-Labrador Highway and that the Government of Newfoundland and Labrador had a duty to consult with NunatuKavut in respect of the construction of the highway.

111 In *Labrador Metis Nation* the Newfoundland and Labrador Court of Appeal stated:

[51] A "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in *Haida*, at paras. 37 and 39, supports the view in the present case that the claim is more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. The respondents have established a prima facie connection with precontact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing.

[52] The scope of consultation requested by the respondents was set out in a letter to the Minister of Environment and Conservation on October 26, 2004:

We now request that your office forward to us any and all applications for water crossings and other relevant permit requirements under your legislated mandate during the construction phase of the Trans Labrador Highway -- Phase III. We also request adequate time to review and comment on the various permit applications.

An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

112 It concluded that the claim was at least strong enough to trigger a duty to consult at the low level requested.

113 The status of the NCC's claim is also addressed in the record of this matter. The *Aboriginal Consultation Report* prepared by the Agency, addressed the status of NCC's claim:

The *Labrador Metis Nation* submitted its comprehensive claim to Canada in 1991-92. In 1998, the Department of Justice advised that the *Labrador Metis Nation* did not meet the legal tests for proof of Aboriginal rights, as an Inuit group. The evidence failed to establish that the claimants were an Inuit Aboriginal group with rights protected under s. 35(1) of the *Constitution Act* (1982). Rather, it was primarily a political organization which represented, not distinctive Aboriginal communities, but individuals of various Aboriginal descents.

The NunatuKavut asserted that Justice Canada's review was not impartial. In 2002, the claimants submitted further material to Canada. Upon review, the Department of Justice confirmed its earlier advice on the claimants' inability to demonstrate the continuing existence of Aboriginal rights in the south and central Labrador.

On an exceptional basis, Canada committed, in 2003, to contract a legal agent to conduct a further legal review of the claim on the same basis as it was submitted to and reviewed by Canada. This outside review would only take place if Canada rejected the claim based on the new material the claimants intended to submit. Furthermore, the outside review would be based on the same material reviewed by Justice and would be non-binding on Canada. In the interim, the Minister of Indian Affairs wrote to the claimants on March 16, 2004, providing a detailed rationale for the claims rejection. The Assessment and Historical Research Directorate is now in the process of reviewing this material against the comprehensive claim policy and have informed NunatuKavut that their claim will be assessed in a timely manner.

114 Thus, the circumstances are that the NCC's claim, although originally rejected, is still being re-assessed. The NCC has not made substantive submissions supporting the strength of its claim in the context of a spectrum analysis. And, while "*Unveiling NunatuKavut*" is in the record, the Court has not been asked to and is not in a position to assess that document so as to determine the strength of the NCC's claim. Accordingly, it is my view that the best the Court can do in these circumstances is adopt the finding of the Newfoundland and Labrador Court of Appeal, being that the claim is at least strong enough to trigger a duty to consult at the lower level.

115 As to the seriousness of the potential harmful effects of the Project, the NCC asserts that its Aboriginal rights and title, treaty rights and other interests over land and waters would be affected by the Project. Its members are concerned about a number of potential impacts on those rights including: adverse effects on aquatic and terrestrial wildlife and plants; methylmercury contamination; downstream effects; flooding of traditional lands and waters; water crossings which may disturb fish and aquatic life; access roads; the possible use of herbicides and defoliants; and, cumulative environmental effects. The NCC submits that these concerns are exacerbated by some of the problems it has identified pertaining to the Authorization.

116 All of these concerns are related to land and resource use which was addressed by the JRP. In its report the JRP addressed current Aboriginal land and resource use of individual Aboriginal groups, including the NCC. In the executive summary it stated (p xxiii):

The Panel was required to specifically consider Project effects on current use of lands and resources for traditional purposes by Aboriginal persons. Information available to Nalcor, submissions by Aboriginal groups and testimony during the public hearing suggested that current use of the Project area (deemed by the Panel to be within the last 20 years) for traditional purposes is generally intermittent and sporadic relative to use of other areas that would not be affected by the Project.

Some Aboriginal persons suggested that there has been some decline in the intensity and extent of traditional land and resource use activities in recent time due to societal and economic changes. Nevertheless, the Panel recognized the importance, common to all Aboriginal persons, of practicing traditional activities within the entire extent of their traditional territory and the fact that for many groups, any effect from the Project on their practice of traditional activities would act cumulatively with impacts caused by the development of the earlier Churchill Falls project.

...

Inuit-Metis

The NunatuKavut Community Council indicated that it was only able to provide limited information about current land and resource use activities for traditional purposes by Inuit-Metis because of its injunction application and the lack of time and financial resources to provide detailed hearing submissions. Most information was received from individual Inuit-Metis participants, rather than from the organization, and affiliation of participants could not always be confirmed.

The Panel concluded that, based on information identified through the environmental assessment process, there were uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area. The Panel recognized that additional information could be forthcoming during government consultations. To the extent that there are current uses in the Project area, the Panel concluded that the Project's impact on Inuit-Metis land and resource uses, after implementation of the mitigation measures proposed by Nalcor and those recommended by the Panel, **would be adverse but not significant.**

The Panel also observed that many land and resource use locations reported to be frequented by Inuit-Metis are outside of the Project area and would remain unaffected and accessible. Measures considered to mitigate the effects of the Project on trapping activities and to compensate for losses of trapping income, property or equipment attributed to the Project may also be particularly relevant for Inuit-Metis.

...

[Emphasis added]

117 The JRP found that its significant finding in Chapter 8, with respect to the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville, would apply to traditional harvesting activities by Labrador Inuit, including the harvesting of country food in this area should Project-related consumption advisories be required. The JRP did not make a similar finding with respect to the Inuit-Metis or any other Aboriginal group.

118 Because the JRP concluded that the Project impacts on the NCC would be adverse but not significant, I would be inclined to also place the seriousness of the potential harm to the NCC on the lower end of the spectrum. However, I recognize that the JRP also stated that it had received limited information about current land and resource use activities for traditional purposes in the Project area by the NCC and other Aboriginal groups.

119 Given this, and currently unresolved status of the NCC's land claim, when considering both the strength of the NCC claim and the seriousness of the potentially adverse effects on the right or title claimed, I would place the duty to consult between the low and middle range of the spectrum.

120 As to what is required in that range, the Supreme Court of Canada in *Haida* stated that every case must be approached individually and flexibly with the controlling question in all cases being what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interest at stake (*Haida* at para 45). The scope of consultation owed in the mid-range is something more than the giving notice, disclosing information and discussing any issues raised in response to the notice (*Haida* at para 43) and has been held to include:

- * adequate notice of the matter to be decided, the opportunity to discuss the potential impacts of the decision and how these might be mitigated, and, that the concerns be taken into account in making the decision (*Katlocheeche* at para 145);
- * that the Crown must inform itself of the impact of the project on the rights of the Aboriginal group, communicate its findings and engage directly and in good faith to hear concerns and attempt to minimise adverse effects, and, some mitigation of the adverse effects (*Cold Lake* at paras 32-33);
- * providing notice, disclosing of information, responding to concerns raised; meeting, hearing and discussing the concerns; taking them into meaningful consideration; and advising as to the course of action taken and why (*Long Plain First Nations*, 2012 FC 1474 at para 74); and
- * consultation in good faith, with an open mind and the intention of substantially addressing the concerns of the party being consulted as they are raised (*Haida* at paras 10 and 42).

121 I note that when appearing before me the NCC asserted that Canada's consultation process was flawed because there was no evidence that Canada had conducted a spectrum analysis. In my view, that submission cannot succeed. Here Canada implemented a five phase *Consultation Framework* and the issue in this judicial review is whether there was adequate consultation in Phase 5 of that consultation process. In such circumstances, Canada was not required to undertake an explicit spectrum analysis, an analysis usually adopted by the Courts, in Phase 5 or otherwise.

Issue 3: Did Canada satisfy its duty to consult and accommodate?

The NCC's Position

122 The NCC submits that it was not meaningfully consulted during Phase 5 because the Minister failed to address outstanding issues from the JRP, including uncertainties regarding the extent and location of current land use by the NCC members. Because of this, and, in the absence of Phase 5 funding, the ability of all parties to assess the Project's impact on the NCC's Aboriginal rights and title was limited.

123 Further, a lack of funding or other resources at Phase 5 of the consultation process made it impossible for the NCC to adequately review, understand and comment on the highly technical FHC and EEM Plans which formed a critical part of the Authorization. Accordingly, there was no meaningful consultation at that stage (*Platinex Inc v Kitchenuhmaykoosib Inninuwag First Nation*, 2007 CanLII 20790 [*Platinex*]).

124 A complete denial of funding at Phase 5 was also not reasonable or in good faith and that the NCC held a legitimate expectation that they would be provided with such resources.

125 The NCC also submits that the lack of funding precluded its ability to present necessary Aboriginal Traditional Knowledge. The NCC submits that despite the requirement of s 2.3 of the EIS Guidelines that Aboriginal, traditional and community knowledge of the existing environment be an integral part of the EIS, to the extent that it was available to Nalcor, there was no commitment or effort on Nalcor's part to gather this knowledge from the NCC. The evidence suggests that while Nalcor funded some community consultation, communications broke down over funding for a traditional knowledge study and the gap was never addressed. The Minister also failed to consider the NCC's Aboriginal Traditional Knowledge and thereby failed to meaningfully consult and accommodate it.

126 The NCC asserts that the JRP identified uncertainties regarding the extent and locations of current land and resource use by the NCC and that additional time and resources would have been necessary for the NCC to investigate this more fully. Further, that additional information could be forthcoming during government consultations. However, that additional time and resources were not provided at Phase 5 to address this deficiency in information or data gap. This lack of information limited the ability of all parties to assess, and determine the Project's impact on the NCC's Aboriginal rights and title.

127 The NCC also submits that the *Regulatory Phase Protocol* was imposed on it, midway through the consultation process. Further, the delay in responding to its comments on the proposed protocol and in responding to the NCC's response to the JRP Report until immediately prior to the issuance of the Authorization also demonstrates a lack of meaningful consultation as well as a lack of good faith (*Mikisew Cree* at paras 53-54) as demonstrated by the response itself, which did not address concerns raised during the consultation process, and DFO's "close the loop" approach to consultation.

Canada's Position

128 Canada submits that the consultation process far exceeded the requirements of either a low or mid-range consultation. The majority of the consultations took place within the EA and Canada is entitled to rely on such consultations to discharge its duty to consult (*Taku River* at paras 2, 40-41; *Ekuanitshit FCA* at para 113). The JRP Report demonstrates that the NCC's concerns were heard and addressed and, in *Grand Riverkeeper*, this Court found that the NCC was treated fairly within that process.

129 The consultation history demonstrates that the process leading to the issuance of the Authorization was comprehensive and fair. The NCC was consulted on all draft protocols and, once finalized, the protocols were followed. The NCC made no significant objection to the protocols when asked for comments but, in some cases, criticized them later. The fact the NCC limited its engagement for strategic purposes does not invalidate the process or make it unfair.

130 As to the timeliness of DFO's June 28, 2013 letter responding to the NCC's November 9, 2011 letter, Canada points out that its June 28, 2013 reply was just one letter among many communications over the five phase consultation process. On May 31, 2013, DFO provided a detailed response to the NCC's concerns raised on April 15, 2013 and DFO also met with the NCC within Phase 5 and sought its comments on the EEM and FHC Plans. The NCC's letter of November 9, 2011 focused primarily on what it felt was wrong with the JRP Report and, the Province's and Nalcor's activities, but it makes little reference to Canada. Further, between November 9, 2011 and June 28, 2013, the NCC's position on the JRP Report was rejected by this Court in *Grand Riverkeeper*.

131 Canada submits that there is no requirement that the Crown must provide funding to facilitate consultation. Where some funding is necessary in order to allow for meaningful consultation, there is no right to a particular level of funding. The appropriateness of funding depends on the degree of consultation required and the circumstances of the case (*Adams Lake Indian Band v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877 at paras 85 and 87 [*Adams Lake*]).

132 In this instance, Canada provided the NCC with \$154,000 in funding specifically in relation to the Project consultations; \$1.8 million in relation to its land claims; and, Nalcor provided \$248,000 for land use research. This was more than sufficient to enable the NCC to participate meaningfully, and the NCC had been advised in October 2006 and again in May 2012 that DFO would not be providing funding at Phase 5. Although no funds were specifically designated for Phase 5, the NCC did not make a proposal for funds at that stage, it has not said what resources would have been sufficient, and, it did not allocate any of its own funds for this purpose, although it did fund two unsuccessful applications challenging the consultation process.

133 Further, additional funding was not essential to enable the NCC to communicate its traditional knowledge to Canada, given that traditional knowledge regarding land use in the Project area is solely within the NCC's collective knowledge (*Adams Lake* at para 85). The NCC was aware that traditional knowledge and land use information would be needed by the JRP and it was responsible for filling any perceived gaps in that information (*Grand Riverkeeper* at paras 69-70). The NCC elected to boycott much of the JRP process even though that was the primary venue for presenting such information. The NCC now seeks to avoid the consequences of its strategic decision not to fully engage and attempts to challenge the validity of the Authorization on the same basis.

134 In any event, individual members of the NCC did participate and the NCC made a series of presentations near the end of the JRP hearings, after the injunction sought by them was refused. Thus, the NCC was provided with meaningful opportunities to present its traditional knowledge at that stage.

135 Canada submits that the NCC has failed to show that a lack of funding hindered its participation in the Phase 5 consultations or that additional funding was necessary for meaningful consultation.

Nalcor's Position

136 Nalcor submits that the scope and process set out in the Phase 5, *Regulatory Phase Protocol*, and followed by DFO was reasonable given the circumstances which led up to it. The NCC was provided with detailed information about the Authorization, which supplemented the extensive information previously provided about the environmental effects of the Project. It was given an opportunity to provide input into the consultation process and the Authorization including the FHC Plan and the EEM Plan. The NCC participated in the consultation process, by providing its views on both the process and the Authorization itself. These submissions were considered by DFO, as summarized in its letter to the NCC dated May 31, 2013.

137 As to funding, Nalcor submits that in total the NCC received at least \$438,200 in funding specifically intended to allow it to present its views on the Project. Further, a significant amount of information was presented, in particular during the EA process, included the "*Unveiling NunatuKavut*" report which documents all of the NCC land claims data and research, for which the NCC received \$2.0 million in federal government funding.

138 It was reasonable for the Minister to rely on the extensive Aboriginal and technical information which arose from the EA and to refuse to provide further funding, particularly as the NCC did not indicate how much funding it required or for what purpose (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at para 205 and 232 [*Ktunaxa*]; *Adams Lake* at para 85-88; *Ekuanitshit FC* at para 129). Further, the information is within the knowledge of the NCC and its members, and is not highly technical or complex nor is there any evidence that additional technical studies are required.

Analysis

139 It must first be noted that the NCC in this application for judicial review challenges the decision of the Minister to issue the Authorization. Accordingly, it is not open to the NCC to collaterally attack the validity of Canada's Response or the Course of Action Decision by way of this application. However, as I found in *Nunatsiavut*, the five phase consultation process that underlies the JRP Report, and all of the decisions made subsequent to it by Canada, was an ongoing one.

140 The phases of the consultation process, and the consultation undertaken in each phase, are connected. The prior consultation therefore serves, to a degree, to inform the consultation and accommodation undertaken in Phase 5. The consultation process cannot be considered to be complete until the end of Phase 5. Thus, the totality of the consultation between Canada and the NCC in each phase of the EA must be considered in order to understand and assess the extent of the consultation and accommodation in respect of the Authorization. To the extent that the NCC questions the content or adequacy of the consultation with respect to the issuance of the Authorization, it is entitled to look at the prior consultation for that purpose, but not as an attempt to impugn the validity of those prior decisions.

141 In that regard, this Court in *Ekuanitshit FC* was faced with an argument by Canada that the Innu of Ekuanitshit had filed their application for judicial review challenging the Order-in-Council approving Canada's Response and the Course of Action Decision before the consultation period had come to an end. The application for judicial review was filed at the conclusion of Phase 4; at the time of the hearing the process was in Phase 5 (at para 13) of the *Consultation Framework*. This Court found that the judicial review at that stage of the federal government's consultation and accommodation process was premature:

[112] The Court finds that judicial review of the federal government's consultation and accommodation process is premature at this stage. One of the goals of consultation and accommodation is to "preserve [an] Aboriginal interest pending claims resolution" (*Haida*, cited above, at para 38). This requires that Aboriginal groups be consulted and accommodated before the rights they lay claim to are irrevocably harmed. While it is true that preparatory work for the Project has begun, the acts that truly put the Applicant's rights and interests at risk are those which require permits issued by TC and DFO. It is premature to evaluate the federal government's consultation process before those decisions are made. Notwithstanding this finding, the Court considers it should nonetheless review and assess the adequacy of the consultation that has taken place up to the moment when this application for judicial review was filed.

142 The Court went on to assess the adequacy of the consultation up to the time that the application was filed and found that the Crown had satisfactorily fulfilled its duty to consult (*Ekuanitshit FC* at para 137).

143 On appeal of that decision, the Federal Court of Appeal in *Ekuanitshit FCA* agreed with this approach, stating that:

[108] With respect, I find it difficult to conclude that the judge erred in finding that the appellant had been adequately consulted prior to the government's order being issued. Phase V of the *Consultation Framework* confirms that the consultation process between the Crown and the Aboriginal people continues up to the issuance of licences by Transport Canada and Fisheries and Oceans. These licences will authorize Nalcor to undertake certain activities, including the construction of dams that could have consequences on the navigable waters under the *Navigable Waters Protection Act* or on fish habitat under the *Fisheries Act*. But we are not at that point yet. As confirmed and acknowledged by the lawyers of the Attorney General of Canada, the federal government's consultation has not been completed and will remain ongoing until the final phase, namely, the issuance of licences.

144 The Federal Court of Appeal also stated that the Crown must continue to honourably fulfil its duty to consult until the end of the process (*Ekuanitshit FCA* at para 110).

145 Further, in *NCC I*, the NCC sought an interlocutory injunction to stop the JRP hearings until the Court had dealt

with its claim. In February 2011, the NCC had sued Nalcor, the federal and provincial governments, the Agency, and the five JRP panel members. It sought, amongst other things, a declaration that the defendants had breached their duty to consult with the NCC and directions on how consultations should be conducted. Justice Handrigan of the Newfoundland and Labrador Supreme Court rejected the NCC's claim that it would suffer irreparable harm if the public hearings were not enjoined, as he disagreed that the consultation and accommodation to that stage had been deficient, and noted that there were still two phases following the hearings during which the NCC could continue to be involved before the process would be finished (*NCC I* at paras 50-53).

146 In *Grand Riverkeeper* the NCC and the other applicants challenged the lawfulness of the JRP Report. There the issues were whether the JRP had fulfilled its mandate with respect to the need for and alternatives to the Project and its cumulative effects. The NCC also claimed that the JRP had breached principles of procedural fairness or violated its right to be heard.

147 Justice Near, then of this Court, dismissed the application. With respect to the NCC's argument that the JRP had a duty to consult it on all matters and to compel evidence from the NCC on the issues in dispute, Justice Near held that the JRP's mandate was determined by its TOR which required it to invite information from Aboriginal groups or persons. Further:

[69] Moreover, the Panel fulfilled its mandate by inviting, and accepting, on several occasions written submissions from NunatuKavut. In addition, the Panel heard from the group in the General Hearing Sessions it held in Happy Valley-Goose Bay and in St. John's. Indeed, the group received over \$130,000 through the Participant Funding Program to participate in the EA process. NunatuKavut's choice not to participate in a portion of the hearings by virtue of its injunction proceedings, regardless of how good the group's intentions, cannot impose a duty on the Panel to compel evidence from it.

148 Justice Near concluded that there was no infringement of NunatuKavut's right to be heard or of any other principle of procedural fairness with respect to the group's participation in the EA process.

149 I would also note that the Nunatsiavut Government challenged a July 10, 2013 permit to alter a body of water issued by the Province with respect to the Project on the basis that the Province breached its duty to consult and accommodate the applicant. The Supreme Court of Newfoundland and Labrador, in *Nunatsiavut v Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1, found that the conclusions of the EA provided an informed basis for subsequent regulatory decision-making as various permits are sought. Further, that the objection to the permit and to construction of the dam related to issues of mercury contamination were fully considered by the JRP and by the Province, although not to the applicant's satisfaction, before the Province issued its Order-in-Council formally releasing the Project from the EA on March 15, 2012. Justice Orsborn was of the view that it was the decision to issue the Order-in-Council that should have been challenged, rather than a subsequent regulatory decision relating to the specifics of the Project construction. He stated that "... in the circumstances of this case, allowing issues relating directly to the response to the Joint Review Panel and the 2012 release Order to support a challenge to a later and separate issuance of a regulatory permit would be unfair" (at para 114). For that reason he expressed no opinion on whether the Province's response to the JRP Report or the release Order itself suffered from any legal defect relating to consultation, accommodation or reasonableness.

150 Given the foregoing, it is my view that the totality of the consultation between DFO, Nalcor and the NCC from initiation and including Phases 1 to 4 must also be considered when considering the adequacy of consultation and accommodation pertaining to the Phase 5 decision to issue the Authorization, including any concerns arising from an alleged lack of funding and resources (see *Adam* at para 77; *Ktunaxa* at paras 203-206).

(a) *Funding -- Aboriginal Traditional Knowledge and Land and Resource Use*

151 Section 8.1 of the JRP Agreement states that the Agency will administer a participant funding program to facilitate the participation of Aboriginal groups and the public in the EA of the Project. Section 58(1.1) of the *CEAA*

states that the Minister shall establish a participant funding program to facilitate the participation of the public in assessments conducted by review panels.

152 Documentation from the Agency contained in the record of this matter indicates that the Participant Funding Program ("PFP") was designed to promote public participation in the evaluation and review process of projects that are subject to federal EAs pursuant to s 58(1.1) of the *CEAA*. A Funding Review Committee ("FRC"), independent from the JRP, was established to review funding applications and allocate up to \$50,000 to applicants during the Phase 1 consultations. Five eligible applications were received, including that of the NCC. A total of \$119,500 was requested to participate in the review of and to comment on the draft EIS Guidelines and to facilitate public participation for the EIS. The NCC requested \$50,000, and, on August 23, 2007 was awarded \$13,000 of the available \$50,000. In connection with this, the NCC submitted a draft budget which sought a total of \$420,911.50 to cover expenses in connection with the JRP, the EIS Guidelines, EIS review, JRP hearings and government responses. This would, in effect, encompass Phases 1-4.

153 On March 9, 2009, the FRC reviewed three applications received by the PFP - Aboriginal Funding Envelope which requested a total of \$1,183,393. The FRC recommended awarding a total of \$664,439 to the three applicants to assist with their participation in the JRP hearings, including the review of the EIS and to engage in associated consultation activities. The NCC was awarded \$120,000 of the available \$664,439 on July 7, 2008. The related Contribution Agreement between the Agency and the NCC required the NCC to participate in the assessment by the JRP in compliance with the approved work plan, and to ensure that the information gathered was submitted to the JRP. The approved work plan was attached as Appendix B and states, in part, that the NCC will: engage in consultation activities with the federal government that are linked to the EA; "have meetings to collect and distribute information pertaining to the project and to collect local traditional knowledge"; hold workshops to ensure an understanding of the process, science and technical issues involved with the Project; prepare for and participate in consultation meetings associated with the EA; and, to prepare for and participate in public hearings and to prepare their submission to the JRP.

154 On May 19, 2011, the Agency advised the NCC that Phase 4 funding was being provided under the PFP -- Aboriginal Funding Envelope. A total of \$120,000 was available and was intended to support Aboriginal groups who had participated in the JRP review and now wished to engage in consultation activities with Canada concerning the JRP Report. The funds could be used to assist Aboriginal groups with reviewing the report, holding community meetings to review the report and expenses related to meeting with Crown representatives. In its application, the NCC described the proposed activities for which it was seeking funding, which included holding meetings to collect traditional knowledge. It sought \$149,740.81 in funding. On August 12, 2011, it was granted \$21,000 of the available \$120,000 which related to the stated eligible activities. These were consultations on the JRP Report and its Recommendations, as well as seeking to establish whether potential impacts of the Project on potential or established Aboriginal or treaty rights had been addressed and consultations on the manner and extent to which any recommended mitigation measures may serve to accommodate those concerns and whether there remained any outstanding items.

155 The Affidavit of Stephen Chapman, Associate Director, Regional Operations with the Agency ("Chapman Affidavit"), filed in support of Canada's position in this application, states that according to documentation from Indian and Northern Affairs Canada ("INAC"), the NCC also received funding outside the EA process for consultation on its comprehensive land claims. Attached as Exhibit 16 of the Chapman Affidavit is a document described as a spreadsheet from INAC that, after subtracting amounts that are core funding, indicates funding of \$479,589 for 2006-7; \$301,173.68 for 2007-8; \$506,127 for 2008-9 and \$581,665 for 2009-10.

156 The referenced document is entitled Budget Allocation Per Year Report and the referenced entries pertain to POWLEY or POWLEY -- Metis Aboriginal Rights. No explanation of this term is given in the Chapman Affidavit or in the document itself. Counsel for Nalcor referred the Court to page 41 of "*Unveiling NunatuKavut*" which refers to research for a comprehensive lands claims submission to the federal government and to four years of work funded by the federal government from two different programs, footnoted to be "Powley funding (Office of the Interlocutor) and Comprehensive Claims finding (INAC)". In my view, this adds little clarity to the matter. However, this issue was

previously addressed by Justice Handrigan in *NCC I* who stated at paragraph 41 that:

...I am not sure how much funding was actually allotted to either Nunatukavut or the Innu Nation specifically for the Lower Churchill EA process, but I do know that Nunatukavut received more than \$2,000,000 to research and write "*Unveiling NunatuKavut*", its land claim document, which it did present to the JRP ...

157 The Affidavit of Mr. Gilbert Bennett, Vice President of the Project for Nalcor ("Bennett Affidavit") filed in support of Nalcor's position in the application, states that Nalcor and NCC entered into two community consultation agreements ("CCA") whereby the NCC was provided with an additional \$248,000. Amongst other things, the CCAs were intended to allow the NCC to gather information related to its members' contemporary land and resource use surrounding the Project and Nalcor's proposed Labrador Transmission Link (Bennett Affidavit at para 39).

158 The CCAs are found at Exhibit K of the Bennett Affidavit. The first is dated December 11, 2009. Its preamble states that the EIS Guidelines for the Project require Nalcor to consult with Aboriginal groups, including the NCC, to familiarize the groups with the Project and its potential environmental effects, to identify any related issues or concerns and identify what actions Nalcor proposed to take to address them.

159 Further, that Nalcor wished to provide information respecting both the Project and the Transmission Project and to consult with the NCC in respect of the impacts of each project to fulfil the requirements of the EIS Guidelines and to obtain information with respect to the potential environmental effects of each project upon the interests and rights of the NCC and its members and communities. The community consultation process it described includes: the determination of what the NCC thinks about the projects and how each project may affect it, its members and communities; the communication of findings of the community consultation process to the NCC and Nalcor; and, "to identify traditional knowledge and current use of resources" (s 1.1). Should the CCA remain in effect for its full term (to March 31, 2010 with an option to extend by 12 months), it was agreed that compliance by Nalcor with its provisions would completely fulfil the requirements of the EIS Guidelines and discharge the obligations of Nalcor with respect to the consultation with the NCC in that regard (s 8.8). The total amount of funding for the period of December 11, 2009 to March 31, 2010 was \$103,800.

160 The second CCA is dated January 19, 2011. In its preamble, it refers to the CCA that expired on March 31, 2010 and notes that the NCC requested that the parties continue the process of consultation, with a focus on the transmission project, and to collect information in relation to the contemporary land and resource use in the area depicted on the map attached as Schedule I (the Study Area) and relevant traditional ecological knowledge held by members of the NCC. A total maximum amount of funding for eligible expenditures was \$108,400. It was also agreed that the report to be generated would contain sufficient information respecting NunatuKavut traditional knowledge, land and resource use and identification of NunatuKavut issues of concern to enable Nalcor to use the information as a source of material in the EA process.

161 The Appendix A -- Work scope states:

1. Objective

Information on NunatuKavut's issues and concerns relating to, and land use and harvesting activities in the area of, the Lower Churchill Hydroelectric Generation Project (the "Generation Project") was provided by NunatuKavut under the Community Consultation Agreement which expired on March 31, 2010.

NunatuKavut has also provided Nalcor with its supplemental land claims documentation ("*Unveiling NunatuKavut*"). This information, together with other publicly available information, has been provided in the Consultation Assessment Report (Supplemental Information to IR JRP. 151) which Nalcor submitted to the Joint Review Panel on September 27, 2010.

Nalcor now proposes to conclude the Phase II Community Consultation Agreement with NunatuKavut to supplement existing and available information respecting NunatuKavut traditional ecological knowledge, contemporary land use and resource use in the Study Area (shown on the map attached as Appendix "A") and issues of concern in relation to the Labrador-Island Transmission Link (the "Transmission Project").

The proposed Agreement will provide funding for the following activities to be carried out over a four month period from December 15, 2010 to April 15, 2011:

- * A community consultation process
 - * The collection of relevant traditional ecological knowledge, and
 - * A survey of NunatuKavut land use and harvesting activities in the Study Area.

162 The purpose of the CCA is stated to include collection of information on harvesting activities, intensity, seasonality, locations, and species and sites of socio-cultural importance to the NunatuKavut in the Study Area; to complement existing NunatuKavut land and resource use held by Nalcor; and, to collect information on NunatuKavut traditional ecological knowledge. Land and resource use data collection is described and includes the hiring of researchers and the conducting of interviews with key members of NunatuKavut determined to have contemporary land and resource use knowledge in the Study Area. The results of the land and resource use data collection and analysis was to be contained in the final report.

163 The JRP Report also speaks to participant funding received by the NCC:

1.4.2 Participant Funding Program

Pursuant to subsection 58(1.1) of the Canadian Environmental Assessment Act, participant funding was made available to help the public and Aboriginal groups participate in the environmental assessment of the Project. The Participant Funding Program consisted of two funding envelopes: the regular funding envelope and the Aboriginal funding envelope. Funding was available to help participants review the draft EIS Guidelines and the EIS and to participate in the public hearing.

The Canadian Environmental Assessment Agency established Funding Review Committees, independent from the Panel, to review funding applications and to recommend funding allocations. In total, the Canadian Environmental Assessment Agency allocated funding to the following applicants:

- * Council of the Innu of Unamen Shipu and Council of the Innu of Pakua Shipu: \$106,875;
- * Corporation Nishipimian (Council of the Innu of Ekuanitshit): \$55,850.25;
- * Fiducie Takuaihan (Nutashkuan First Nation): \$46,000;
- * Grand Riverkeeper Labrador Inc.: \$77,600;
- * Innu Nation: \$533,968;
- * Labrador Métis Nation (now the NunatuKavut Community Council): \$133,000;
- * Naskapi Nation of Kawawachikamach: \$9,165;
- * Natural History Society of Newfoundland and Labrador: \$16,400;
- * Nunatsiavut Government \$23,471;
- * Sierra Club Canada - Atlantic Chapter: \$50,000; and
- * Women in Resource Development: \$5,000.

The Canadian Environmental Assessment Agency will make additional funding available under the Aboriginal funding envelope for the participation of Aboriginal groups in consultation activities related to the Panel report.

164 Based on the foregoing, it is apparent that the NCC did receive funding that was, at least in part, intended to assist it in gathering Aboriginal Traditional Knowledge and assessing current land and resource use. The NCC asserts that this was inadequate for that purpose and, therefore, that there was no meaningful consultation. However, the funds that it received from Nalcor and the Agency were in fact in excess of the NCC draft budget which sought a total of \$420,911.50 to cover expenses in connection with the JRP, the EIS Guidelines, EIS review,

JRP hearings and government responses. Additionally, it was funded so as to produce "*Unveiling NunatuKavut*" which documented its land claim. A stated purpose of that document was to act as a foundational treatise to be provided to the federal government in an effort to illustrate present day rights and title held by the Inuit descent people of South Central Labrador. That document also points the reader to the work of Dr. Hanrahan, entitled "Salmon at the Centre", which examined the Indigenous Knowledge, including local knowledge of animals, plants and landscape, of Inuit elders and experts.

165 The NCC refers to *Platinex* in regard to the role of funding. That was a motion arising out of a decision directing the parties to continue the process of consultation and negotiation in the hope of implementing a consultation protocol and other steps. The Court reserved its right to make further orders in that regard if the parties could not reach agreement. As to funding, the consultation agreement appended a schedule of eligible costs. Ontario had offered to fund the first nation's reasonable costs for consulting in phase 1 and set a \$150,000 target, with the quantum and other matters to be captured in a contribution agreement. This was rejected by the first nation as being inadequate, it sought \$600,000 up front and an assurance that all of its consultation and litigation costs would be covered, and asserted that the imbalance between the financial positions of the parties rendered the consultation process unfair. The Court stated that the issue of appropriate funding is essential to a fair and balanced consultation process to ensure a level playing field, however, that there was insufficient material before the court for it to make an informed decision as to what level of funding would be available (*Platinex* at paras 23-27).

166 In this matter, the NCC has not provided any evidence as to what level of funding, in addition to that which it did receive, would have been adequate for purposes of gathering Aboriginal Traditional Knowledge and assessing its current land and resource use. I would note that the FRC recommended the allocation of funding amounts that it deemed reasonable in light of the information provided in the funding applications, follow-up responses and funds received by applicants from other sources. Further, that the level of funding that was provided by the Agency to the NCC does not appear to be out of line with the funding provided to other Aboriginal groups, as reflected in the JRP Report listing above.

167 Ultimately, this Court is simply not in a position to make an assessment as to the adequacy of funding and, in the absence of evidence to the contrary, must assume that the Agency had not only the authority to allocate funding, but also appropriately exercised its discretion to determine appropriate funding levels in the prevailing circumstances.

(b) *Funding -- Phase 5*

168 The NCC also submits that a complete denial of funding in Phase 5 precluded fair and meaningful consultation because the Minister failed to address the uncertainties regarding the extent and location of current land and resource use by the NCC and, without additional funding at Phase 5, the Project's impact on NCC's Aboriginal rights and title were not properly addressed.

169 In my view, in this regard, it must be recalled that Phase 5 was not the only opportunity afforded to the NCC to make representation on Aboriginal Traditional Knowledge and current land and resource use. During the consultation process the NCC not only received funding to collect Aboriginal Traditional Knowledge and to address land and resource use but also to participate in the JRP process. The NCC did participate as described in the JRP Report. For example, in considering the sufficiency of the EIS, the JRP issued 166 IRs in total. A table of concordance issued by the JRP indicates that 56 IRs were generated by the JRP taking into consideration submissions made by the NCC, including concerning Aboriginal Traditional Knowledge. The JRP also invited comments on Nalcor's responses. In that regard the NCC submitted its "*Response to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement*" on June 19, 2009. On December 18, 2009, the NCC submitted a further response of the same name, taking issue with the level or lack of consultation by Nalcor in relation to the EIS.

170 The JRP sought additional information concerning Aboriginal Consultation and Traditional Land and Resource Use by way of IR JRP.151. Nalcor submitted its response to JRP.151 in May, 2010. In it, Nalcor stated that consultation efforts with the NCC regarding the Project had been ongoing since April 2007, and included a record of consultation. Nalcor submitted a supplemental response in September 2010 which was comprised of its Aboriginal Consultation Assessment Report. This described consultation efforts and additional data collected pertaining to the NCC, and other Aboriginal Groups, including historic and contemporary activities including fishing, hunting, trappings and marine mammal and plant harvesting. It also set out a table listing issues of concern to the NCC and proposed and complete actions and responses. The NCC filed a submission in response.

171 The JRP hearings commenced on March 3, 2011. On March 4, 2011, the NCC advised the JRP that it would not participate and had filed an injunction seeking to halt the hearing. The JRP responded with regret and stating that as it had said in the past, it viewed the public hearings as an opportunity for Aboriginal groups to provide it with valuable information on asserted or established Aboriginal rights and title and how the Project may impact them, such information could then be included in the JRP Report.

172 On March 24, 2011, the injunction application in *NCC I* was dismissed by Justice Handrigan of the Newfoundland Supreme Court. He set out a detailed review of the communications and consultations to that point in time and also addressed the role of the JRP stating:

[49] But Nunatukavut's criticism of the JRP casts the Panel in a poor light and unfairly so. In fact, the Panel quite vigorously, if not aggressively, insisted that Nalcor take its duty to consult and accommodate Nunatukavut and the other Aboriginal groups seriously. I note, for example, the four series of comprehensive information requests which it directed to Nalcor between May 1, 2009 and November 2, 2010, one of which related specifically to Nalcor's consultation with Aboriginal groups. I also note here the letter the JRP sent to Nalcor on February 5, 2010 instructing Nalcor to provide monthly updates to the Panel on its consultation activities with Aboriginal groups and the JRP's decision in January, 2010 that the information it had received from Nalcor by then was not sufficient to go to public hearings.

[50] The JRP has been an important advocate for Aboriginal consultation and accommodation throughout the EA process. And it has, to the extent that its mandate will permit, sought and received information about the potential adverse impacts that the Project will have on asserted or established Aboriginal rights or title, including those of Nunatukavut. Nunatukavut has not and will suffer no harm, irreparable or otherwise, because of the Panel's actions. It does risk harm, though it will not likely be irreparable, if it declines the JRP's outstanding invitation to participate in public hearings and otherwise engage in the remaining phases of the EA process.

173 Subsequent to the denial of the injunction, the NCC did participate and made oral submissions to the JRP, accompanied by presentation materials. The first presentation concerns perceived data gaps, the need for a literature review, archival records and the time and resources to address this. The second recommended that Aboriginal Traditional Knowledge be incorporated in the EIS, that there be more meaningful consultation and that outstanding environmental issues be resolved.

174 The JRP acknowledged the significance of its report in the context of Canada's overall consultation process:

In August 2010, the Canadian Environmental Assessment Agency released the Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project (the Framework) to clarify how the federal government would rely on the Panel review process in fulfilling its legal duty to consult Aboriginal groups. The Framework clarified the role of the Canadian Environmental Assessment Agency and federal departments in consultation activities during the Panel review process as well as consultation activities outside the Panel process.

The Framework identified the importance of the Panel review process within overall federal government consultation activities and the importance of Aboriginal participation in that process. **The Framework also**

pointed out that the Panel report and records established through the Panel review would be the primary source of information to support the federal government assessment of potential impacts of the Project on potential and established Aboriginal and treaty rights.

[Emphasis added]

175 The JRP Report, in Chapter 8, Land and Resource Use, addressed effects of the Project on harvesting activities (hunting, trapping, fishing, and berry picking), cabins, winter travel, navigation and other resource-based activities (mining, agriculture and ecotourism) applicable to Aboriginal and non-Aboriginal land and resource users alike. The JRP noted that the available information suggested that the area affected is used for a variety of purposes, but is currently not a prime area for land and resource use activities. It concluded that the Project would have an adverse but not significant effect on fishing in the main stem of the Churchill River because this is not currently an important fishing destination.

176 However, should new consumption advisories be required in Goose Bay and Lake Melville, the Project would have a significant adverse effect on fishing and seal hunting in this area because of the reliance by many Aboriginal and non-Aboriginal people on fish and seals caught there. It was uncertain whether consumption advisories would be required beyond the mouth of the Churchill River, and the JRP referenced its Recommendation 6.7 concerning the assessment of downstream effects in that regard. Thus, the Project would not have a significant adverse effect on land and resources use, with the exception of the potential effects on fishing and seal hunting in the Lake Melville area the JRP identified.

177 In Chapter 9, Current Aboriginal Land and Resource Use of Traditional Purposes, the JRP set out Nalcor's and the participants' views, including that the NCC did not agree with Nalcor's conclusion that the NCC's members do not currently practice land and resource use activities within the Project area and its submission that this conclusion was based on deficient information. In particular, the NCC disagreed with Nalcor's use of information contained in "*Unveiling NunatuKavut*" as it was primarily concerned with a limited study area.

178 The JRP noted that in reaching its conclusions on current Aboriginal land and resource use for traditional purposes, it had considered certain factors to be particularly relevant. These included information related to experiences on the land shared with the Panel by some Aboriginal persons which suggested that there has been some decline in the practice of traditional land and resource use practices in recent time; that the intensity of traditional activities practiced within the Project area varies across the various Aboriginal groups, but the area does not appear to be a prime area for land and resource use activities, with mostly intermittent and sporadic use relative to other areas outside of the assessment area; and, that the absence of negotiated consultation agreements with certain Aboriginal groups led to the JRP receiving limited and imprecise information with respect to current Aboriginal land and resource use within the Project area.

179 The JRP then listed its findings and recommendation in connection with each Aboriginal group. For the NCC this was:

Inuit-Metis

The Panel recognizes that it received only limited information during the review process about current land and resource use activities for traditional purposes in the Project area by Inuit-Metis. While some efforts were achieved initially when the first phase of a consultation agreement to facilitate information gathering was agreed upon by the NunatuKavut Community Council and Nalcor, late participation of the NunatuKavut leadership in the public hearing due to their interlocutory injunction application limited their input into the review process. The Panel also recognizes that the NunatuKavut Community Council's lack of resources prevented it from submitting substantial information after it started participating in the public hearing. During the public hearing, most information was received from individual Inuit-Metis participants, rather than from the organization, and the Panel notes that affiliation of participants could not always be confirmed.

The Panel notes that the main land and resource use activity practiced by NunatuKavut members, which has persisted for two centuries, is trapping and measures considered to mitigate the effects of the Project

on trapping activities and to compensate for losses of trapping income, property or equipments attributed to the Project (Recommendation 8.1) might be particularly relevant to Inuit-Metis trappers. The Panel also observes that many land and resource use locations reported to be frequented by Inuit-Metis are outside of the Project area and would remain unaffected and accessible.

Based on the information on current land and resource use identified through the environmental assessment process, there are uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area. The Panel recognizes that additional information could be forthcoming during government consultations. To the extent that there are current uses in the Project area, the Panel concludes that the Project's impact on Inuit-Metis land and resource uses, after implementation of the mitigation measures proposed by Nalcor and those recommended by the Panel, would be adverse but not significant.

[Emphasis added]

180 Importantly, the JRP found that its significant finding in Chapter 8, with respect to the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville, would apply to traditional harvesting activities by Labrador Inuit, including the harvesting of country food in this area should Project-related consumption advisories be required. The JRP did not make a similar finding with respect to the Inuit-Metis or any other Aboriginal group.

181 It is also of note that in its findings concerning Quebec Aboriginal groups, the JRP recognized, as it did with respect to the Inuit-Metis, that it received only limited information during the review process regarding current land and resource use activities for traditional purposes in the Project area. In that case this was due to the fact that Nalcor and the Aboriginal groups were unable to conclude consultation agreements, with the exception of the Council of the Innu of Pakua Shipu. In addition, time constraints during the hearing period did not allow the Panel to travel to each community in Quebec.

182 However, like its treatment of the NCC, the JRP concluded that although there were uncertainties regarding the extent and locations of current land and resource use by Quebec Aboriginal groups in the Project area, and that additional information could be forthcoming during government consultations, to the extent that there are current uses in the Project area, the Project's impact on Quebec Aboriginal land and resource uses, would be adverse but not significant. In other words, the NCC was not singular in the JRP's findings that available information regarding current land use activities for traditional purposes in the Project area was limited. Regardless, and recognizing that further information might be forthcoming during consultation subsequent to the issuance of its report, it concluded that the Project impact on land and resource use would be adverse but not significant.

183 In Chapter 10, Aboriginal Rights and Title, the JRP noted that in accordance with its mandate, it invited Aboriginal persons or groups to submit information related to the nature and scope of potential or established Aboriginal rights or titles in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project would have on asserted or established Aboriginal rights or titles. Information on Aboriginal rights and titles was received by the JRP through testimony during the public hearings and written submissions. A summary of that information was provided. Further, Appendix 7 contains a list of documents received from each Aboriginal group with information relative to their respective Aboriginal rights and title. In accordance with its mandate, the JRP did not come to any conclusions or make any recommendations with respect to this information. However, it is significant that while acknowledging that further information might be forthcoming, the JRP was able to make a determination that the impact on the NCC's land and resource use would be adverse but not significant.

184 From the foregoing it is clear that the JRP process was the primary mechanism by which Aboriginal groups could identify their concerns about potential adverse Project impacts on their Aboriginal rights or title. The NCC was aware of this. It received funding to address these issues in the JRP process. While it may not be satisfied with the level of funding, I am unable to conclude that this precluded the NCC from meaningfully participating in the JRP process. And, to the extent that it elected not to do so but to instead pursue its injunction, it was aware of the risk that it took by not taking full advantage of that process and, ultimately, it did make limited submissions.

185 It is true that the JRP acknowledged that there were uncertainties regarding the extent and locations of current land use in the Project area. However, the NCC also received funding in Phase 4 which concerned consultation on the JRP Report. In its funding application for Phase 4 the NCC described the proposed activities for which it was seeking funding which included holding meetings to collect traditional knowledge. The funding received, \$21,000, served to permit consultation on the JRP Report and its recommendations -- which acknowledged the land use uncertainties -- as well as to establish whether potential Project impacts on Aboriginal or treaty rights had been addressed, recommended mitigation measures and any remaining outstanding items. Being aware of the JRP's findings regarding current land and resource use, the NCC was in a position to substantively address that alleged knowledge gap at Phase 4 by providing further information, but did not choose to do so.

186 The NCC's comments on the JRP Report were set out in its November 9, 2011 submission. It alleged that:

- The JRP process was impaired by Canada and the Province's failure to engage separately with the NCC prior to the JRP process;
- Aboriginal and treaty rights were not adequately considered, and the obligation to consult and accommodate had not been met;
- The Province and Nalcor were indistinguishable and the Province was biased and intent on obstructing consultation;
- The JRP discriminated against the NCC and gave preferential treatment to other Aboriginal groups;
- The JRP recognised that the NCC required additional time and financial resources to investigate more fully current land and resource use but failed to make a recommendation in that regard. Further, resources were still unavailable to conduct proper studies;
- The JRP applied a Eurocentric world view to its consideration of what constitutes traditional land use which was prejudicial and an error of law;
- The JRP did not exercise its TOR as it failed to insist that the NCC be provided with funding and that proper work on Aboriginal Traditional Knowledge be carried out;
- As to accommodation, the JRP should have required that licenses and permits issued to Nalcor be conditional on adequate consultations, financial accommodations and impact- benefit arrangements and royalty sharing;
- The JRP abdicated its jurisdiction and responsibility to consider Project alternatives and to assess cumulative effects;
- Nalcor was not candid and kept information from the JRP that was contrary to its interests and misrepresented information received from the NCC or its members:

NCC completed its contractual expectations by delivering information to Nalcor and then, when Nalcor did not present that information fairly and completely, lacked the resources to re-present the material directly to the JRP. As a result, the data before the JRP with respect to the NCC communities was seriously flawed.

- Further, that Nalcor had failed to engage the NCC at any level during the assessment.

187 Many of these concerns had already been addressed by Justice Handrigan in his decision denying the NCC's injunction and were later addressed by Justice Near in *Grand Riverkeeper*. But what is significant for the purpose of this judicial review is the absence of a substantive response to the alleged lack of information concerning Aboriginal Traditional Knowledge and current land and resource use information when Phase 4 funding was provided and could have been directed to that issue. Even if the funding was not at a level that the NCC might have wished, given the importance that it places on this issue, it would have permitted at least some form of substantive response

to factually ground its concerns. And, if the NCC felt that the data it gathered with the funding received from Nalcor was inaccurately presented by Nalcor to the JRP, it could have presented the information at Phase 4 and explained the basis of its concerns. As that research had previously been funded, there would have been little or no cost restriction in that regard.

188 In summary, the NCC has not identified how much additional funding it would have required at Phase 5 to address Aboriginal Traditional Knowledge and current land and resource use. However, it had been provided with funding that was or could have been used for that purpose in Phases 1-4. Further, the JRP process was the primary mechanism by which Canada was to effect consultation with Aboriginal groups. Therefore, it was incumbent upon the NCC to fully utilize that process. If, at Phase 4, it remained unsatisfied as to the lack of information concerning Aboriginal Traditional Knowledge and current land and resource use it could, at that phase, make some effort to further factually address its concerns; specifically, to address, at least at a preliminary level, the uncertainty identified by the JRP. However, no substantive submission was made in that regard. The NCC also does not explain how the alleged gaps in such knowledge and information affected the Phase 5 consultation, which is concerned, in particular, with the FHC and EEM Plans. For all of these reasons, I am unable to conclude that the NCC has established that a lack of funding at Phase 5 precluded it from presenting necessary Aboriginal Traditional Knowledge and current land and resource use information which resulted in a lack of meaningful consultation during that Phase.

(c) *Funding -- Phase 5, Legitimate Expectations*

189 As to the doctrine of legitimate expectations, in my view the NCC's argument on this point cannot succeed. The Supreme Court laid out the test for legitimate expectations in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 131:

The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai*, [2001] 2 S.C.R. 281 *supra*, at para. 29; *Brown and Evans, supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

190 As stated in *Agraira* at para 94, if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been.

191 In its written submissions, the NCC states that its legitimate expectations regarding funding, and other matters, are informed largely by the JRP process. However, the NCC does not point to anything within that process that can be characterized as clear, unambiguous and unqualified and that induced in the NCC a reasonable expectation that they would receive Phase 5 funding. Rather, the NCC simply states that as it received funding for Phases 1 to 4, its expectation as to Phase 5 is legitimate. In my view this does not meet the test for legitimate expectations. As the EA process concluded at Phase 4, it is unsurprising that funding for Phase 5, the regulatory permitting phase, would not have been addressed by the JRP or the PFP.

192 Further, the Participant Funding Program Review Report for Phase 2 of the EA process contains no mention of further or future funding to be provided and the Funding Report for Phase 4 is virtually identical. Nor has the NCC provided any evidence that a similar funding application process for Phase 5 funding was contemplated.

193 In short, the record contains no evidence that the Minister represented in a clear, unambiguous and unqualified manner, or in fact in any manner, that funding for Phase 5 would be provided. Nor did the NCC provide evidence that there is a practice of providing Phase 5 funding that would give rise to such an expectation. Accordingly, the NCC's submission as to legitimate expectations cannot succeed.

(d) *Funding -- Phase 5, Review of FHC and EEM Plans*

194 The NCC also submits that the lack of Phase 5 funding prevented it from adequately reviewing and commenting on what it describes as the highly technical FHC and EEM Plans. As a result, the NCC could not meaningfully participate at this stage of the consultation. As noted above, the NCC has at no time indicated what level of funding it would have required in this regard.

195 The FHC Plan describes itself as outlining Nalcor's plan to offset fish habitat loss and harmful alteration caused by the Project through a series of physical habitat creations and enhancements that will be added to the predicted use of the reservoir by resident fish, together with a detailed adaptive monitoring program to measure function, effectiveness and to direct any required mitigations.

196 It is also of note that the roots of the FHC Plan existed prior to Phase 5. The Chapman Affidavit indicates that Nalcor recognized that a FHC Plan would be required in order to obtain the Authorization and that its development started in 2006. The first step was the development by AMEC, engaged by Nalcor, of a Fish Habitat Compensation Framework for submission to DFO. This was also submitted to the JRP by way of response to IR# JRP.107. In May 2010, the Fish Habitat Compensation Strategy was completed. This was provided to the JRP by Nalcor in respect to IR# JRP.153. The Nalcor submission on its Fish Habitat Compensation Strategy states that it provides habitat requirements for fish species present and demonstrates how these will be met through habitat creation and enhancement, the intent being to sustain, to the extent possible, the existing and natural patterns of fish habitat utilization. Values attributed to fish and fish habitat by the public, Aboriginal groups and other stakeholders were identified as part of its development and would continue to be incorporated in the future work on the FHC Plan.

197 Fish habitat compensation workshops were held by Nalcor in April 2009. A representative of the NCC attended each of the two Fish Habitat Compensation workshops held in Happy Valley -- Goose Bay on April 7, 2009. Exhibit KKK of the Chapman Affidavit contains notes from the workshops, the objective of which is stated to be to gain input from people that use and are knowledgeable about the river or are familiar with fish habitat compensation measures. A PowerPoint presentation provided an overview of the process, existing information and the approach of the strategy and raised questions for discussion, such as the importance of preferred species, angler access, preferred rivers for downriver enhancements, etc.

198 Additional workshops were held in St. John's, Newfoundland on March 12, 2010 and in Happy Valley -- Goose Bay on March 23, 2010. Nalcor prepared a summary of questions, comments and concerns arising from these, based on the minutes of those meetings. The NCC does not appear to have attended, although various other stakeholders did, such as Grand Riverkeeper, the Innu Nation and others.

199 On December 21, 2012, Nalcor wrote to the NCC advising that it intended to consult with stakeholders concerning the draft FHC Plan and EEM Plan. This letter extended an offer to meet with representatives of the NCC to offer a briefing on the FHC Plan. It also extended an invitation to the NCC to attend a public information session in Happy Valley - Goose Bay on January 16, 2013 when the plan would be discussed. Nalcor enclosed a copy of the FHC Plan for the NCC's review. The letter stated that the FHC Plan was an important mitigation strategy for the Project effects and that Nalcor looked forward to engagement with the NCC. It also stated that if the NCC had any questions or required further information, it could contact Nalcor to discuss the matter further. The Bennett Affidavit states that the NCC did not respond to this offer to meet.

200 On January 16, 2013, Nalcor hosted a public information session to present the draft FHC and EEM Plans.

Representatives of the NCC attended the information session and the Summary Report of that session indicates that the draft FHC Plan was posted on Nalcor's website at that time.

201 As to the EEM Plan, the Bennett Affidavit states that AMEC was engaged to prepare the plan which focuses on predictions made in the EA, and is designed to verify the environmental effect predictions and determine the effectiveness of mitigation measures.

202 With regard to DFO's consultation in Phase 5, as set out above in the background facts, on May 9, 2012 at the NCC's request, its representatives met with those of DFO's to discuss the regulatory permits. At that time a number of issues were raised, including that the NCC had no resources to review or respond to the permitting, and DFO advised that it could not provide such resources.

203 By letter of June 1, 2012, DFO advised that prior to the issuance of the Authorization it would consult with Aboriginal groups, including the NCC, and that an Aboriginal consultation protocol governing that process was being developed and would be provided to the NCC for comment.

204 On July 9, 2012, DFO wrote to the NCC advising that, pursuant to the *Consultation Framework*, the Project was now entering the regulatory permitting phase and proposed to conduct the Phase 5 consultations in accordance with the attached draft *Regulatory Phase Protocol*. DFO sought comments on the process within 14 days.

205 Although the NCC did respond, more than 30 days later, its August 8, 2012 email reply did not substantially address the proposed *Regulatory Phase Protocol*. Instead, it made the following comments, and stated these were all of its comments at that time:

- We would like to have a protocol put in place to share/review NCC's aboriginal traditional knowledge;
- We would like more emphasis placed on aboriginal traditional knowledge;
- As well as, a clear definition of the project in the footprint area.

206 The draft FHC Plan was provided to the NCC by Nalcor on December 21, 2012. Both the draft FHC and EEM Plans were provided to the NCC on February 28, 2013 by DFO which also stated that detailed biological and engineering designs associated with the plans "are provided in the Fish Habitat Compensation Plan and Environmental Effects Monitoring Plan which can be accessed on the Nalcor's website at <http://nalcorenergy.com/news-and-publications.asp>". Pursuant to the *Regulatory Phase Protocol*, DFO sought comments, within 45 days, and noted that the NCC could request a meeting within 10 days if necessary to discuss the plans with DFO. DFO also stated that it would provide a written response to such comments.

207 The NCC responded on April 15, 2013, but did not provide comments on the FHC Plan or EEM Plan. It stated, amongst other things, that the NCC did not accept the *Regulatory Phase Protocol*, that the 45 day review period was unreasonable, that there had been an absence of procedural engagement with the NCC in preparing the plans, that no resources had been provided for Phase 5, and that there had been no direct consultation with the NCC in relation to the proposed Authorizations.

208 The letter also stated that none of the agencies or companies holding a direct or delegated duty to consult in relation to the Authorization had met with the NCC directly on its concerns. The NCC sought a meeting to discuss its concerns as to non-compliance by the proponent and inadequacies in consultation and accommodation. It attached a table listing certain of the JRP recommendations, and deficiencies in response to them, as identified by the NCC.

209 The FHC Plan is, undoubtedly, a technical document. The question is, did a lack of funding for Phase 5 preclude meaningful consultation. While it certainly would have been preferable if further funding had been provided

at this stage, I am not convinced that without it there could be no meaningful consultation. The NCC was aware that Phase 5 funding would not be provided. It was provided with opportunities to meet with Nalcor to discuss the FHC and EEM Plans. While Nalcor, as the Project proponent, may not have been viewed by the NCC as an independent source of information, it could at least have sought to have Nalcor explain the technical aspects of the FHC Plan to ascertain whether or not it adequately addressed and mitigated the NCC's interests, in particular, being any adverse impact on its current land and resource use.

210 Similarly, although DFO was not able to provide Phase 5 funding, it effected and followed the *Regulatory Phase Protocol* and offered the NCC the opportunity to comment on that process. That encompassed the opportunity for the NCC to request a meeting within 10 days of receipt of the draft plans. The NCC did not make such a request, although it did subsequently challenge the protocol process and sought a meeting. DFO had no self interest in the Plans and it was in a position to provide the NCC with technical expertise in interpreting them. With such information, the NCC could have determined whether or not the FHC Plan was deficient in mitigating any adverse Project effects on its interests in the affected fish resources. It is also of note that the Affidavit of Ray Finn, Regional Director of Ecosystems Management, Newfoundland and Labrador Region, DFO, sworn February 5, 2014 in support of DFO's position in this application, states that he was advised that at the May 9, 2012 meeting requested by the NCC to discuss regulatory permitting, the NCC was told that, although DFO could not provide Phase 5 funding, it could meet as required to discuss the documents.

211 The Todd Affidavit states that the NCC does not have the technical expertise or the resources to interpret the Plans. However, as Canada and Nalcor point out, the NCC was able to find resources to bring an injunction and later an application for judicial review of the JRP decision as well as this current application. In my view, it would not seem unreasonable, therefore, for it to have engaged a consultant, if necessary, to provide technical advice, and, at least at a preliminary level, to determine if the FHC and EEM Plans sufficiently mitigated any adverse impact, or were deficient, in the context of the NCC's claimed land and resource use.

212 As stated in *Halfway River First Nation*:

[161] There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan v. Fort St. James Forest District (District Manager)* [1994] B.C.J. No. 2642 (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.); affirmed (1994), 40 B.C.A.C. 91 (B.C. C.A.).

213 By not making at least some effort to assess the FHC and EEM Plans, either by way of the offered meetings with Nalcor or DFO or by utilizing its own resources to instruct and retain a consultant to provide preliminary advice, the NCC has failed to provide any evidence both that there was a failure to adequately consult and a resultant adverse impact on its rights and title.

214 For these reasons, I am not satisfied that a lack of funding at Phase 5 precluded meaningful consultation.

(e) *Lack of Meaningful Consultation and Bad Faith*

215 The NCC also submits that there was an absence of good faith and meaningful consultation at Phase 5 as demonstrated by an internal DFO memorandum and the delayed response of DFO to the NCC's comments on the JRP Report and the *Regulatory Phase Protocol*.

216 The referenced memorandum is dated February 5, 2013. It was prepared for the DFO Regional Director General, NL Region, addresses the status of Aboriginal consultations for Phase 5, and was updated on February 21, 2013. The updated memorandum states that comments received in response to the proposed *Regulatory Phase Protocol* "predictably" indicated that some Aboriginal groups still had concerns about the EA that they felt

had not been addressed and that "close the loop" letters were being prepared in response:

"Close the loop" letters will be sent prior to sending the finalized regulatory phase consultation protocol. DFO expects to send the letters and protocol to Aboriginal groups by the end of February 2013 and commence consultation immediately afterwards.

217 During the hearing before me, the NCC advised that it no longer asserted that these memorandums were indicative of bad faith. They did, however, indicate a lack of meaningful consultation.

218 When seen in the context of the document in whole, this reference is not, in my view, indicative of bad faith or condoning perfunctory responses to Aboriginal concerns. Rather, the phrase is used in the context of the preparation of future communications to Aboriginal groups to address their outstanding concerns.

219 More troublesome is Canada's delay in responding to the NCC. The NCC received Canada's reply to their November 9, 2011 comments on the JRP Report and their August 8, 2012 comments on the draft *Regulatory Phase Protocol* on June 28, 2013. The NCC submits that this appears to be the "close the loop" letter and came a year and a half after its comments on the JRP Report were submitted, almost a year after its comments on the draft *Regulatory Phase Protocol* were submitted and only days before the Authorization was issued. The NCC submits that waiting until the last moment, days before issuing the Authorization, to send a letter which responds to, but does not address, concerns raised in the consultation process is not meaningful and good faith consultation.

220 However, in my view, Canada's June 28, 2013 letter cannot be viewed in isolation. As noted above, the NCC's comments on the JRP Report were wide ranging. They alleged that the JRP discriminated against the NCC, that it did not live up to its TOR, that it failed to consider alternatives to the Project, that there was a lack of candor on the part of Nalcor and other matters. The letter made few comments that concerned specific issues raised and Recommendations made by the JRP. Thus, while Canada certainly did not respond to it in a timely manner, given that the comments were made in Phase 4 while a response was not provided up until Phase 5, viewed in context, I am not convinced that the delay amounted to a lack of good faith or meaningful consultation.

221 As to the NCC's August 9, 2012 email responding to the draft *Regulatory Phase Protocol*, as noted above, this did not provide substantive comments on the proposed protocol. Further, by letter of February 21, 2013, Canada advised that comments not directly relating to the protocol would be addressed in a follow-up letter to follow shortly and that comments on the protocol had been fully and fairly considered and were reflected in the final version of the protocol, which was provided with that letter.

222 In that regard, in its June 28, 2013 letter, DFO specifically addressed the NCC's view that a clear definition of the Project and the footprint had not been provided, advising that both were defined during the EA. As to the NCC's concern that more emphasis should be placed on Aboriginal Traditional Knowledge and that a protocol be put in place to share/review the NCC's Aboriginal Traditional Knowledge, DFO responded as follows:

DFO and other federal authorities developed, in collaboration with aboriginal groups, a protocol for consulting with aboriginal groups during the regulatory phase of the Project. This protocol provides the opportunity for meetings, at which Aboriginal groups could share Aboriginal traditional knowledge with regulatory authorities for review and consideration in the issuance of permits or approvals. DFO offered such meetings to the NCC on February 28, 2013 for the authorizations being prepared for the Muskrat Falls site, and will offer meetings similarly for any future authorizations for the Project.

Prior to submitting a Fish Habitat Compensation Plan, as well as an Environmental Effects Monitoring Plan, to DFO, Nalcor Energy (Nalcor) as a proponent may also offer to meet with Aboriginal groups. At that time, groups can share traditional knowledge with Nalcor so that it can be incorporated into the plans prior to submission.

223 Given the delay in receiving this letter and its proximity to the issuance of the Authorization on July 9, 2013,

the NCC's submission that this was not meaningful consultation is not without merit. However, when the letter is viewed together with other correspondence between Canada and the NCC, and well as the opportunities in Phase 5 to relay their Aboriginal Traditional Knowledge, I cannot conclude that this constitutes a breach of the duty to consult or a lack of meaningful consultation.

224 For example, on April 15, 2013, the NCC sent DFO a letter citing its concerns with, among other things, the protocol for Phase 5, its lack of resources for consultation during this Phase and its need to have more time for review.

225 DFO responded soon after, on May 31, 2013. It noted that it gave full and fair consideration to the comments provided on the draft *Regulatory Phase Protocol*, including those of the NCC; that by Canada's letter of February 28, 2013, the NCC had been offered an opportunity to request a meeting with DFO to discuss the FHC and EEM Plans prior to the submission of comments, but that such a request had not been made; and its view that Nalcor had provided the NCC an opportunity to meet with Nalcor to discuss the FHC Plan, but such a meeting did not take place, and Canada's obligations had, therefore, been fulfilled in that regard. The letter also responded to the NCC's view that JRP Recommendations 6.7 and 6.9 had not been addressed.

226 And, as described above, on January 16, 2013, Nalcor hosted a public information session in Happy Valley - Goose Bay to present its draft FHC and EEM Plans and gather input from interested stakeholders. A letter was sent, prior to the event, notifying the NCC of the session and offering to meet with the NCC. However, the NCC did not respond to that opportunity.

227 And, on February 28, 2013, DFO sent a letter to the NCC, asking for input on Nalcor's FHC and EEM Plans. In accordance with the *Regulatory Phase Protocol*, it notified the NCC that it could request a meeting with DFO to discuss the documents within the first 10 days of receiving the Plans and that such a meeting must be held within the 45 day review period. The NCC did not request such a meeting until the period had passed at which time, by way of its April 15, 2013 letter, it also challenged the consultation process as set out in the *Regulatory Phase Protocol*.

228 Thus, while Canada could certainly have acted with greater expediency in addressing some of the NCC's concerns, considering the above, I am not convinced the delay in response indicates a lack of good faith or that Canada did not adequately or meaningfully consult with the NCC during Phase 5. The consultation process must be reasonable, not perfect (*Ekuanitshit FC* at para 131).

229 In my view, the *Regulatory Phase Protocol* clearly identified how the consultation process for Phase 5 would proceed. DFO provided the NCC with a draft of the proposed protocol for its comment. Although the NCC did respond, its comments were not responsive to the proposed process. DFO proceeded in accordance with the finalized *Regulatory Phase Protocol*, which had been revised in response to other comments received with respect to the draft document. And, as set out above, DFO addressed three issues raised by the NCC, albeit not to its satisfaction.

230 The NCC also submits that a lack of good faith and meaningful consultation is demonstrated by Canada's imposition of the *Regulatory Phase Protocol* on it, without incorporating the NCC's feedback, and that it received the final form of the protocol midway through the process, after much of Nalcor's work on the FHC and EEM Plans was complete.

231 In my view, this submission lacks merit. As set out above, Canada provided the draft *Regulatory Phase Protocol* to the NCC for comment in July 9, 2012 and sought comments within 14 days. On August 8, 2012, the NCC responded but did not provide substantive comments on the protocol. Canada provided the final form of the *Regulatory Phase Protocol* on February 21, 2013. Canada then proceeded in accordance with the process set out in the *Regulatory Phase Protocol*. It is true that by its letter of April 15, 2013, after it had been provided with the draft FHC and EEM Plans for review, the NCC then asserted that the *Regulatory Phase Protocol* was unacceptable to it. However, this does not support a view that the protocol was forced upon it. Further, it is clear from the record

that the Plans required much background work and were being developed long before the commencement of Phase 5, the purpose of which was to review and comment on the completed draft Plans. Accordingly, the fact that work on these Plans had been done prior to the drafts being provided to the NCC pursuant to the *Regulatory Phase Protocol* is not indicative of a lack of good faith or failure of Canada's duty to consult.

232 In my view, viewed in context, the Phase 5 consultation process was adequate, if not perfect, and Canada satisfied its duty to consult.

Issue 4: Was the decision to issue the Authorization reasonable?

The NCC's Position

233 The NCC submits that the JRP process was relied upon heavily by Canada in fulfilling its consultation obligations. The JRP Recommendations were one of the main measures for mitigating the impacts of the Project and, therefore, an important accommodation measure. As such, a failure to follow the JRP Recommendations is a failure of accommodation.

234 In particular, Nalcor was not required to follow Recommendation 6.7 and to carry out a comprehensive review of downstream effects prior to impoundment, with third party expert review, and a discussion workshop involving Aboriginal groups. As a result, the downstream effects of the Project have never been properly studied, and there remains a substantial risk of serious downstream effects, including methylmercury contamination of fish, seals, birds and humans.

235 Although Canada accepted the intent of Recommendation 6.7, the required actions of baseline sampling and monitoring, which are directed at identifying problems in the future as they arise, is different than carrying out a comprehensive review prior to impoundment, which is directed toward identifying problems before they start. As a consequence, the NCC argues that baseline sampling and monitoring fulfils Recommendation 6.9, the development of an aquatic monitoring program, but not Recommendation 6.7.

236 This is compounded by the fact that the JRP recommended full clearing of the reservoir, yet Nalcor has only been required to conduct partial clearing. This necessarily results in higher levels of methylmercury contamination, the impact of which has not been appreciated by the Minister.

237 The NCC submits that while the Minister was not bound by the JRP Recommendations, given the importance that Canada placed on the JRP process in fulfilling its duty to consult obligations, they should not be taken lightly. Here the Minister is departing from the Recommendations without explicitly acknowledging that she is doing so, without providing reasons for doing so and in a manner that creates an elevated risk of methylmercury contamination. The decision to issue the Authorization is, for these reasons, unreasonable.

238 The NCC also submits that, with respect to the FHC Plan, the Minister ignored the science available to her, including that of DFO scientists, regarding the lack of effectiveness of DFO's fish habitat compensation programs in actually reaching "no net loss" of fish habitat, as recognized by the JRP. Because DFO provided no information on the measures being taken to improve the effectiveness of the program it was, in effect, knowingly adopting an ineffective mitigation measure. Accordingly, the decision to issue the Authorization was not reasonable.

Canada's Position

239 Canada takes the view that the NCC's primary allegation is that the Authorization is unreasonable because the monitoring and mitigation measures required by the Authorization are unlikely to be effective. Canada submits that this is an impermissible attack on the science underpinning the Authorization and is contrary to the principle that the Court is not to be turned into an "academy of science". The Court's role is to determine whether the Authorization rests on a reasonable basis, and not whether its measures will be effective (*Ekuanitshit FC* at para 94). The standard of review is reasonableness and considerable deference is owed regarding the effectiveness of the plans

(*Grand Riverkeeper* at paras 27-39). Canada also asserts that the NCC's argument is an unacceptable collateral attack on the Order-in-Council.

240 Further, that all of the JRP Recommendations noted by the NCC were implemented, although Recommendations 4.5 and 6.7 were not implemented precisely as recommended by the JRP. Regardless, the Authorization conditions concerning baseline sampling, monitoring and habitat compensation are reasonable.

Nalcor's Position

241 Nalcor conducted its analysis in this regard in the context of considering whether the Minister's decision to issue the Authorization constituted an abuse of discretion as a failure to consider a relevant ground. Nalcor submits that where legislation is silent as to the factors that an administrative decision-maker must take into consideration, as is the situation here, the decision-maker has the discretion to determine the appropriate factors (Guy Regimbald, *Canadian Administrative Law*, 1st ed (Markham: LexisNexis Canada, 2008 at pp 190); *Electric Power & Telephone Act (PEI)*, Re (1994), 109 DLR (4th) 300 at para 15).

242 Nalcor submits that the RAs and the Governor-in-Council were required to consider the JRP Report and carry out their ss 37 and 37.1 duties. Canada's Response accepted, accepted with modifications or rejected the Recommendations. This was approved by the Governor-in-Council, which mandated what Recommendations and mitigation measures were required. The NCC did not seek judicial review of Canada's Response. In the exercise of her discretion the Minister is guided by the *Fisheries Act*, Canada's Response and the *CEAA*. This means that she was required to follow the direction contained in the JRP Report. In the event of conflict, the Order-in-Council and the *CEAA* prevail.

243 There was no obligation on the Minister to implement Recommendation 4.5. The factors for consideration were within her discretion and she reasonably excluded reservoir clearing as a requirement. A direction to fully clear the Muskrat Falls reservoir is also *ultra vires* the Minister, as it would encroach on the jurisdiction over forestry of the Province. Further, Nalcor considered the question of reservoir clearing and is proceeding with "partial clearing". In Nalcor's view, there is a negligible difference in predicted methylmercury levels between full and partial clearing. It also took into consideration other factors such as safety, logistics, fish habitat, greenhouse gas emissions and economics.

244 As to Recommendation 6.7, the requirements of Canada's Response have been incorporated into the FHC and EEM Plans and, therefore, the Authorization. There is also no evidence to support the NCC's argument that the Minister is adopting a fish habitat compensation program that she knows will not be effective. Canada's Response to Recommendation 6.6 required Nalcor to develop and implement a compensation plan that will include a multi-year habitat monitoring strategy with thresholds identified for further action and, if required, reporting processes and adaptive management measures. Nalcor asserts that it must adjust the FHC Plan, if necessary, to ensure effectiveness.

Analysis

(a) *Recommendations 6.7 and 4.5*

245 The NCC asserts that by declining to implement Recommendation 6.7, the downstream effects on the Project have not been properly studied. This creates a risk with regard to downstream methylmercury contamination. The EEM and FHC Plans, as conditions of the Authorization, do not remedy this defect and, therefore, the NCC's concerns were not accommodated. This is compounded by the failure to implement full clearing as per Recommendation 6.5. In *Nunatsiavut*, I described in detail Recommendation 6.7, primarily in the context of methylmercury bioaccumulation. The NCC's position results in a similar analysis.

246 Chapter 6 of the JRP Report, Aquatic Environment, addressed a number of issues including methylmercury in

the reservoirs and downstream. As to the fate of mercury in the reservoirs, the JRP set out the views of Nalcor and the participants. Nalcor included a description of how reservoir formation leads to the release of methylmercury into the aquatic environment. Specifically, that when soils in reservoir areas are flooded, bacterial breakdown of the vegetation causes methylation, a chemical process that converts inorganic mercury in the soils to methylmercury, a more toxic form. Methylmercury then enters the aquatic ecosystem accumulating in aquatic animals mostly when they feed on organisms with elevated mercury. The concentration of methylmercury increases upward through the food chain (referred to as bioaccumulation) resulting in higher concentrations in predatory fish, in animals such as otters or seals that eat fish, and potentially in humans. Typically, as shown in experience from other reservoirs in boreal regions, mercury levels in fish peak 5 to 16 years after flooding and then gradually decrease to background levels over 30 or more years. Nalcor's modeling predicted that mercury concentrations would peak within 5 years after flooding, declining to baseline levels within 35 years.

247 The JRP noted that Nalcor's proposed mitigation and monitoring related to methylmercury included monitoring fish mercury concentrations annually for the first 10 years following inundation to verify predictions. Monitoring frequency could then be adjusted depending on results.

248 As to the participants, the JRP noted that both EC and NRC concluded that Nalcor had modelled mercury increases in the lower Churchill River appropriately. DFO also stated that Nalcor's predictions about mercury levels were consistent with the current state of knowledge but questioned the accuracy of Nalcor's predictions regarding the magnitude and duration of methylmercury in the lower Churchill River. DFO therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream, including at Goose Bay, following reservoir creation. The frequency and timing of sampling should be sufficient to support a clear assessment of the magnitude and timing of these changes, and inform determinations of risks to human health and implementation of related fisheries management measures. Further, that more baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

249 Recommendation 6.7 addressed downstream effects including flow dynamics, water quality, productivity and mercury. The JRP again set out Nalcor's position as well as those of the participants.

250 Nalcor predicted that mercury levels would increase after impoundment in water and plankton downstream to the mouth of the river and into the Goose Bay narrows. Methylmercury levels would increase in fish downstream to and including Goose Bay, but levels would be lower compared to fish in the reservoirs with the exception of piscivorous fish feeding below the tailrace of Muskrat Falls. Mercury would not be detectable beyond Goose Bay because concentrations in the water would be gradually diluted, sediments would settle, and plankton and zooplankton die-off before or at the saltwater interface. Effects of elevated mercury levels associated with piscivores feeding on entrained fish would only be seen fairly close to the tailrace area below Muskrat Falls. In any case, Nalcor predicted that at no time would fish methylmercury reach a level to affect fish health or behaviour at a population level. Peak methylmercury levels were expected to return to baseline levels within 35 years.

251 Nalcor stated that a more extensive assessment of the cumulative effects of mercury levels associated with the Churchill Falls hydro-electric project was not necessary. Nalcor acknowledged some uncertainties associated with its modelling and the state of knowledge about bioaccumulation and the fate of mercury in the ecosystem that limited its ability to make accurate predictions of potential increases in methylmercury in Lake Melville. However, Nalcor said its methylmercury modelling in the downstream environment was sufficient for planning and assessment purposes. Further, that its modeling approach provided the necessary level of predictive capacity required to determine downstream methylmercury concentrations. This would be backed up by Nalcor's commitment to monitor the follow-up to verify protection, address uncertainty and incorporate adaptive management. Nalcor's proposed mitigation measures included working with Aboriginal stakeholders to monitor mercury in fish and seals downstream of Muskrat Falls and collecting more baseline data on mercury levels in estuarine fish and seals downstream of Muskrat Falls and in Goose Bay.

252 As to other participants, the JRP noted that they had raised concerns about the exclusion of Goose Bay and

Lake Melville from the assessment area, changes to erosion and deposition downstream, mercury accumulation, including entrainment effects, in fish and seals, and changes to ice formation. DFO said that Nalcor had provided insufficient rationale for its decision to exclude Goose Bay and Lake Melville.

253 The JRP noted that DFO had released a research paper showing that mercury effects from the Churchill Falls project could be seen in several estuarine species (rainbow smelt, tomcod, sea trout) in the waters of Lake Melville over 300 kilometres away from the Smallwood Reservoir. DFO expressed concern about the absence of downstream sampling of primary producers and macrobenthos because of their potential to bioaccumulate mercury. DFO therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream including at Goose Bay following reservoir creation. The frequency and timing of sampling should support a clear assessment of the magnitude and timing of these changes, and inform determinations of risks to human health and implementation of related fisheries management measures. More baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

254 In its conclusions and recommendations the JRP acknowledged that there was limited information on downstream, estuarine effects on hydro projects in a boreal region, and limited application of reports that were cited by participants, which lack of information it said was likely compounded by Nalcor's decision to place the study boundary at the mouth of the river and, therefore, not carry baseline sampling in Lake Melville. As a result, the JRP stated that it could not confidently conclude what the ecological effects would be downstream of Muskrat Falls, particularly in the estuarine environment of Goose Bay and Lake Melville:

The Panel concludes that Nalcor's assertion that there would be no measurable effect on levels of mercury in Goose Bay and Lake Melville has not been substantiated. Evidence of a long distance effect from the Churchill Falls project in estuarine species clearly indicate that mercury effects can cross from freshwater to saline environments, in spite of Nalcor's assertions to the contrary. The Panel also concludes that Nalcor did not carry out a full assessment of the fate of mercury in the downstream environment, including the potential pathways that could lead to mercury bioaccumulation in seals and the potential for cumulative effects of the Project together with other sources of mercury in the environment. Because Nalcor did not acknowledge the risk that seals could be exposed to mercury from the Project, it did not address whether elevated mercury would represent any threat to seal health or reproduction.

The significance of the potential for downstream mercury effects on Aboriginal and non-Aboriginal land and resource use, and on human health and communities is discussed in Chapters 8, 9, and 13.

The Panel is not convinced that all effects beyond the mouth of the river will be "nonmeasurable" as defined by Nalcor (within natural variability). The Panel concludes that downstream effects would likely be observed in Goose Bay over the long term caused by changes in sediment and nutrient supply and in water temperature. Effects in Lake Melville are more difficult to predict on the basis of existing information. The Panel acknowledges that there is difficulty in accurately predicting the scale of effects given the absence of long-term ecological studies of the effects of hydroelectric projects in northern environments on receiving waters. However, the Panel believes that this emphasizes the need for a precautionary approach, particularly because no feasible adaptive management measures have been identified to reverse either long-term adverse ecological changes or mercury contamination of renewable resources.

With the information before it, the Panel is unable to make a significance determination with respect to the risk of long-term alteration of ecological characteristics in the estuarine environment. The Panel concludes that there is a risk that mercury could bioaccumulate in fish and seals in Goose Bay and possibly in Lake Melville populations as well but would probably not represent a risk to the health of these species. The implications on health and land use are addressed elsewhere, but the following recommendation addresses the need to take a precautionary approach to reduce the uncertainty regarding both the potential ecological and mercury effects downstream.

RECOMMENDATION 6.7 Assessment of downstream effects

The Panel recommends that, if the Project is approved and before Nalcor is permitted to begin impoundment, Fisheries and Oceans Canada require Nalcor to carry out a comprehensive assessment of downstream effects including:

- * identifying all possible pathways for mercury throughout the food web, and incorporating lessons learned from the Churchill Falls project;
- * baseline mercury data collection in water, sediments and biota, (revised modelling taking into account additional pathways, and particularly mercury accumulation in the benthos) to predict the fate of mercury in the downstream environment;
- * quantification of the likely changes to the estuarine environment associated with reduction of sediment and nutrient inputs and temperature changes; and
- * identification of any additional mitigation or adaptive management measures.

The results of this assessment should be reviewed by Fisheries and Oceans Canada and by an independent third-party expert or experts, and the revised predictions and review comments discussed at a forum to include participation by Aboriginal groups and stakeholders, in order to provide advice to Fisheries and Oceans Canada on next steps.

255 It is important to consider the context of this Recommendation. The JRP, based on the information before it, was not able to make a significance determination with respect to the risk of long-term alteration of ecological characteristics in the estuarine environment. However, it concluded that there was a risk of mercury bioaccumulation in fish and seals in Goose Bay and possibly Lake Melville. It made its Recommendation to reduce uncertainty regarding both the potential ecological and mercury effects downstream.

256 Thus, the intent of Recommendation 6.7 was to obtain a greater level of certainty about mercury effects downstream prior to impoundment.

257 Canada's Response stated that it considered whether the significant adverse environmental effects of the Project could be justified in the circumstances, taking into consideration Canada's commitments made in response to the JRP Recommendations, as well as those of Nalcor in the EIS and at the JRP hearings. Further, that Canada would require certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as additional studies on downstream effects by way of requirements in federal authorizations and approvals. Canada determined that ensuring that those commitments were carried out minimized the negative effects of the Project and reduced the risks associated with the uncertainty about the success of the mitigation measures. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report.

258 Canada's Response in relation to Recommendation 6.7 stated that:

6.7 Response:

The Government of Canada agrees with the intent of this recommendation and notes it is directed to Fisheries and Oceans Canada.

As a condition of a subsection 35(2) authorization under the *Fisheries Act*, and prior to impoundment, Fisheries and Oceans Canada will require Nalcor to collect additional baseline data on bioaccumulation of methyl mercury in fish and on fish habitat downstream of Muskrat Falls.

Fisheries and Oceans Canada will require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methyl mercury in fish (including seals) within the reservoirs and downstream, including the Goose Bay/Lake Melville area. Fisheries and Oceans Canada will also require that Nalcor carry out multi-year post-project monitoring and reporting downstream into Lake Melville on a variety of parameters including nutrients, primary production, fish habitat utilization and sediment transport in order to assess changes to downstream fish habitat.

259 There is no question that the Response does not fully adopt Recommendation 6.7. While the Recommendation suggests that there be further pre-impoundment assessment to better predict the levels of mercury in the downstream environment, that this assessment be reviewed by DFO and an independent third party expert(s), and that the revised predictions be discussed at a forum, including Aboriginal groups, to advise DFO on "next steps", Canada's Response requires the pre-impoundment collection of additional baseline data and a comprehensive multi-year program to monitor and report on bioaccumulation of methylmercury in fish and seals within the reservoir and downstream into Lake Melville.

260 The Authorization addressed these requirements in Condition 6:

6. The Proponent shall undertake an Environmental Effects Monitoring Program as outlined in the "Lower Churchill Hydroelectric Generation Project - Aquatic Environmental Effects Monitoring Program - Muskrat Falls" (EEM Plan), dated February 2013, to monitor and verify the predicted impact of the proposed development from a fish and fish habitat perspective including project related downstream effects, methylmercury bioaccumulation in fish and fish entrainment as the Muskrat Falls facility by:

...

6.3 Methylmercury bioaccumulation shall be monitored annually to determine levels in resident fish species, including seals, both within the reservoir and downstream as per established monitoring schedule, to record and report peak level and subsequent decline to background levels.

6.4 Information collected from the baseline and post-project surveys to compare and verify predictions if project impact to fish and fish habitat is to be reported by:

6.4.1 Providing a comprehensive annual report summarizing all aspects associated with the EEM Program (including baseline data collection) to DFO by March 31. This will include on-going baseline monitoring up to and including 2016, as well as post-project monitoring for a period of no less than twenty (20) years from 2018 through and including 2037

6.4.2 Providing a comprehensive EEM Program review report summarizing all aspects associated with the post-Project EEM Program to DFO by March 31 of every fifth (5th) year, commencing in 2023. This will facilitate adjustments as needed, and as approved by DFO.

...

261 The EEM Plan notes that transport of mercury into Goose Bay and Lake Melville was modelled with the results showing minimal increases within Goose Bay. The report includes a table setting out the predicted total mercury concentrations in water, five months following impoundment. However, it also states that bioaccumulation of mercury in river reaches downstream of hydro-electric development is a known phenomenon. Therefore, relying solely on a before and after comparison of mercury concentration is not considered an appropriate means of monitoring environmental effects. Post-project mercury concentration would, therefore, be compared to modeled results as well as baseline data in conjunction with literature from similar hydro-electric developments. And, while baseline data had been collected since 2001, it was for the purpose of developing the model used to predict post-project concentrations.

262 The EEM Plan study area for mercury sampling includes the Muskrat Falls reservoir and downstream out to Goose Bay/Lake Melville. Sampling is to occur on an annual basis until the visible peak and decline in concentration is observed. Further analysis will be conducted at that point, and additional monitoring will occur "with an efficient schedule".

263 The EEM Plan states that baseline total mercury concentrations in fish have been collected over a 13 year period (since 1999) and that actual concentration at the time of inundation may be different. Therefore, additional fish samples would be collected and analysed for mercury body burden during pre-inundation in order to continue collection of mercury concentrations and as much data as possible from each fish. A graph shows the mean

mercury concentrations that have been measured in the mainstream below Muskrat Falls for nine types of fish to date, while another shows mean mercury concentrations measured in Goose Bay and Lake Melville for eleven types of fish. Similar information concerning seals is provided.

264 As noted above, Canada's Response does not fully adopt Recommendation 6.7. The NCC does not suggest that Canada is bound to accept recommendations made by the JRP as part of the EA process. However, in my view, as the purpose of the EA process and the JRP Report is to identify environmental impacts and to inform Canada's Response, the JRP's Recommendations cannot simply be ignored or rejected without reasons. To do so would be to entirely undermine the EA process and its use by Canada to fulfil its consultation obligations.

265 Here, however, Recommendation 6.7 was not ignored or rejected in whole. Rather, the intent of the Recommendation was accepted to the extent that the uncertainty identified by the JRP was acknowledged and addressed, although not in the manner recommended by the JRP. Canada's Response explained that ensuring commitments made by Nalcor and the provincial government were carried out would minimize the negative effects of the Project *and reduce the risks associated with the uncertainty about the success of the mitigation measures*. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report.

266 In this regard, the JRP did not identify the NCC as being at risk of a significant adverse effect if consumption advisories were required. But, even if it had, Canada's Response acknowledged the concerns and balanced the competing interests explaining why it arrived at its conclusion (*Haida* at para 45; *Taku River* at para 2). While Canada's Response could, undoubtedly, have provided a more in-depth explanation as to why it accepted the intent of Recommendation 6.7, but not its adoption in whole, its rationale is apparent from the record. In the context of this judicial review of the issuance of the Authorization, this is relevant as it pertains to the underlying consultation and rationale supporting Canada's Response and the Course of Action Decision, which, in turn, led to the issuance of the Authorization and its conditions.

267 And, although the further assessment recommended by the JRP may have permitted a higher level of predictive certainty as to mercury levels, it is also apparent from DFO's submissions to the JRP, which were essentially adopted by Canada's Response, that DFO was satisfied that the modeling and data gathered by Nalcor also served to provide a sufficient predictive basis against which future monitoring could be compared when combined with the further baseline sampling and monitoring required by the EEM Plan. That is, Canada was satisfied that the uncertainty and risk pertaining to methylmercury bioaccumulation could be managed by way of the monitoring programs.

268 The consultation process demonstrates that Canada was fully informed of the views of Aboriginal groups to the extent of the downstream assessment that was required. However, it is apparent that it did not agree with those views. The May 31, 2013 letter from DFO to the NCC responded to this issue in the context of Phase 5. DFO explained that with respect to Recommendation 6.7, per Canada's Response, Nalcor would be required to collect additional baseline data on methylmercury accumulation in fish and on fish habitat downstream of Muskrat Falls in advance of impoundment. The EEM Plan provided for review of the detailed information that Nalcor will collect.

269 In essence, Recommendation 6.7 sought further assessment prior to impoundment to obtain a greater predictive level of certainty about mercury effects downstream. Canada's Response, in effect, accepted that this uncertainty presented a risk. However, balanced against the Project benefits, the significant adverse environmental effects were outweighed and could be managed by way of the Authorization conditions. The NCC disagrees with this conclusion, however, its objections are not concerned with any perceived flaws in the EEM Plan. It does not suggest, for example, that annual sampling is insufficient, that the number of fish species tested is not representative or that there are specific steps that could be taken that would improve the baseline sampling or monitoring efforts described. Rather, it again raises its disagreement, in principle, with Canada's Response.

270 Again, while Canada undoubtedly could have done a far better job explaining why a more in-depth assessment was not required and why the EEM Plan sufficed, its explanation was sufficient to provide an understanding of its

rationale (*Haida* at para 44; *Ka'a'Gee Tu #2* at para 131; *West Moberly* at para 144).

(b) *Reservoir Clearing -- Recommendation 4.5*

271 The JRP addressed reservoir preparation both in Chapter 4, Project Need and Alternatives, and Chapter 6, Aquatic Environment of its report.

272 In Chapter 4, the JRP described Nalcor's submissions on the environmental, technical and economic reasoning for three clearing scenarios: no clearing, full clearing or partial clearing. It also described the participants' views. This included NRC's view that the methods Nalcor had used to model the fate of mercury in the environment after reservoir clearing were appropriate; however, that the EIS did not indicate whether Nalcor had considered the effectiveness of partial clearing. Nor had Nalcor assessed removing the organic layer of soil or selective clearing of brush or other organics to reduce methylmercury production. Based on new information from experimental lakes, NRC recommended the removal of trees, brush and possibly soils in the drawdown zone river between high and low water levels, as research indicated that this area would be the greatest contributor of methylmercury, thus supporting Nalcor's scenario of partial clearing. The NCC does not appear to have made any submissions on this issue.

273 The JRP noted that Nalcor's "partial clearing" alternative involved clearing trees only in the ice and stick up zones around the perimeter of the reservoirs and only in areas in these zones that are within Nalcor's pre-defined safety, environmental and economic pending constraints, otherwise the trees are left standing. The "full clearing" alternative involved, in addition to partial clearing, clearing wood in the flood zone in areas that meet the same operating criteria as for "partial clearing". In other words, "full clearing" did not mean the removal of all trees.

274 The JRP listed the factors it considered to be particularly relevant in reaching its conclusions on alternate means of reservoir preparation. It stated that:

The Panel also notes, as further discussed in Chapter 5, the more trees cleared, the more benefits accrue in terms of reducing methylmercury accumulation and greenhouse gas emissions, though gains may be small. The Panel also notes that National Resources Canada recommended that Nalcor study the removal of soils in the drawdown area to reduce the production of methylmercury in flooded terrain. This is discussed in Chapter 6.

275 The JRP concluded that it was both technically and economically feasible to carry out "full clearing" for the Muskrat Falls reservoir. Its Recommendation 4.5 was that, if the Project was approved, Nalcor be required to apply its full clearing reservoir preparation option to that reservoir.

276 In Chapter 6 the JRP also addressed reservoir clearing and described the participants' views. Nalcor stated that mobilization of methylmercury in the reservoirs was an unavoidable impact of hydro-electric projects and that the "full clearing" would only reduce mercury levels in fish by about ten percent, which would not justify the extra expense. It also indicated that other types of mitigation, such as intensive fishing of certain species, were unproven and likely not feasible. Nalcor also noted that NRC recommendation, the large scale removal of vegetation and soils before inundation, had only been tried at an experimental level, would not be technically or economically feasible, and would have considerable environmental effects.

277 NRC pointed out that development of knowledge about the methylmercury problems associated with reservoir creation was still at an early stage and that mitigation to date had been largely confined to consumption advisories (which the Panel addressed in Chapter 13). Recent research had shown that the most effective mitigation may be removal of vegetation and the upper soil layer in what would become the drawdown area of the new reservoir. NRC therefore recommended that Nalcor consider large scale removal of mercury and carbon-rich soils within this area, the so-called "bathtub ring", to mitigate methylmercury production, acknowledging that this form of mitigation had so far only been conducted at a smaller experimental scale.

278 The JRP concluded that:

The Panel notes that Natural Resources Canada challenged the notion that mercury mobilization is an inevitable consequence of hydro power development and consumption advisories are adequate as the only response. The benefits of carrying out pre-inundation mitigation such as more extensive clearing of vegetation or soils would need to be evaluated in the context of effects of the predicted mercury levels on fish-eating wildlife (Chapter 7), the use of renewable resources (Chapter 8) and human health (Chapter 13). Similarly, the significance of the cumulative effect of another period of methylmercury contamination on the lower Churchill system, following the effects of the Churchill Falls project, should be evaluated in the context of human health and the use of renewable resources.

...

The Panel accepts that selective soil removal around the reservoir rim is not yet proven as mitigation but observes that this approach appears to have merit, especially if the clearing can be confined to the reservoir rim. The Panel also notes that the type of preparation required for this mitigation might be complementary with the riparian and fish habitat measures that Nalcor would already be undertaking.

The Panel concludes that consumption advisories transfer part of the cost of generating hydroelectricity to local populations and it is therefore important to find better approaches to reducing methylmercury in reservoirs. Therefore the Panel believes that Natural Resources Canada should move ahead with testing the mitigative approach of removing soil in the drawdown zone, including determining how to avoid or minimize environmental impacts, and ways to make beneficial use of the materials removed.

279 With respect to Recommendation 4.5, the JRP concluded that it was both technically and economically feasible to carry out "full clearing" for the Muskrat Falls reservoir and made the following recommendation:

RECOMMENDATION 4.5 Full clearing of the Muskrat Falls reservoir

The Panel recommends that, if the Project is approved, Nalcor be required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls reservoir.

280 Canada's Response stated the following:

Recommendation 4.5: Full clearing of the Muskrat Falls reservoir

The Panel recommends that, if the Project is approved, Nalcor be required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls reservoir.

Response: The Government of Canada notes that this recommendation is directed to the operations of Nalcor as regulated by the Province of Newfoundland and Labrador. The Government of Canada will work with the appropriate parties as required.

281 The NCC submits, in essence, that when issuing the Authorization the Minister ignored the impact that the approach taken by Canada's Response to Recommendation 4.5 would have on methylmercury levels and resultant impacts.

282 The Bennett Affidavit attaches a copy of the Province's response which was filed on the same date as Canada's Response. It states:

Recommendation 4.5 -- Full clearing of the Muskrat Falls reservoir

The Panel recommends that, if the Project is approved, Nalcor is required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls Reservoir.

Response:

The Government of Newfoundland and Labrador agrees with the principle of maximizing the utilization of the forest resource. With limited opportunities to use the resource, and the likely insignificant reductions in mercury levels associated with full versus partial clearing, the Government supports partial harvesting of the flood zone. If an economic opportunity to use the resource materializes, consideration will be given to harvesting additional fibre.

283 The Finn Affidavit states that it is Mr. Finn's "understanding that Nalcor is in the process of removing a significant portion of the trees in the Muskrat Falls reservoir area". However, the basis of his understanding is not stated, nor is any explanation offered as to what a "significant portion of the trees" might mean in the context of full or partial clearing.

284 Tree removal as a mitigation measure is directly related to the issue of methylmercury bioaccumulation and related potential need for consumption advisories downstream of Muskrat Falls and in Lake Melville. Thus, while Canada's Response was based on jurisdiction, Canada would have known that the Province was intending to require partial rather than full clearing as recommended by the JRP. Yet Canada did not account for the resultant increase in methylmercury in its response to Recommendation 4.5 or explain how this was elsewhere considered. Given that methylmercury levels were a concern of Aboriginal groups and a central issue for the JRP, and that the JRP process fulfilled part of Canada's duty to consult and its report informed Canada's Response, the NCC could well have expected that the issue would be explicitly addressed, rather than simply disposed of on the basis that clear cutting was within Provincial jurisdiction.

285 However, as discussed above, Canada was satisfied that Nalcor's modeling, baseline data collection, sampling and monitoring, as enhanced by the EEM Plan that formed a part of the Authorization, were sufficient to identify any unpredicted increase of methylmercury levels in fish and seals. Therefore, its decision to issue the Authorization without requiring full, as opposed to partial clearing, was informed and reasonable. This is particularly so as the JRP had acknowledged that the gains of requiring full rather than partial clearing may be small.

(c) *Effectiveness of the FHC Plan*

286 The NCC submits that the Minister ignored science that was available to her, including two research papers published by DFO scientists, regarding the lack of effectiveness of DFO's fish compensation programs in actually reaching no net loss of fish (Todd Affidavit, at para 69). Therefore, she knowingly adopted a program that is unlikely to be effective rendering her decision unreasonable.

287 The JRP dealt with fish habitat loss, alteration and compensation in Chapter 6 of its report. The JRP outlined Nalcor's view, being that the key policy guiding its assessment of effects on fish and fish habitat was DFO's "no net loss" principle for the management of fish habitat. Nalcor, in collaboration with DFO, had developed a methodology specific to the lower Churchill River to calculate current and future habitat losses for all of the fish species present in the assessment area. Nalcor referenced the EIS, which showed the amount of fish habitat that would potentially be destroyed or altered by the Project as determined by DFO, and the direct footprint of the Gull Island and Muskrat Falls generating facilities which would destroy 26.03 and 7.30 hectares, respectively. Nalcor stated that this loss would be offset by creation of new habitat both by incidental means (reservoir creation) and through the construction of physical compensation works. Nalcor concluded that its compensation and mitigation strategies would go a long way towards achieving DFO's no net loss objective and would provide sufficient habitat for each life cycle of every fish species found in the Project area. Therefore, no significant adverse effects for fish and fish habitat were expected. Nalcor set out its proposed mitigation and monitoring measures which included preparing fish habitat compensation plans, considering habitat enhancement sites outside the flood zone to compensate for potentially ineffective physical compensative works after impoundment, the carrying out of long-term monitoring and adaptive management of compensation works to ensure no net loss and collection of additional data.

288 DFO generally concurred with Nalcor's description of long-term effects the Project would have on fish habitat and indicated that Nalcor's compensation strategy was acceptable in principle, with details to be provided in its

forthcoming compensation plan. DFO noted that Nalcor had made significant long-term commitments to comprehensive habitat monitoring in the reservoirs and that it expected this monitoring to adequately confirm predictions of fish habitat utilization. DFO did, however, identify uncertainties about how long it would take water quality in the reservoirs to stabilize and how fish populations would adapt to those changes. DFO therefore recommended the collection of more pre-inundation baseline data on fish and fish habitat in advance of construction.

289 Various participants expressed concerns about fish and fish habitat compensation. However, as will be discussed further below, the NCC was not one of these. Referring to several reports, Grand Riverkeeper Labrador criticized the success of compensation works in mitigating habitat loss caused by large projects and suggested that neither DFO nor EC had adequately fulfilled their obligations regarding monitoring and enforcement with respect to large scale compensation initiatives under the *Fisheries Act*.

290 Amongst other findings, the JRP acknowledged that if Nalcor's proposed compensation strategy was successful, it would eventually likely address most of the habitat needs of resident species. Further, that DFO had tentatively endorsed the strategy and had reported success with smaller compensation works, however, that detailed evidence was not provided in support of this. Nor did Nalcor provide evidence of success or lessons learned from similar large scale hydro-electric projects.

291 More specifically:

The Panel heard evidence that Fisheries and Oceans Canada has not been able to demonstrate substantive progress in achieving its mandate of no net habitat loss and that fish habitat compensation projects across the country, when examined closely, often do not reproduce successful or equivalent habitat to that which was lost. Regional staff from Fisheries and Oceans Canada stated that their experience in Newfoundland and Labrador was different and that compensation projects in the province have been effective but did not present detailed information to support these statements.

RECOMMENDATION 6.6 Fish habitat compensation

The Panel recommends that, if the Project is approved, Fisheries and Oceans Canada require Nalcor to:

- * prepared a detailed fish habitat compensation plan in consultation with stakeholders and Aboriginal groups that addresses to the extent possible the likely interactions between species and life stages, including predator-prey relationships and also the potential to replace tributary-type habitats;
- * prepare a habitat monitoring plan including thresholds for further action and identified adaptive management measures;
- * implement the proposed plan, documenting the process;
- * evaluate the extent to which new, stable habitat has been created, its use and productivity; and
- * apply any lessons learned from implementing the Muskrat Falls compensation plan to the proposed Gull Island compensation works.

If, after all feasible adaptive management measures have been applied, Fisheries and Oceans Canada determines that there has been a significant shortfall in the amount of habitat successfully created and maintained, compared to the original proposal, Nalcor should be required to compensate by carrying out habitat compensation works in other watersheds in Labrador. Preference should be given to remediation and enhancement on areas adversely affected by the Churchill Falls project.

292 The JRP went on to state that while it recognized the comprehensive nature of Nalcor's compensation plan, it concluded that there was considerable risk that compensation measures would not be as effective as needed for the reasons it set out, including that the Project would create a heavy dependency on the success of an ambitious habitat compensation plan.

293 The JRP made a significance determination in the next section of its report dealing with effects on fish assemblage. Specifically, that because of uncertainty about the effects on fish and fish populations caused by the number and scale of changes in the aquatic environment as a result of reservoir creation, the uncertainty about the effectiveness of habitat compensation, and the risk that at least some of the fish habitat lost would not be effectively re-created, the Project would result in a potentially irreversible, significant adverse environmental effect to fish habitat and the final fish assemblage in both reservoirs.

294 Several things arise from this. First, the JRP clearly considered the issue of the effectiveness of habitat compensation. It recognized the uncertainty and addressed this in its report. In other words, this issue was addressed in the course of the JRP process.

295 Secondly, the NCC, by way of the Todd Affidavit, in making its assertion that the Minister ignored the science that was available to her, references two research papers published by DFO scientists regarding the lack of effectiveness of DFO fish habitat compensation programs in actually achieving no net loss of habitat, which reports are Exhibits to that affidavit.

296 However, the Finn Affidavit points out that the second of the two papers was actually discussed, along with another study by the same authors on the topic of fish habitat compensation programs, with DFO participation, during the JRP aquatic environmental session hearings held on March 15-16, 2011. The Finn Affidavit also notes that the NCC did not make submissions at that session. Further, that the two papers were known to DFO and were part of a large body of knowledge, along with the JRP's findings and recommendations, which were considered and formed the scientific foundations for the FHC Plan, which was attached as a condition of the Authorization. Mr. Finn also deposes that he was satisfied that the FHC Plan was sound and addressed concerns like those raised in the two papers and, therefore, recommended that the Regional Director General issue the Authorization.

297 The NCC acknowledges that it made no representations on this issue during the JRP process but states that this was because it was not participating at that time "due to ongoing litigation".

298 In my view, the time to raise these concerns was during the JRP process (*Katlodeeche* at paras 119, 164-165). The NCC was well aware that the JRP was the primary mechanism by which it could raise concerns of this nature. It elected not to participate, as it was entitled to do, but that election came with a risk. Further, there is no evidence that after its injunction was denied, that the NCC then tried to raise this concern with the JRP or DFO. Nor was this issue raised as a concern when the NCC sought judicial review of the JRP Report, which was denied by this Court on December 20, 2012 (*Grand Riverkeeper*). The Finn Affidavit states that the subject two reports were, in fact, never raised by the NCC as matters that DFO or the Agency should consider prior to the filing of the Todd Affidavit. As stated in *Katlodeeche*:

[164] The "fracking" concern has never been raised by KFN in the past and has been raised for the first time before me as a part of this application. It can hardly be said that the Crown has failed to consult with KFN on an issue that KFN has not indicated as a concern until now. As Paramount points out, fracking was expressly contemplated as a completion technique within the scope of EA03-005, and was addressed in the context of the environmental assessment. Chief Fabian conceded in cross-examination that he was aware that the cumulative effects of the Project were considered under EA03-005. Yet he is raising fracking before the Court for the first time. KFN has also been repeatedly asked to state its concerns about the Project, but has not mentioned fracking.

[165] As regards the Aquatic Effects Monitoring, I believe KFN is well aware of the weakness of its case in this regard, and has attempted to bolster its position by raising additional concerns for the first time in this application. The proper venue for raising new concerns is not this application. There is no evidence before me that KFN will not be able to raise and have considered any new concerns with the Crown as the Project evolves, or indeed that concerns such as "fracking" have not already been addressed as part of the EA process. This approach by KFN of raising new concerns before me that were not brought forward during

the many opportunities KFN has had to raise them, and when they could have been properly considered and addressed by qualified personnel prior to the issuance of the Type A Water Licence, cannot undermine the reasonableness of the Minister's decision to approve the Type A Water Licence on the basis of the whole record before him.

299 By failing to raise this issue until this application for judicial review, the NCC is, in effect, attempting to frustrate the consultation process (*Halfway River First Nation* at paras 160-161).

300 As stated in *Katlodeeche*:

[104] While consultation is a duty of the Crown, there is also a corresponding duty on the part of Aboriginal groups to participate in good faith in reasonable consultation opportunities. There is a reciprocal obligation on Aboriginal groups to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" (*Mikisew Cree*, above, paragraph 65).

301 Further, by way of the Authorization, DFO required compliance with the FHC Plan and included conditions pertaining to it. Significantly, these conditions include that if, at any time, Nalcor becomes aware that compensatory habitat is not completed and/or functioning according to the criteria set out in the Authorization and the FHC Plan, it must carry out any works which are necessary to ensure the compensatory habitat is completed and/or functioning as required by the Authorization (Condition 4.5), and, relating to the monitoring and reporting of compensatory habitat (Condition 5), including implementation of an adaptive management process to monitor post-project predictions and to undertake adaptive measures should unanticipated changes occur (Condition 5.4).

302 Accordingly, even if the fish habitat compensatory measures are not as effective as predicted, Nalcor is still required by the Authorization to take any necessary further actions to ensure full compliance.

303 And, finally, as stated in *Ekuanitshit FC*, in the context of a challenge to Canada's Response to the Project:

... It is important to reiterate that it is not this Court's role to decide whether or not the Nalcor and MHI's analyses are correct and to reassess the weight to be assigned to one study over another, but rather to determine whether the federal government's decision rests on a reasonable basis. As Justice Sexton reasoned in *Inverhuron & District Ratepayers' Assn.*, above:

The environmental assessment process is already a long and arduous one, both for proponents and opponents of a project. To turn the reviewing Court into an "academy of science" - to use a phrase coined by my colleague Strayer J. (as he then was) in *Vancouver Island Peace Society v. Canada* [12] - would be both inefficient and contrary to the scheme of the Act (*Inverhuron*, above, at para 36).

304 This was restated in *Grand Riverkeeper* at para 41:

[41] The Federal Court of Appeal noted in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (Fed. C.A.) at para 40 that a reasonableness review requires merely that the Court be able to perceive a rational basis for the Panel's conclusions. This Court elaborated on the point in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, [2008] F.C.J. No. 324 (F.C.) (*Pembina*), stating that "deference to expertise is based on the cogent articulation of the rationale [*sic*] basis for conclusions reached" (para 75). This view is consistent with *Dunsmuir*, above, in which the Supreme Court held that reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 47).

305 In this case, the JRP process canvassed the issue of the effectiveness of fish habitat compensation programs,

identified the uncertainties arising and made recommendations which were implemented by the FHC Plan and the conditions of the Authorization. There is no doubt that the duty to consult can be satisfied through consultation that takes place within the regulatory process (*Taku River* at para 40; *Little Salmon* at para 39; *Ekuanitshit FCA* at para 99; *Katlodeeche* at para 97) and I am satisfied that the duty to consult was met, that the Authorization reflects a reasonable accommodation and that the Minister's decision to issue it was informed and reasonable.

306 And, as stated in *Malcolm*, the role of the Court in the context of decisions of this nature is not to reweigh the factors and come to its own conclusion. Provided the decision is one that a Minister could reasonably make, deference requires that it be respected (at para 73).

(d) *Miscellaneous Issue*

(i) Impoundment

307 The Russell Affidavit also asserts that DFO did not require Nalcor to carry out reservoir impoundment according to the schedule recommended by the JRP, which could result in damage to fish during the spawning cycle. However, the Finn Affidavit states that the Authorization is consistent with Recommendation 6.1 as it includes a condition specifically requiring reservoir impoundment to be carried out between mid-July and the end of September. I note that Canada's Response accepted Recommendation 6.1 and that the Authorization to be issued would require Nalcor to carry out impoundment within the time frame recommended by the JRP, being mid-July to the end of September. In that regard, the Authorization as issued is valid from June 15, 2013 to December 31, 2017 and full reservoir impoundment is limited to July 15 to September 30 within that period, this would appear to be in compliance with Recommendation 6.1.

(ii) Treatment of Innu

308 Finally, the NCC also submits that it was not treated in the same manner as the Innu by Nalcor and DFO and that DFO's treatment of the Innu, as the Aboriginal group most directly affected by the Project, is an error of law that undermines the validity of the consultations. I see little merit in that submission. The issue in this matter is concerned with the adequacy of consultation by Canada with the NCC in Phase 5 in the context of the NCC's affected title and interests. That question is fact based, specific to the NCC, and is concerned with the Authorization and its conditions, in particular, the FHC and EEM Plans, and the Minister's decision to issue the Authorization. And, in any event, the *Regulatory Phase Protocol*, the consultation process, applied to all Aboriginal groups.

Conclusion

309 The duty to consult and accommodate does not mean that Aboriginal groups possess a veto over government decision-making. The Crown may proceed to make decisions even if an Aboriginal group opposes them, as long as the consultation process and accommodations are fair, reasonable and consistent with the honour of the Crown (*Adams Lake* at para 100).

310 In this case, the duty to consult fell between the low and mid-range of the spectrum. Canada, consistent with the *Consultation Framework*, proposed the *Regulatory Phase Protocol* for Phase 5 of the Project. DFO met with the NCC to discuss the regulatory permitting to follow by way of the *Fisheries Act* Authorization. DFO also provided the NCC with the draft *Regulatory Phase Protocol* and sought the NCC's comments on that consultation process. The NCC did respond, outside the requested 14 day period, but did not provide substantive comments, instead seeking a definition of the Project footprint, a matter that had been addressed at the beginning of the five phase consultation process, and a separate protocol to share the NCC's Aboriginal Traditional Knowledge, which the NCC stated should be emphasized.

311 DFO provided the draft FHC and EEM Plans to the NCC in accordance with the *Regulatory Phase Protocol*. However, rather than comment on the Plans, the NCC challenged the protocol process, took issue with alleged

non-compliance with the JRP Recommendations, a lack of funding for Phase 5 and other matters. DFO responded to each of those concerns.

312 In my view, the process set out in the *Regulatory Phase Protocol* was adequate to meet Canada's duty to consult, was reasonable and was followed by DFO. While DFO's response may have been less than perfect, perfection is not required so long as reasonable efforts have been made to consult and accommodate and if the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, there will be no basis to intervene (*Ka'a'Gee Tu #2* at para 90-92; *Haida* at para 42). While the NCC is not satisfied with many of Canada's responses, as discussed above, the Minister's decision to issue the Authorization was, ultimately, reasonable.

313 As to the adequacy of consultation governing the NCC's Aboriginal Traditional Knowledge and current land and resource use, I am not convinced that insufficient funding or consultation opportunities in Phases 1-4 of the consultation process precluded the NCC from gathering and presenting this information. The JRP process was the primary mechanism addressing these issues. Additionally, further, albeit limited, funding was provided in Phase 4 to address issues arising from the JRP Report, which would have included the NCC's position that its Aboriginal Traditional Knowledge and land and resource use had not been adequately addressed. Because the consultation process was an ongoing one, the Minister was entitled to consider the prior consultation when deciding to issue the Authorization.

314 Funding was not provided in Phase 5. This was unfortunate as it may have limited the ability of Aboriginal groups, including the NCC, to retain third party consultants, if necessary, to assist them in determining if the Authorization, in particular, the FHC and EEM Plans, adequately mitigated any adverse impacts to their effected title and interest. However, the NCC was aware of the consultation process effected by the *Regulatory Phase Protocol* and was also afforded the opportunity to meet with both Nalcor and DFO to discuss the Plans but declined to do so. The NCC also did not utilize any of its own resources in this regard. As a result, it has not established either a failure of the duty to consult or an adverse impact resulting from it.

315 As to the compliance with Recommendations 6.7 and 4.5 of the JRP Report, Canada was satisfied that Nalcor's modeling and data gathering served to provide a sufficient predictive basis against which future monitoring could be compared when combined with the further baseline sampling and monitoring required by the EEM Plan. That is, Canada was satisfied that the uncertainty and risk pertaining to methylmercury bioaccumulation could be managed by way of the monitoring programs. Accordingly, the Minister's decision to issue the Authorization on that basis, and without requiring full clearing, was informed and reasonable and does not demonstrate a failure of accommodation.

316 Finally, the NCC's allegation that the Minister ignored available science and knowingly adopted a fish habitat compensation plan that was unlikely to be effective, rendering her decision unreasonable, is not sustainable. First, because the JRP dealt with the issue, recognized the uncertainty and made recommendations in that regard which are reflected in the Authorization. Secondly, because the NCC failed to raise this as a concern at any point in the consultation process. Raising such an issue for the first time at judicial review of the final phase of a lengthy consultation process and asking that the Court reweigh the scientific evidence is not the role of the Court nor an appropriate manner in which to deal with the issue.

317 For the above reasons, it is my view that the duty to consult was met and that the Minister's decision to issue the Authorization was reasonable.

318 Accordingly, this application for judicial review is denied.

JUDGMENT

THIS COURT'S JUDGMENT is that

Nunatukavut Community Council Inc. v. Canada (Attorney General), [2015] F.C.J. No. 969

1. The application is dismissed.
2. The Attorney General of Canada and Nalcor shall have their costs in the amount of \$1,250.00 per party.

STRICKLAND J.

End of Document

TAB 11

Innu of Ekuanitshit v. Canada (Attorney General), [2014] F.C.J. No. 867

Federal Court Judgments

Federal Court of Appeal

Montréal, Quebec

Gauthier, Mainville and Boivin JJ.A.

Heard: June 9, 2014.

Judgment: August 22, 2014.

Docket: A-196-13

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Between Council of The Innu of Ekuanitshit, Appellant, and The Attorney General of Canada, in his capacity of legal member of the Queen's Privy Counsel for Canada and The Honourable Keith Ashfield, in his capacity of Minister of Fisheries and Oceans Canada and The Honourable Denis Lebel, in his capacity of Minister of Transport Canada and The Honourable Joe Oliver, in his capacity of Minister of Natural Resources Canada and Nalcor Energy, Respondents

(124 paras.)

Case Summary

Aboriginal law — Aboriginal status and rights — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Appeal by Council of Innu of Ekuanitshit, an Indian band, from dismissal of application for judicial review of Order-in-Council and decision of federal ministries authorizing, following environmental assessment ("EA"), hydroelectric plant project dismissed — Order-in-Council approved federal government's response to report finding project's significant adverse environmental effects were offset by its benefits and Ministries approved project if certain environmental mitigation measures were applied — Decisions were reasonable and Canadian Environmental Assessment Act was adhered to — Council had been adequately consulted to date and consultation continued.

Environmental law — Environmental assessments — Canadian Environmental Assessment Act — Scope of assessment — Aboriginal issues — Traditional uses and traditional environmental knowledge — Practice and procedure — Appeal by Council of Innu of Ekuanitshit, an Indian band, from dismissal of application for judicial review of Order-in-Council and decision of federal ministries authorizing, following environmental assessment ("EA"), hydroelectric plant project dismissed — Order-in-Council approved federal government's response to report finding project's significant adverse environmental effects were offset by its benefits and Ministries approved project if certain environmental mitigation measures were applied — Decisions were reasonable and Canadian Environmental Assessment Act was adhered to — Council had been adequately consulted to date and consultation continued.

Appeal by the Council of Innu of Ekuanitshit from the dismissal of its application for judicial review of an Order in Council and of a decision by Fisheries and Oceans Canada, Transport Canada and Natural Resources Canada authorizing, following an environmental assessment ("EA") process, a project for the construction of two hydroelectric plants on a river in Newfoundland and Labrador. The applicant was a registered Indian band and

participated throughout the EA process for the project. The Order of the Governor in Council approved the federal government's response to a report on the project. In its response, the federal government found that the energy, socioeconomic and environmental benefits of the hydroelectric plant project outweighed its adverse environmental effects. The Order-in-Council also allowed the three federal ministries to follow up on the report. In their decision, the three ministries decided to allow the project if certain environmental mitigation measures were applied. The Council sought judicial review of the decision arguing that the Minister's scoping decision to conduct separate EAs for the project and for the transmission link amounted to project splitting and resulted in the true negative effects of the actual project remaining unknown, that the federal government failed to properly consider the negative impact of the project on their current use of the land for traditional purposes, and that it was not adequately consulted. The respondents argued that judicial review of the scoping decision was statute barred and that the government possessed sufficient information to fulfill its mandate. The Federal Court judge dismissed the Council's application for judicial review. First, he determined that the Council had commenced its application for judicial review outside the time allowed. He further found that regardless of whether the application was commenced in time, the decision about the scope of the project was reasonable and no breach of the CEAA was established. Secondly, he found the decision of the federal government and the responsible ministries was reasonable as the government was aware of the adverse environmental effects of the project and carefully weighed them against the benefits. Finally, he concluded that judicial review of the federal government's consultation and accommodation process was premature and the applicant had been adequately consulted up to the current stage. The Council appealed the decision arguing that the judge erred in his interpretation of the CEAA and his conclusion that the federal Crown had fulfilled its duty to consult.

HELD: Appeal dismissed.

The decisions of the Governor in Council and the responsible ministries were not unreasonable. In the absence of evidence of the abandonment of the construction of one of the plants or of any unreasonable delay in its construction, the Council had not established that it was unreasonable for the Governor in Council or the responsible ministries to conclude that, in light of the positive effects and proposed mitigation measures, the adverse environmental effects of the project were justified. As the Council's use and occupation of the lands in the project area were seasonal, sporadic and of short duration, their interest in the land and the seriousness of the adverse impact the project would have on their claimed rights was limited. The Council had been adequately consulted to date and the consultation process continued.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 15, s. 16, s. 16(1), s. 16(2), s. 24, s. 24(1), s. 24(2), s. 34, s. 37, s. 37(1), s. 37(1.1), s. 37(2.1), s. 37(2.2), s. 40

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35(1)

Environmental Protection Act, SNL 2002, c. E-14.2, s. 57, s. 69

Fisheries Act, R.S.C. 1985, c. F-14, s. 35(2)

Navigable Waters Protection Act, R.S.C. 1985, c. N-22, s. 5(1) (a)

Counsel

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REASONS FOR JUDGMENT

The judgment of the Court was delivered by

BOIVIN J.A.

1 This is an appeal from a decision of Justice Scott (the judge) of the Federal Court dated April 23, 2013. In his decision, the judge dismissed the application for judicial review of the Council of the Innu of Ekuanitshit (the appellant or Innu of Ekuanitshit) against an order of the Governor in Council adopted on March 12, 2012, and a decision made on March 15, 2012, by Fisheries and Oceans Canada, Transport Canada and Natural Resources Canada. The order and the decision authorize, following an environmental assessment process, a project for the construction of two hydroelectric plants on the Churchill River in Newfoundland and Labrador. In dismissing the

application for judicial review, the judge also found that the federal government had met its constitutional duty to adequately consult the appellant before adopting the order, but that consultations should continue.

2 In the order of March 12, 2012, the Governor in Council approved the federal government's response to the *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador*. In its response, the federal government essentially found that the energy, socioeconomic and environmental benefits of the hydroelectric plant project outweighed its adverse environmental effects. The Governor in Council also allowed, under subsection 37(1.1) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (Repealed, 2012, c. 19, s. 66) (the *CEAA*), Fisheries and Oceans Canada, Transport Canada and Natural Resources Canada (the responsible authorities) to follow up on the Report of the Joint Review Panel.

3 In their decision of March 15, 2012, made in conformity with the approval of the Governor in Council and under subsection 37(1) of the *CEAA*, the responsible authorities followed up with the Report and decided that they would allow the implementation of the project if certain environmental mitigation measures were applied.

4 The appellant essentially argued that the judge erred in law and fact in his interpretation of the *CEAA* and in his conclusion that the federal Crown had fulfilled its duty to consult.

5 For the following reasons, the appeal should be dismissed.

I. Background

A. *The Project*

6 The sequence of events that led to this dispute is as follows.

7 On November 30, 2006, Newfoundland and Labrador Hydro, now Nalcor Energy (Nalcor), submitted a registration and description document for the "Lower Churchill Hydroelectric Generation Project" (Project).

8 In its Project, Nalcor planned the construction and operation of two hydroelectric plants in Lower Churchill River, Labrador. The Project specifically includes two hydroelectric plants, at Gull Island and Muskrat Falls, as well as transmission lines to the Labrador grid. The two plants will generate a total of more than 3,000 megawatts (MW). The Gull Island plant will have a capacity of 2,250 MW and will include a dam 99 m high and 1,315 m long, with a 232 km long reservoir inundating 85 km² of land. The Muskrat Falls plant has a capacity of 824 MW, will include a dam 32 m high and 432 m long and a second one 29 m high and 325 m long, with a 59 km long reservoir, inundating an area of 41 km².

B. *The decision to subject the Project to a joint environmental assessment*

9 In January 2007, the Minister of Environment and Conservation of Newfoundland and Labrador (provincial minister) decided that the Project would be subject to the *Environmental Protection Act*, SNL 2002, c. E-14.2 and an environmental impact study. He also recommended that a public hearing on the Project be held.

10 One month later, Fisheries and Oceans Canada found that, to carry out the Project, it would have to take measures under subsection 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14. Transport Canada found that it had to take measures under paragraph 5(1)(a) of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22. Since the Project required that Fisheries and Oceans Canada and Transport Canada issue permits and provide pre-approval, they determined that the Project had to be subject to a federal environmental assessment. Fisheries and Oceans Canada and Transport Canada also decided that they would be the responsible authorities for the environmental assessment. Natural Resources Canada was added to the group of responsible authorities on August 19, 2011, after granting Nalcor a loan guarantee.

11 Considering that the Project risks creating adverse environmental effects, the responsible authorities recommended submitting the Project to a federal review panel. In June 2007, the federal Minister of the Environment adopted this recommendation and decided to refer the assessment to a review panel.

12 Following this process, the Newfoundland and Labrador government and the federal government agreed to submit the Project to an environmental assessment process, which would be conducted by a Joint Review Panel.

C. The guidelines for the environmental impact assessment

13 In December 2007 the provincial minister and the Canadian Environmental Assessment Agency jointly published a draft of the guidelines for the environmental impact assessment.

14 From December 19, 2007, to February 27, 2008, the guidelines for the environmental impact assessment were subject to a public consultation.

15 Following the comments received, the provincial Minister of the Environment and his federal counterpart published a final version of the guidelines for the environmental impact assessment on July 15, 2008. They told Nalcor that it would have to refer to these guidelines in completing its environmental impact study so as to meet the statutory requirements of both governments.

16 On January 8, 2009, the provincial minister and the Canadian Environmental Assessment Agency, in accordance with section 40 of the *CEAA*, entered into an agreement to establish a Joint Review Panel ("Agreement for the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project"). This agreement describes the mandate of the Joint Review Panel, which is essentially responsible for determining whether the completion of the Project is likely to have significant adverse effects on the environment, considering the implementation of mitigation measures by the proponent Nalcor. Under the agreement, the Joint Review Panel must also invite Aboriginal groups to make submissions on their Aboriginal rights in the region of the Project and the negative impact that the Project may have on them. Under section 15 of the *CEAA*, the federal Minister of the Environment defined the scope of the Project to be assessed as including the Muskrat Falls and Gull Island plants.

17 Generally, under section 34 of the *CEAA*, the Joint Review Panel must first gather the information required for the environmental assessment of the Project under review. Second, it must hold hearings so as to give the public the opportunity to participate in the environmental assessment of the Project. Third, it must prepare a report containing its conclusions and recommendations relating to the environmental assessment of the Project and summarizing the comments received from the public. Fourth, it must submit its report to the federal Minister of the Environment and to the responsible authorities.

18 On February 17, 2009, Nalcor submitted its environmental impact study, developed in accordance with the guidelines established by the Newfoundland and Labrador government and the federal government. In its environmental impact study, Nalcor identified the adverse environmental effects of the Project, proposed measures likely to mitigate them and assessed their significance considering these mitigation measures.

19 From March 9, 2009, to April 15, 2011, 52 stakeholders, including the Innu of Ekuanitshit, made submissions regarding Nalcor's environmental impact study to the Joint Review Panel for its information gathering process. Following these submissions, the Joint Review Panel submitted 166 information requests to Nalcor, who provided responses to all these information requests. Members of the public were then invited, on two occasions, to make submissions regarding Nalcor's responses to the information requests.

20 On January 14, 2011, after compiling the stakeholders' submissions and considering Nalcor's responses to the information requests, the Joint Review Panel found that the assessment could proceed to public hearings.

21 From March 3, 2011, to April 15, 2011, the Joint Review Panel held public hearings in six municipalities of Newfoundland and Labrador and Quebec. The appellant made submissions, filed documents and showed a video during a hearing held in Sept-Îles, Quebec, on April 7, 2011.

22 On August 23, 2011, the Joint Review Panel published its *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project* and presented it to the federal Minister of the Environment and the responsible authorities. The key finding of this Report was that the Project is likely to cause significant adverse environmental and socioeconomic effects, but that the potentially significant economic benefits that it would generate, although uncertain, would compensate for these risks. The Report also made more than 80 recommendations about the mitigation measures and the additional information that would be required on some aspects so that the Project could move forward.

23 Following the publication of the Report of the Joint Review Panel, the appellant contacted the Canadian Environmental Assessment Agency and made some requests. In particular, the appellant requested that no decision be made regarding the Project before serious studies on the historic use of the land covered by the Project and on the caribou herds that live on it were carried out.

24 On March 12, 2012, in order C.P. 2012-285, the Governor in Council endorsed both the response of the federal government to the Report (response) and the decision that the responsible authorities had to make under their respective laws (decision). Under subsections 37(1) and 37(1.1) of the *CEAA*, the federal government and the responsible authorities had to read the Report and determine whether the Project was justified despite its adverse environmental effects, but it was ultimately up to the Governor in Council to approve this response.

25 The response, after summarizing the environmental assessment process and the issues contained in the Report, presented the federal government's findings and the reasons for which the significant adverse environmental effects of the Project are justified by its benefits. It also responded to each of the Joint Review Panel's recommendations. It described, among other things, the federal government's participation in the Project.

26 The decision contains the list of mitigation measures that must be implemented to carry out the Project, concerning inter alia: birds, fish, mammals and their habitat; Aboriginal use of land and resources for traditional purposes; socioeconomic effects; and physical and cultural heritage. The decision also provides for the implementation of a follow-up program that aims to monitor the accuracy of the environmental assessment and the effectiveness of the mitigation measures to be carried out from October 1, 2012, to October 1, 2037.

27 On March 16, 2012, the responsible authorities officially filed their decision, previously endorsed by the Governor in Council, with the Canadian Environmental Assessment Agency (reference number 07-05-26178).

28 One month later, the appellant filed an application for judicial review of the order of the Governor in Council endorsing the federal government's response to the Report and the subsequent decision of the responsible authorities, approved by the order.

II. The judge's decision

29 After establishing the facts of this matter and conducting an analysis of the evidence, the judge dismissed the application for judicial review for three main reasons.

30 First, the judge determined that the appellant had not respected the deadline for the judicial review of the order that set the scope of the Project under section 15 of the *CEAA*. Despite this, whether or not the application for review was out of time, the judge found that the decision to maintain the current scope of the Project as presented by Nalcor - i.e. without the transportation line (between Labrador and the Island of Newfoundland) - was reasonable and that no breach of the process under the *CEAA* had been established.

31 Second, the judge found that the decision of the federal government and the responsible authorities under section 16 of the *CEAA* was reasonable. The government was aware of the adverse environmental effects of the Project and carefully weighed them against the benefits from a national perspective. The judge decided that the appellant's fear relating to the switched order of construction of the two dams and to the approval of the Gull Island Project was unsubstantiated at this stage.

32 Third, the judge determined at paragraph 112 of his reasons that the government admitted that it had a duty to consult the Innu of Ekuanitshit and that, rather, the issue was whether the Crown had sufficiently consulted. He first stated that it was premature to conduct the judicial review of the federal government's consultation process and accommodation at this stage, but he nonetheless proceeded to review the issue. After analyzing the evidence on the record and the case law regarding the Crown's duty to consult, the judge found that the consultation process was not complete and that the consultation performed to date, i.e. up to the Governor in Council issuing the order, was sufficient.

III. Issues

33 This appeal raises two issues:

1. Did the judge err in finding that the decisions of the Governor in Council and the responsible authorities complied with the *CEAA*?
2. Did the judge err in finding that the Crown had not breached its duty to consult the Innu of Ekuanitshit on aspects of the Project likely to have a prejudicial effect on their Aboriginal rights and to seek accommodation measures?

IV. Analysis

- A. *Did the judge err in finding that the decisions of the Governor in Council and the responsible authorities complied with the CEAA?*

34 The appellant submits that the judge committed a number of errors in finding that the impugned decisions of the Governor in Council and the responsible authorities complied with the provisions of the *CEAA*. The errors involve, in particular, (i) the authorization of the Project under section 37 of the *CEAA* despite the lack of a construction date for the Gull Island plant, (ii) the uncertain application of section 24 of the *CEAA*, and (iii) the interplay between the powers of the Governor in Council and of the federal Minister of the Environment.

(1) Standard of review

35 In an appeal from a judicial review judgment, the role of this Court is to determine, first, whether the judge identified the appropriate standard of review and, second, whether he applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at para. 18).

36 In this case, the appellant maintains that the judge erred by applying a standard of review that was far too deferential toward the decisions of the Governor in Council and the responsible authorities under section 37 of the *CEAA*. The appellant further criticizes the judge for having applied the principles in *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106 [*Thorne's Hardware*], when the Supreme Court recently rejected those principles in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 [*Catalyst Paper*]. According to the appellant, the judge should have instead used the standard of review analysis developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*] and found that a correctness standard should be applied to questions relating to jurisdiction and to the applicability of the *CEAA* (*MiningWatch Canada v. Canada (Fisheries*

and Oceans), 2007 FC 955, [2008] 3 F.C.R. 84, aff'd. by 2010 SCC 2, [2010] 1 S.C.R. 6 [*MiningWatch*] as well as to questions regarding the interpretation of the *CEAA* (*Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2010 FC 1233, [2012] 3 F.C.R. 136 at para. 60, conf. 2012 FCA 40, [2013] 4 F.C.R. 155 [*Georgia Strait*]).

37 I cannot accept the appellant's arguments with regard to the applicable standard of review in this case.

38 The Supreme Court of Canada teaches us that an exhaustive analysis is not always necessary for determining the appropriate standard of review. A reviewing court must begin by determining whether the case law has already established in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question (*Dunsmuir* at para. 62).

39 In this case, the crucial issue for the judge to decide with regard to the *CEAA* was whether the Governor in Council and the responsible authorities had respected the requirements of the Act prior to making their decisions under subsections 37(1) and 37(1.1) of the *CEAA*.

40 The judge determined, at paragraphs 72 to 76 of his reasons, that the decisions made under subsections 37(1) and 37(1.1) of the *CEAA* should be reviewed on a reasonableness standard. In reaching his conclusion, the judge relied on *Thorne's Hardware*, but also *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203 at para 32, *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461 at para. 78 and *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*, 2005 FC 1123 at para. 74. These decisions, from this Court and the Federal Court, set out that a reviewing court must not intervene in decisions of the Governor in Council or responsible authority under section 37 of the *CEAA*, unless the statutory process was not followed properly. The judge concluded his overview of the case law by citing our Court at paragraphs 75 and 76 of his reasons as follows:

[75] In *Canada (Wheat Board) v. Canada (Attorney General)*, 2009 FCA 214, at para 37, Justice Noël described the limits imposed on the Courts' ability to review decisions made by the GIC pursuant to a legislative power given to it by statute as follows:

It is well-settled law that when exercising a legislative power given to it by statute, the Governor in Council must stay within the boundary of the enabling statute, both as to empowerment and purpose. The Governor in Council is otherwise free to exercise its statutory power without interference by the Court, except in an egregious case or where there is proof of an absence of good faith (*Thorne's Hardware Ltd. et al. v. The Queen et al.*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, page 111; *Attorney General of Canada v. Inuit Tapirisat of Canada et al*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, p. 752).

[76] This Court agrees with the above formulation of Justice Noël. As a result, the Court will only intervene with the GIC and Responsible Ministers' decisions under subsections 37(1.1) and 37(1) if it finds that: 1) the *CEAA* statutory process was not properly followed before the section 37 decisions were made; 2) the GIC or Responsible Ministers' decisions were taken without regard for the purpose of the *CEAA*; or 3) the GIC or Responsible Ministers' decisions had no reasonable basis in fact; which is tantamount to an absence of good faith.

41 I am of the view that the judge rightfully concluded that the above-mentioned case law establishes in a satisfactory manner that a reviewing court must show deference when reviewing the exercise of power delegated by the Act to the Governor in Council or to a Minister.

42 As this judicial review does not involve questions of jurisdiction or statutory interpretation, the principles set out in *MiningWatch* at paragraph 135, and *Georgia Strait* at paragraph 60, upon which the appellant relies, do not apply.

43 In addition, contrary to what the appellant asserts, *Catalyst Paper*, does not substantially alter the applicable law with respect to the judicial review of the exercise of a delegated authority. Although it is correct to state that the

Supreme Court of Canada abandoned the distinction inherited from *Thorne's Hardware* between policy, which is theoretically exempt from judicial review, and legality, the Court nonetheless reiterated the principle by which an authority "[i]n passing delegated legislation ... must make policy choices that fall reasonably within the scope of the authority the legislature has granted it" (*Catalyst Paper* at para. 14).

44 Therefore, in my view, the judge correctly found that deference was owed to the decisions made pursuant to subsections 37(1) and 37(1.1) of the *CEAA*, but that a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme.

(2) Reasonableness of the decisions of the Governor in Council and responsible authorities

45 The appellant submits that the judge committed three main errors in his analysis of the reasonableness of the impugned decisions.

(a) *The absence of a construction date for the Gull Island plant*

46 First, the appellant's essential argument is that the Governor in Council and responsible authorities were not able to determine whether the Project's negative consequences could be justified in the circumstances, as required by subsections 37(1) and 37(1.1) of the *CEAA*, since the Project as defined included the Gull Island plant, when to this date only the construction of the Muskrat Falls plant has been confirmed.

47 With regard to the allegation of the abandonment of the construction of the Gull Island plant, the judge wrote as follows:

[91] The Applicant's concerns regarding the approval of Gull Island is fundamentally a scoping argument which the Court has already concluded to be statute barred in this instance. The Applicant submits that Gull Island should have been removed or "scoped out" of the Project. The Supreme Court of Canada already decided that the minimum scope of a project "is the project as proposed by the proponent" (see *MiningWatch*, above, at para 39). The scope of the Project can then be increased but not decreased. The rationale is easy to understand. Why would a proponent propose a project larger than they intended to build? They would only be rendering the EA process more onerous for no valid reason...

48 The judge concluded that, in light of the evidence and the obligations provided for under the *CEAA*, the decisions of the Governor in Council and responsible authorities were reasonable:

[95] The evidence before the Court indicates that the federal government was properly informed of the potential negative environmental impacts of the Project. Furthermore it reasonably justified its decision to proceed in this instance after having weighed the benefits against the negative environmental impacts from its national perspective. As the Court reviewed the Response and Decision, it is clear that both are carefully considered decisions that balance competing objectives.

49 I point out that the impugned decisions were made under subsections 37(1) and 37(1.1) of the *CEAA*, which provide as follows:

Decision of responsible authority

37.(1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

- (i) the project is not likely to cause significant adverse environmental effects, or
- (ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

The responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (a).

Autorité responsable

37.(1) Sous réserve des paragraphes (1.1) à (1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes :

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet :

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en oeuvre du projet en tout ou en partie.

Agrément du Gouverneur en Conseil

(1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du Gouverneur en Conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément.

50 Under section 15 of the *CEAA*, it was up to the Minister of the Environment to determine the scope of the Project that was to be subject to the environmental assessment process and Joint Review Panel Report, upon which the Governor in Council and responsible authorities were to ultimately base their decisions:

Scope of project

15.(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by

(a) the responsible authority; or

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.

Détermination de la portée du projet

15.(1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.

51 In the order, the Governor in Council thus describes as follows the Project whose scope was determined, on January 8, 2009, by the federal Minister of the Environment (A.B., Vol. 1 at. 201):

[TRANSLATION]

The Nalcor Energy company proposes to build two hydroelectric generation facilities on the lower Churchill River in central Labrador, the combined capacity of which will be 3,074 megawatts (MW). The Project consists of two dams located at Muskrat Falls and Gull Island, two reservoirs and transmission lines between Muskrat Falls and Gull Island and between Gull Island and the existing Churchill Falls facility. Other facilities would include access roads, temporary bridges and construction camps; borrow pits and quarry sites, diversion facilities and spoil areas.

[Emphasis added.]

52 In this instance the responsible authorities had to decide, with the agreement of the Governor in Council, whether to exercise their powers under their respective statutes, thereby allowing the Project as defined by the federal Minister of the Environment to proceed. To do so, the responsible authorities and the Governor in Council had to determine whether the adverse environmental effects described in the Joint Review Panel Report were justifiable given the positive effects of the Project and the application of appropriate mitigation measures.

53 In the order, the Governor in Council determined, after consulting the Joint Review Panel Report as well as several government studies, that [TRANSLATION] "the significant energy, economic, socio-economic and environmental benefits outweigh the negative environmental impacts of the Project identified in the Panel's Report" (A.B., Vol. 1 at 206).

54 I share the appellant's view that the abandonment of the Gull Island plant, if this were proven to be true, would raise serious questions about the validity of the environmental assessment and the impugned decisions. The Project authorized by the Governor in Council and responsible authorities following the balancing exercise imposed by section 37 of the *CEAA* included the Muskrat Falls plant as well as the Gull Island plant. I would note that this authorization was not a blank cheque for Nalcor to postpone the construction of the Gull Island plant indefinitely. If Nalcor were to forego construction of the larger of the two plants assessed (Gull Island), or if there was an unreasonable delay in its construction, the balancing exercise carried out for one of the Report's findings would be necessarily compromised.

55 I note, however, that the appellant adduced no evidence that the Gull Island plant had truly been abandoned by the proponent. For its part, Nalcor contends that construction of the Gull Island plant has not been abandoned and that it still has every intention of building the plant. Nalcor explains its difficulty in providing a construction start date by invoking its obligation to satisfy internal control mechanisms that require, in particular, confirmation of access to commercial markets likely to ensure the profitability of the Gull Island plant.

56 The sequence of construction of the two plants was certainly modified in November 2010. Following this modification, it was decided that the Muskrat Falls plant would be built first, when it was initially supposed to be built

after the Gull Island plant. However, the reversal of the sequence of construction of the plants does not suggest that Gull Island will never be built.

57 At best, it appears that, unlike the Muskrat Falls plant, there is no scheduled construction date currently planned for the Gull Island plant. The appellant has provided no statutory or judicial authority requiring that a proponent provide a specific construction date in advance for each component of a project of this magnitude. Indeed, if it is true that there is no basis for concluding that the Gull Island plant will actually be built, it is equally true that there is no evidence to the contrary either.

58 In the absence of evidence of the abandonment of the construction of the Gull Island plant or of an unreasonable delay in its construction, the appellant has not established that it was unreasonable for the Governor in Council and responsible authorities to conclude that, in light of the positive effects and proposed mitigation measures, the adverse environmental effects of the Project including the two plants were justified.

59 Therefore, I share the judge's conclusion and find that this ground of appeal must fail.

(b) *Section 24 of the CEAA*

60 Second, the appellant submits that the judge erred by stating that section 24 of the *CEAA* would apply if the Gull Island facility was not built within a reasonable timeframe. At first instance, the appellant argued that approving the Project when there is no planned construction date for the Gull Island facility would be tantamount to granting indefinite approval for the Project, which was prejudicial to the appellant given the negative environmental impacts that would result.

61 In upholding Nalcor's argument, the judge concluded that section 24 of the *CEAA* prevents the indefinite approval of the Project decreed by the appellant:

[91] ...Furthermore, section 24 of the *CEAA* will prevent the indefinite approval of any component of a project which is not built within a reasonable timeframe.

62 Section 24 of the *CEAA* provides, among other things, that when a proponent proposes to carry out a project for which an environmental assessment has previously been conducted, the responsible authority must use the assessment and corresponding report, while making any adjustments made necessary by changes in circumstances:

Use of previously conducted environmental assessment

24.(1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and

(a) the project did not proceed after the assessment was completed,

...

The responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.

Necessary adjustments

(2) Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

Utilisation d'une évaluation antérieure

24.(1) Si un promoteur se propose de mettre en oeuvre, en tout ou en partie, un projet ayant déjà fait l'objet d'une évaluation environnementale, l'autorité responsable doit utiliser l'évaluation et le rapport correspondant dans la mesure appropriée pour l'application des articles 18 ou 21 dans chacun des cas suivants :

a) le projet n'a pas été mis en oeuvre après l'achèvement de l'évaluation;

[...]

Ajustements nécessaires

(2) Dans les cas visés au paragraphe (1), l'autorité responsable veille à ce que soient apportées au rapport les adaptations nécessaires à la prise en compte des changements importants de circonstances survenus depuis l'évaluation et de tous renseignements importants relatifs aux effets environnementaux du projet.

63 The respondents acknowledge that the conditions for applying section 24 of the *CEAA* are uncertain. Nalcor further concedes that the judge's words create confusion and that it is inaccurate to assert that section 24 of the *CEAA* "will prevent" the indefinite approval of a project or one of its components. According to Nalcor, this provision nonetheless implies that Parliament contemplated situations in which a project, after undergoing an environmental assessment, was not carried out and for which the initial assessment must be adjusted in order to take into account changes in circumstances that occurred in the intervening period.

64 Section 24 of the *CEAA* has until now received only summary treatment in the case law. The section does appear to apply to situations in which a proponent submits for approval by the government a project that has already been assessed but never carried out. By requiring the responsible authority to use, with the necessary adjustments, the previous environmental assessment, section 24 of the *CEAA* appears geared toward achieving greater administrative efficiency by avoiding unnecessary duplication and minimizing the risks of the impacts resulting from the approval of projects not built within a reasonable timeframe.

65 The relevance of such a provision in the context of this judicial review is unclear. Not only has the Project barely begun to move forward in this case, but it is difficult to fathom how the mechanism set out in section 24 of the *CEAA*, which deals with situations likely to occur long after a project has been approved, could be employed in a judicial review of a decision to approve made pursuant to section 37 of the *CEAA*.

66 Even if the judge did not have to decide in the circumstances of this case on the application of section 24 of the *CEAA*, his findings are of no consequence. Indeed, any discussion surrounding the abandonment of the construction of the Gull Island facility, when less than three years have passed since the Project was approved, is at this point entirely hypothetical and speculative and cannot compromise the reasonableness of the impugned decisions.

(c) *Limits on the Governor in Council's power under the CEAA*

67 Third, the appellant maintains that the judge erred by concluding that the Governor in Council's power is limited by the decision on the scope of the Project made by his Environment Minister, who is subordinate to the Governor in Council. The appellant claims that in making this finding, the judge violated the principle according to which the powers of the Governor in Council, who represents the democratically elected government, [translation] "must be presumed to trump those of a mere Environment Minister" (memorandum of the appellant at para. 122).

68 Dealing with the power of the Governor in Council or of the responsible authorities to modify the scope of the Project so as to take into account the fact that no construction date had been submitted by the proponent, the judge concluded as follows:

[91] ... The Supreme Court of Canada already decided that the minimum scope of a project "is the project as proposed by the proponent" (see *MiningWatch*, above, at para 39). The scope of the Project can then be increased but not decreased ...

69 The discretionary power of the Governor in Council and responsible authorities to authorize a project in spite of its adverse environmental effects is circumscribed by the *CEAA*. Section 15 of the *CEAA* clearly sets out that the decision that the Governor in Council and the responsible authorities must make under section 37 of the *CEAA* concerns a project whose scope has previously been determined by the Minister of the Environment. The wording of section 15 further specifies that the Minister of the Environment must consult the responsible authority before determining the scope of the project: "... [t]he scope of the project in relation to which an environmental assessment is to be conducted shall be determined by [...], where the project is referred to a mediator or a review panel, the minister, after consulting with the responsible authority".

70 As the judge noted, the Supreme Court of Canada concluded, in *MiningWatch* at paragraph 39, that "the minimum scope is the project as proposed by the proponent, and the [responsible authority] or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project". Therefore, once the proponent has proposed a project for the purposes of assessment, the minister may enlarge the scope, but not restrict it.

71 The appellant maintains that [TRANSLATION] "the determination of the scope of the project by the Minister ... is subject to the discretion of the Governor in Council to make a determination that the project has changed and to refer the report of the JRP [Joint Review Panel] to the responsible authorities" in order for them to be able to amend their report based on the changes that have occurred after the initial environmental assessment. The appellant quotes as principal authority in support of this claim subsection 24(2) of the *CEAA*. As previously noted, the subsection provides that, where a proponent proposes a project for which an environmental assessment was previously conducted but which has not proceeded, the responsible authority must use that assessment and "ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environment effects of the project".

72 As with the first two arguments of the appellant, this claim is ultimately based on the hypothesis that the Gull Island facility will not proceed. Even if it were for the Governor in Council to determine that a project or part of a project has not been carried out within the meaning of subsection 24(1) of the *CEAA*, which has not been demonstrated, there is no basis for concluding that the lack of a precise construction date, less than three years after the Order in Council approval, means that the Gull Island facility will not proceed within a reasonable timeframe.

73 Be that as it may, the fact that the Governor in Council and responsible authorities exercised their discretion to approve a project whose scope was defined by the minister with the statutory authority to do so tends to favour the reasonableness of the impugned decisions, rather than the reverse.

74 For these reasons, I am of the view that the judge's finding is consistent with the scheme of the *CEAA*, the rulings of the Supreme Court of Canada and the facts in this case.

(d) *Other grounds of appeal*

75 It should be noted that the appellant raised two other grounds of appeal that need not be decided by this Court.

76 The appellant first submits that the judge erred in finding that the real decision impugned by the appellant was the one made by the Minister pursuant to section 15 of the *CEAA* (judge's reasons at paras. 41-68).

77 Although it appears that the scope of the Project was in fact the subject of much discussion during the hearing at first instance, the appellant acknowledged on appeal before this Court that it was not challenging the decision of the federal Minister of the Environment to maintain the scope of the Project as proposed by Nalcor or the conclusions of the Joint Review Panel Report. It is therefore unnecessary to address the judge's findings in this regard as they cannot have any impact on the present appeal.

78 The appellant further contends that the judge erred in finding that the appellant was seeking to re-scope the Project or restart consultations, when it was merely asking that the Court order the Governor in Council and responsible authorities to make a new decision based on the Project as it has actually proceeded, which does not include the Gull Island facility (judge's reasons at para. 2).

79 As indicated previously, it appears that the appellant made submissions in the hearing at first instance with respect to the appropriate scope of the Project. The appellant nonetheless emphasizes that the principal remedy sought at first instance and on appeal is to refer the Report back to the Governor in Council and responsible authorities in order for them to make the appropriate decisions on the basis of what it considers to be the real Project. Given that the appellant asserts that it did not seek the remedies it claims the judge attributed to the appellant in his reasons and that the judge took into account those actually pursued by the appellant, any alleged error of the judge on this point has no bearing in this appeal.

(3) Conclusion

80 The appellant has not persuaded me that the judge committed an error in his analysis regarding the reasonableness of the decision of the Governor in Council and the decision of the responsible authorities that would warrant the intervention of this Court.

81 I will now address the second issue regarding the Crown's duty to consult.

B. *Did the judge err in finding that the Crown had not breached its duty to consult the Innu of Ekuanitshit on aspects of the Project likely to have a prejudicial effect on their Aboriginal rights and to seek accommodation measures?*

(1) Standard of review

82 The judge noted in his reasons that issues relating to the existence and content of the duty to consult attract a standard of correctness. He further asserted that a decision as to whether the Crown met its duty to consult is reviewable on a reasonableness standard, as it is a mixed question of fact and law. In the present instance, the parties acknowledge that the Crown recognized its duty to consult from the outset. The issue is therefore not whether the Crown has a duty to consult but rather whether the efforts of the Crown met the requirements of its duty to consult. As Justice Binnie writes in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at paragraphs 48 and 77 [*Little Salmon*]: "the standard of review in that respect, including the adequacy of the consultation, is correctness", but nonetheless it "must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied".

83 It is through that lens that the following issues will be examined.

(2) The Crown's duty to consult

84 The Crown's duty to consult Aboriginal peoples, if any, and its duty to accommodate, even prior to a decision on

asserted Aboriginal rights and title, was recognized in 2004 by the Supreme Court of Canada in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [*Taku River*] and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*]. The Crown's duty to consult is grounded in the principle of the honour of the Crown and this 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" (*Haida Nation* at para. 35; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at paras. 31, 40 and 41 [*Carrier Sekani*]). It requires the government to undertake a meaningful consultation in good faith with the Aboriginal people concerned on matters that may adversely affect their rights and to accommodate those interests in a spirit of reconciliation (*Haida Nation* at paras. 20 and 25; *Carrier Sekani* at para. 31). The duty to act honourably derives from the Crown's assertion of sovereignty and the fact that Canada's Aboriginal peoples were here when the Europeans arrived (*Haida Nation* at para. 25). Subsection 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and title, enshrines this principle (*Taku River* at para. 24). Thus, the honour of the Crown is always at stake in its dealings with Aboriginal peoples (*R v. Badger*, [1996] 1 S.C.R. 771; *R v. Marshall*, [1999] 3 S.C.R. 456).

85 The Crown's duty to consult cannot be defined in isolation, and the extent of the duty will vary with the circumstances. On the basis of the proportionality test, the nature and scope of the duty of consultation is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect on the right or title claimed" (*Haida Nation* at paras. 39, 43-45; *Taku River* at paras. 29 to 32; *Carrier Sekani* at para. 36).

(a) *The decision of the Supreme Court of Canada in Tsilhqot'in Nation*

86 It should first be mentioned that the Supreme Court of Canada handed down its decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*] after this Court heard the present matter. The parties were however provided with an opportunity to submit additional written submissions regarding the impact of *Tsilhqot'in Nation*. The case at bar will therefore be examined taking into account the principles set out by the Supreme Court of Canada in *Tsilhqot'in Nation*.

87 *Tsilhqot'in Nation* focuses on the existence and characteristics of Aboriginal title as well as on the Crown's duty to consult. This Supreme Court of Canada decision clarifies the existing principles regarding the manner in which the Crown must deal with the potential existence of Aboriginal title where planned actions could adversely affect that Aboriginal title. In *Tsilhqot'in Nation*, after reviewing the evidence over a 339-day trial spanning a five-year period, Justice Vickers of the British Columbia Supreme Court found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title on a portion of the claim area. The Supreme Court of Canada, for its part, granted a declaration of Aboriginal title over the area at issue.

88 The Supreme Court of Canada further determined that the Crown had breached its duty to consult in relation to certain forestry activities on Aboriginal title lands that occurred without any meaningful consultation with the Tsilhqot'in (*Tsilhqot'in Nation* at paras. 95-96).

(b) *The case at bar*

89 In this case, the federal government agreed in 1979 to negotiate land claims with the Innu of Ekuanitshit for the purpose of concluding a treaty on the basis of the traditional occupation of the lands. Although the land claims of the Innu of Ekuanitshit remain unresolved, the traditional occupation of the lands in question has been accepted as a background by the federal government and by Nalcor, even though Nalcor at first denied this traditional occupation, but later reversed its position.

90 Given the use and occupation of their traditional lands, it is understandable that the Innu of Ekuanitshit were wary when Nalcor presented the hydroelectric Project in issue. In the context of a land claim that had been accepted for negotiation by the government, it is reasonable to think that this Project could a priori affect the yet to

be established rights of the Innu of Ekuanitshit over the lands claimed. This is indeed what led the judge to state at paragraph 104 of his reasons that "the [appellant] has a strong prima facie case for land use rights in the Project area". Pursuant to established principles of case law, the Crown therefore had a duty to consult the Innu of Ekuanitshit and that consultation had to be carried out at a level higher than the bare minimum of the spectrum.

91 As I previously noted, the appellant does not dispute the fact that the Crown did consult the Innu of Ekuanitshit. This is not a situation in which the Crown denied its duty to consult or made a decision that may affect the rights of an Aboriginal group without consultation (*Haida Nation*; *Mikisew Cree*; *Tsilhqot'in Nation*). The issue raised by the appellant and which must be decided is rather whether the consultation process carried out so far by the Crown was adequate and proportionate not only to the strength of the claim but to the seriousness of the adverse impact the contemplated government action would have on the claimed right (*Haida Nation* at para. 39; *Tsilhqot'in Nation* at para. 79).

92 At this stage it is appropriate to examine the unfolding of the process used by the government in its consultation with the Innu of Ekuanitshit. I have already indicated that the federal government acknowledged from the outset its duty to consult. In order to fulfill this duty, the federal government began by establishing its framework for consultation, which set out five dialogue phases between the government and the Aboriginal people prior to the Project being executed. The five phases are the following:

[TRANSLATION]

- Phase I: Initial participation and consultation on the draft Joint Review Panel Agreement, the appointment of the Joint Review Panel's members and the Environmental Impact Study Guidelines;
- Phase II: Joint Review Panel Process leading up to the hearings;
- Phase III: Hearings and drafting of the Joint Review Panel's environmental assessment report;
- Phase IV: Consultation on the Joint Review Panel's environmental assessment report;
- Phase V: Issuance of regulatory permits.

(A. B., Vol. 12, Tab 22 at 4049)

93 This consultation framework provided the Aboriginal people with the opportunity to present their perspective on the following matters:

[TRANSLATION]

- Their traditional knowledge with respect to the environmental effects of the Project;
- The effect that environmental change caused by the Project may have on the current use of lands and resources for traditional purposes;
- The nature and scope of their recognized or asserted Aboriginal rights or treaty rights, the potential impacts of the Crown's activities in relation to the Project on those rights and the appropriate measures to avoid or mitigate those impacts.

(A.B., Vol. 12, Tab 22 at 4040)

94 In this context, the government identified the Aboriginal groups that could be affected by the Project. The Innu of Ekuanitshit were among the groups identified by the government and the judge noted in his decision that the appellant's participation was active and began early in the consultation process, in particular through the environmental assessment process.

(c) *Environmental assessment process*

95 In the case at bar, the appellant submits that the judge erred when he stated that the environmental assessment

process provided under the *CEAA* allowed the Crown to include it in the consultation in order to partially meet its constitutional duties.

96 Within the framework of the environmental assessment process of the Project, the Joint Review Panel was tasked with inviting Aboriginal groups to explain their use of the territory and how the Project would impact them. In carrying out its mandate, the Joint Review Panel was to consider a number of factors following the environmental assessment in accordance with subsections 16(1) and 16(2) of the *CEAA* and sections 57 and 69 of the *Environmental Protection Act* of Newfoundland and Labrador, including [TRANSLATION] "the comments of Aboriginal groups and peoples, the public and interested parties received by the Panel during the (environmental assessment)..." (A.B., Vol. 3 at 909).

97 The Joint Review Panel's mandate with respect to considerations touching on Aboriginal rights did not include making any determinations or interpretations of:

- the validity or strength of any Aboriginal group's claim to Aboriginal rights and title or treaty rights;
- the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
- whether Canada or Newfoundland and Labrador has met their respective duty to consult and accommodate in respect of potential rights recognized and affirmed by section 35 of the *Constitution Act, 1982*;
- the scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

98 In other words, the Joint Review Panel could not determine the strength of the Innu of Ekuanitshit's claim to Aboriginal rights or the scope of the duty to consult but was to consider the Project's impacts on their claimed rights.

99 In *Taku River*, the Supreme Court held that participation in a forum created for other purposes, such as a social and environmental impact assessment process, may nevertheless satisfy the duty to consult if, *in substance*, an appropriate level of consultation is provided. This principle was recently explicitly reiterated in *Little Salmon* at paragraph 39 and in *Carrier Sekani* at paragraphs 55 to 58. The Supreme Court of Canada, per Justice Binnie, further teaches that, under the appropriate circumstances, the environmental assessment process provided under the *CEAA* may be applied by the federal government to carry out consultations and fulfill its duty to consult Aboriginal peoples (*Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557 at para. 45).

100 An invitation on the part of the Crown to an Aboriginal group to participate in an environmental assessment is not necessarily sufficient to discharge the Crown of its duty to consult (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388). The Aboriginal group must be consulted "as a First Nation" and not "as members of the general public" (*Little Salmon* at para. 79). In the case at bar, it would be inaccurate to claim that the appellant did not participate as a First Nation in the environmental assessment process. More specifically, the appellant provided feedback on the contents of Nalcor's impact study, it was invited to make submissions on the draft agreement on the establishment of a Joint Review Panel and to appoint members. The appellant also received financial assistance from the Participant Funding Program of the Environmental Assessment Agency, which provided it with an opportunity to file its written submissions on Nalcor's impact study. The appellant also presented its oral submissions in Sept-Îles in 2011 (judge's reasons at paras. 114-116).

101 Following Phase IV of the consultation process regarding the "consultation on the Joint Review Panel's environmental assessment report", the Joint Review Panel issued its Report. The findings of the Joint Review Panel regarding the Innu of Ekuanitshit and the territory covered by the Project are determinative in this case. Under its mandate, the Joint Review Panel found, among other things, that contemporary land use by the Innu of Ekuanitshit in the Project area was seasonal, sporadic, and of short duration, and that the impacts, although negative, would not be significant. The Joint Review Panel conveyed this in the following terms:

In addition to caribou hunting, the Panel noted that other use of lands and resources by Quebec Aboriginal groups in the Project area appeared to be seasonal, sporadic and of short duration, including incidental harvesting along the Trans Labrador Highway.

The Panel also noted that many land and resource use locations reported to be frequented by Aboriginal persons living in Quebec are outside the Project area and would remain unaffected and accessible.

Based on the information on current land and resource use identified through the environmental assessment process, there are uncertainties regarding the extent and locations of current land and resource use by Quebec Aboriginal groups in the Project area. The Panel recognizes that additional information could be forthcoming during government consultations. To the extent that there is current use of the land in the Project area, the Panel concludes that the Project's impact on Quebec Aboriginals land and resource uses, after implementation of the mitigation measures proposed by Nalcor and those recommended by the Panel, would be adverse, but not significant. (A.B., Vol. 3 at 756)

[Emphasis added.]

102 It is important to note that this finding of the Joint Review Panel is not disputed by the appellant.

103 The government's acceptance to negotiate comprehensive land claims and Nalcor's acknowledgement of the traditional use of the lands claimed supports the finding that, at first glance, a project such as Nalcor's could have adverse impacts on claimed rights and title. However, the factual background and the evidence with respect to the appellant's current use of the land in the Project area are important elements in assessing the strength of the rights but also in identifying the true impact and seriousness of the potentially adverse impacts of the Project on the appellant's rights.

104 As I have noted above, the assessment of whether the duty to consult was met must be carried out on the basis of two inextricably linked elements, namely, the strength of the claim and the severity of the impact of the proposed Project. The Joint Review Panel, after holding its hearings, concluded that the appellant's current interests in the Project area were seasonal, sporadic and of short duration. Furthermore, if the use and occupation of the lands claimed for traditional purposes is not challenged by either the federal government or Nalcor, I would add that the evidence in the record adduced by the appellant in support of the interest of the Innu of Ekuanitshit in the Project zone remains, on the whole, limited.

105 In *Tsilhqot'in Nation*, the evidence revealed, a priori, the existence of a strong Aboriginal title and the existence of that Aboriginal title in the designated area had previously been established by a court following an adversarial debate with regard to proof of title. Once the existence of Aboriginal title has been established, it stands to reason that the level of consultation and accommodation is necessarily higher (*Tsilhqot'in Nation*). In the case at bar, the issue of Aboriginal title was not directly raised by the appellant.

106 Even if it were granted that the Innu of Ekuanitshit exercised traditional use of the land in the Project area, as was noted by the Joint Review Panel in its findings, which are not disputed, the interest the Innu of Ekuanitshit could claim and the seriousness of the adverse impact the proposed Project would have on their claimed rights remain limited.

(d) *Premature challenge*

107 Unsatisfied with the way the consultation was proceeding, the appellant did not wait until the end of the process before applying to the Federal Court for judicial review alleging the insufficient nature of the consultation during the phases prior to Phase V of the consultation framework. The judge concluded that it was premature to determine whether there had been adequate consultation in light of the fact that the consultation was not finished and Phase V of the consultation process had yet to begin. Nevertheless, the judge analyzed the way the consultation had unfolded up to phase V and concluded that it had been adequate. Before this Court, the appellant is challenging the merits of the judge's decision.

108 With respect, I find it difficult to conclude that the judge erred in finding that the appellant had been adequately consulted prior to the government's order being issued. Phase V of the consultation framework confirms that the consultation process between the Crown and the Aboriginal people continues up to the issuance of licences by Transport Canada and Fisheries and Oceans. These licences will authorize Nalcor to undertake certain activities, including the construction of dams that could have consequences on the navigable waters under the *Navigable Waters Protection Act* or on fish habitat under the *Fisheries Act*. But we are not at that point yet. As confirmed and acknowledged by the lawyers of the Attorney General of Canada, the federal government's consultation has not been completed and will remain ongoing until the final phase, namely, the issuance of licences.

109 Also, as explained in *Haida Nation*, the consultation process may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response (see in this regard *Taku River* at para. 42). The Joint Review Panel found that certain studies should be carried out at a later stage in order to better appreciate the concerns of Quebec Aboriginal peoples, including the appellant. There is no doubt that the Joint Review Panel, and as a consequence the respondents in this matter, examined the issue regarding the extent to which the appellant's concerns should be accommodated at the approval stage of the Project and the circumstances under which the appellant could continue to participate in the process so as to ensure that its concerns were taken into consideration and, if required, accommodated. It is therefore expected that at each stage (permits, licences and other authorizations) as well as during the assessment of the adequacy of corrective measures taken by Nalcor and the relevant government authorities to address any adverse consequences of the Project, particularly on the caribou which is of interest to the appellant, the Crown will continue to honourably fulfill its duty to consult the appellant and, if indicated, to accommodate its legitimate concerns (see in this regard *Taku River* at para. 46).

110 In view of the foregoing and taking into account the following: (i) the unfolding of the environmental assessment process, (ii) the consultation process implemented by the government, (iii) the appellant's participation in the process, (iv) the consultation carried out at each stage and (v) the Joint Review Panel's finding on contemporary use and the impacts of the Project, elements that are not disputed by the appellant, it is difficult for me to conclude that the government failed to comply with the established principle of the honour of the Crown. I would like to note, however, that the Crown must continue to honourably fulfill its duty to consult the Innu of Ekuanitshit until the conclusion of the process.

(e) *Evidence and essential issues*

111 Secondary to its main argument regarding the Crown's duty to consult, the appellant further contends that the judge erred by failing to take into account the evidence on several essential issues. I will address each of the issues raised by the appellant in turn.

112 The appellant first notes that the Innu of Ekuanitshit are not named in the government's response to the Joint Review Panel Report as it only refers generally to [TRANSLATION] "Aboriginal groups in Quebec" (A.B., Vol. 2 at 484-531). At the outset, the appellant argues that it is impossible to conclude that the concerns of the Innu of Ekuanitshit were taken seriously or accommodated. However, the appellant's complaint in this regard cannot be accepted. Several Aboriginal groups from Quebec and Labrador participated in the environmental assessment process. In particular, the Appendix of the Joint Review Panel Report lists all of the participants in the public hearings held by the Joint Review Panel. The Innu of Ekuanitshit are listed among the participants. Furthermore, Chapters 9 and 10 of the report contain an analysis of the use of the lands by all of the Aboriginal groups concerned as well as an analysis of their established or asserted rights and titles.

113 The appellant further claims that the Joint Review Panel had suggested a more in-depth consultation that never materialized. However, a careful reading of the Joint Review Panel's findings at pages 185 and 186 of its report (A.B., Vol. 3 at 755-756) in fact shows that the Joint Review Panel specifically stated that additional information could be gathered during the government's consultation process which has yet to be completed.

114 The appellant further insists that the judge erred with respect to the negotiations that were held between the Innu of Ekuanitshit and Nalcor in order to agree to an amount to facilitate its participation in the environmental assessment process. The initial amount proposed by the appellant was approximately \$600,000 and was based on an environment impact study carried out for a hydroelectric project in Quebec, namely, the Romaine project. That study noted, *inter alia*, the small size of the population of the Innu of Ekuanitshit in the 20th century. The study also confirmed that the traditional territory of the Innu of Ekuanitshit was primarily used for hunting, fishing and gathering.

115 For its part, Nalcor was of the view that the sum of \$600,000 was not needed in order to be able to identify land use for traditional purposes by the Innu of Ekuanitshit in the Project area. Nalcor therefore proposed a budget of \$87,500. This sum was rejected as insufficient by the appellant.

116 The judge concluded that, having refused the \$87,500 offered by Nalcor, it was up to the appellant to submit a counter offer, which it apparently did not do (judge's reasons at para. 129). The appellant claims that the counter offer was made and that it can be found in a letter dated November 9, 2010 (A.B., Vol. 18, Tab FF at 6241-6242). In failing to refer to this letter in his reasons, the appellant maintains that the judge committed an error. The appellant then contends that Nalcor replied to its counter offer only three (3) months later, namely, on January 14, 2011 (A.B., Vol. 15, Tab A.1 at 4901) just days before the Joint Review Panel's hearings were about to begin. Essentially, in the appellant's view, there was therefore no follow up to their counter offer.

117 The judge noted, at paragraph 129 of his reasons, that "the Court reviewed the correspondence exchanged in the negotiations", but concluded nonetheless that no counter offer had been made. However, the letter dated November 9, 2010, referenced by the appellant, which proposes that the parties agree on a mandate of an expert is in fact a counter offer. Therefore, I agree with the appellant that the judge wrongly asserted that the appellant had not made a counter offer.

118 Be that as it may, this omission on the judge's part is of no real consequence. Indeed, echoing the conclusions of the Joint Review Panel, the judge at paragraph 84 of his reasons noted that the current land use by Innu of Ekuanitshit in the Project area was "seasonal, sporadic and of short duration" and that he "fails to see how further details would have significantly modified the JRP (Joint Review Panel)'s ultimate conclusion in this instance". The appellant provided no convincing arguments explaining how a response and follow up to the counter offer would have actually altered the conclusion of the Joint Review Panel.

119 Lastly, the appellant suggests that the judge committed another error in his finding regarding the mitigating measures that were to be taken to minimize the impact on the caribou herds in the Project area. The appellant was particularly insistent with regard to the caribou herd at Lac Joseph and on the appellant's request that the federal government refrain from authorizing the Project. The appellant alleges that its request went unanswered and that the Project was later approved. The consultation process would thus be fundamentally flawed.

120 However, the mitigation measures proposed by Nalcor to minimize the impacts of the Project on the caribou were intended for the herd of caribou on Red Wine Mountain, a herd particularly vulnerable to the impacts of the Project (A.B., Vol. 3 at 692-696). The judge was of the view that the mitigating measures applied to the more at risk Red Wine Mountain herd could also be applied to the Lac Joseph herd. The judge wrote as follows at paragraph 132 of his reasons:

[132] Furthermore, while the federal government did not respond to the Applicant's letter regarding the Lac Joseph herd, its concern was addressed by the mitigating measures proposed in the JRP [Joint Review Panel] report and confirmed in the Decision (see NR, vol. 3, p. 638). Nalcor chose to focus on the Red Wine herd in its EIS [Environmental Impact Study] (i.e., to use as its "key indicator") because it was the species most at risk. The mitigating measures introduced to prevent serious harm to the Red Wine caribou can also be applied to the Lac Joseph herd(see N.R., vol. 8, page 1914).

[Emphasis added.]

121 As far as the more specific mitigating measures regarding the caribou and the recommendations contained in the government of Canada's response, the federal government took into account in its decision the measures envisaged by the province with respect to management and recovery of the caribou herds. The conclusions found in the government of Canada's response are clear as far as its role under subsections 37(2.1) and 37(2.2) of the *CEAA* in that it would [TRANSLATION] "require certain mitigating measures, the monitoring of environmental impacts and adaptive management on the part of Nalcor, as well as further studies on the effects over time" (A.B., Vol. 13, Tab 57 at 4306-4308). The appellant adduced no evidence to indicate that this would not be done.

V. Conclusion

122 The appellant has not demonstrated, in the circumstances of this case, that the government neglected its duty to consult prior to the issuance of the order. Therefore, in light of the evidence in the record, I am of the view that the judge did not err in finding that the appellant was consulted in an adequate manner and that the mitigating measures address, for now, its concerns. Indeed, the consultation conducted at this stage, given the strength of the claim and the seriousness of the adverse impact that the government-proposed measure would have on the asserted right, meets "the idea of proportionate balancing" referred to in *Haida Nation*. (*Haida Nation* at para. 39; *Tsilhqot'in Nation* at para. 79).

123 In short, I find that the consultation carried out is adequate for now, to maintain the honour of the Crown and meet its constitutional obligations.

124 For all of these reasons, I would dismiss the appeal. In my opinion, there is no reason to order costs against the appellant given the nature of the dispute and the particular circumstances of the case.

BOIVIN J.A.

GAUTHIER J.A.:— I agree

MAINVILLE J.A.:— I agree

MUSKRAT FALLS INQUIRY

Reply Submissions
made on behalf of the
Innu Nation

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MUSKRAT FALLS INQUIRY

Reply Submissions

made on behalf of the

Innu Nation

Overview

1. The Innu Nation makes the following brief reply to the submissions made by other parties in the Commission of Inquiry Respecting the Muskrat Falls Project (the “Commission” or “Inquiry”).

Innu Nation represents the Innu of Labrador

2. The submissions of the Grand Riverkeeper Labrador Inc. and Labrador Land Protectors (“GRL/LLP”) make reference in several places to the views of Innu people.
3. The Order in Council which established the Inquiry provided for participation by “the established leadership of Indigenous people”. There is no dispute that the Innu Nation is the established leadership of the Innu of Labrador.

Reference Newfoundland and Labrador Regulation 101/17 at article 4 [“Order in Council” or “Terms of Reference”].

4. We wish to caution the Commissioner in reading the submissions of GRL/LLP that where those submissions refer to the views of individual Innu persons, that these views should not be taken to represent the views of Innu Nation or Innu people as a whole. Innu Nation is the representative body formed by the Innu people of Labrador to speak for their collective interests.

Reference *Behn v. Moulton Contracting Ltd*, 2013 SCC 26, paras 26-31.

NCC submissions seek findings about historical use and occupancy

5. The Commission has been clear that it will not determine Aboriginal and Treaty Rights. As such, it has rightly found that questions about the historical use of land are outside the scope of the Inquiry.

Reference Interpretation of the Terms of Reference, para 47.
Hearing Transcript, October 3, 2018, p1.

6. The submissions of the NunatuKavut Community Council (“NCC”) repeatedly make reference to historical land use evidence, and then invite the Commission to make a finding that NCC members “have an ongoing relationship with” certain lands and waters. It is notable that NCC’s submissions make reference in three places to historical land use and occupancy evidence that was adduced on September 18, 2018, prior to the Commission’s clarification on October 3, 2018 that historical land use evidence was not within the scope of the Inquiry. NCC’s submissions in this regard plainly seek to get the Inquiry to exceed its mandate, the boundaries of which have been clearly demarcated by the Commissioner. These NCC submissions must be disregarded.

Reference NCC submissions, para 10-17
Hearing Transcript, October 3, 2018, p1.

NCC submissions seek determinations of Aboriginal rights

7. The Commissioner stated early on in the hearing: “what I’m interested in really, is what consultation took place. I’m not interested in determining whether or not it was the consultation that should have taken place under section 35” of the *Constitution Act, 1982*. This is consistent with the Interpretation of the Terms of Reference (“Interpretation”), which states that the Commission would not be determining any Aboriginal or Treaty Rights.

Reference Interpretation of the Terms of Reference, para 47.
Hearing Transcript, October 3, 2018, p2.

8. NCC's submissions invite the Commission in several places to make findings about the reasonableness of the consultation efforts of the Government of Newfoundland and Labrador ("GNL") and of Nalcor.
9. NCC asks the Commission to distinguish between a determination of consultation adequacy in the sense of the constitutional duty to consult and accommodate in respect of section 35(1) asserted and proven rights, versus a determination of "whether the steps the Province and Nalcor took were reasonable, prudent, and strategic".

Reference NCC submissions, para 21, 24, 31, 39, 47, 58, 65, 70
Hearing Transcript, October 3, 2018, p1.

10. In the Innu Nation's Final Submissions, at paragraphs 30-34 and 38, we gave a broad overview of the types of considerations at law that go to whether the Crown's consultation effort for a particular project was reasonable and adequate.
11. In spite of NCC's attempt to derive a different concept of consultation adequacy, it is notable that all of the factors (save one, which we will deal with subsequently) that NCC urges upon this Commission for the determination of consultation adequacy are factors that are found in the case law on consultation adequacy for the purposes of section 35(1) of the *Constitution Act, 1982*. NCC has simply repackaged the tests for the legal and constitutional duty to consult and is asking the Commission to make a determination of consultation adequacy for the purposes of section 35(1) of the *Constitution Act, 1982*, under the guise of doing something else.
12. NCC urges the following findings upon the Commission:
 - (a) that consultation with NCC was insufficiently early;
 - (b) that funding for NCC consultation was insufficient; and

- (c) that the Province's efforts when consulting with NCC breached Supreme Court of Canada case law requirements for meeting the constitutional duty to consult and accommodate.

Reference NCC submissions, para 30-31, 34, 45-47, 51

13. Each of these factors can be found in the case law on consultation adequacy for purposes of the constitutional duty to consult and accommodate. In fact, one of these factors is a direct allegation that GNL and Nalcor's efforts is inconsistent with Supreme Court of Canada case law. It is impossible for the Commission to perform an analysis of consultation adequacy on the basis proposed by NCC without making findings that implicate legal questions regarding the constitutional duty to consult and accommodate. The findings urged upon the Commission by NCC regarding consultation would unavoidably bring the Commission beyond the mandate set out in its Terms of Reference.

Consultation vs. consultation

14. As outlined above, NCC has repackaged the elements of the constitutional duty to consult and has suggested in oral submissions that this Commission consider them in the context of "small c" consultation.
15. NCC's suggestion that such an approach is possible does not stand up to scrutiny.
16. The Crown has a legal duty to consult Indigenous peoples, and its consultation efforts can be measured against its legal obligations. Indeed, NCC has repeatedly alleged failures of the Crown to meet these legal consultation obligations through judicial review and each time it has failed.

Reference For references to NCC's attempts to judicially review consultation adequacy, please see Final submissions of Innu Nation, paras. 45-51.

17. Briefly, the duty to consult Aboriginal rights holders or rights claimants, and that duty's content, derive from the fact that, as the Supreme Court put it in *Haida Nation*:

... Canada's Aboriginal peoples were here when Europeans came, and were never conquered. ... The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected.

Reference *Haida Nation* at para. 25.

18. What is owed under this duty, and to whom, are complex legal determinations that necessarily involve a rights assessment. The content of the duty flows from the rights affirmed by section 35 of the *Constitution Act, 1982*.

19. The fact that the duty to consult NCC may have been recognized with respect to another project does not lead to a finding that a duty to consult that group is triggered for all projects. Rather, whether a duty is owed is always context-dependent, so while the Crown was found to owe NCC a duty to consult in the context of the construction of the Trans-Labrador Highway, it does not follow that a duty would be owed with respect to the Muskrat Falls Project. A strength of rights claim and impact of project assessment must be done for each project.

Reference *Newfoundland and Labrador v. Labrador Métis Nation*, 2007 NLCA 75.

20. It is impossible to divorce consultation with Aboriginal rights holders or claimants from the constitutional duty to consult, because the type of consultation owed to and undertaken with Aboriginal rights holders and rights claimants versus that undertaken with stakeholders is different in kind. One is reflective of a constitutional duty flowing from the unextinguished rights held by Aboriginal peoples and the honour of the Crown. The other is not. Moreover, it is not possible to measure whether the Crown met its duty to consult an Indigenous community without measuring the strength of its claim to Aboriginal rights – including whether the claim to being an Indigenous rights holding community is a valid one.

Reference *Québec (Procureur général) (Ministère des Ressources naturelles) c. Corneau*, 2015 QCCS 463, paras 24-29.

21. By contrast to the legal obligations of the Crown to consult Indigenous peoples, there is no concomitant duty of the Crown to consult non-Indigenous communities (aside from periodic democratic elections and any statutorily established processes). There is no basis to speak of an obligation of the Crown to consult stakeholder groups.
22. The Commission indicated during closing submissions that it is considering an approach to these issues in which it would look at consultation with Indigenous groups through the same lens as it would consultation taking place with a non-Indigenous stakeholder. This was, to Innu Nation, an unexpected suggestion and approach.
23. We respectfully reiterate the submissions made in oral closings that such an approach is unworkable, for the reasons outlined above: the word consultation can be used in regards to both consultation with Indigenous groups and with stakeholders, but the word's content is deeply and significantly different.
24. Moreover, we respectfully submit that looking at consultation through a lens other than that associated with Indigenous consultation is outside this Commission's scope (except insofar as the Commission may wish to review and recount the evidence it has heard on the experience that various groups have had in being consulted). This is not a comment on the importance of such consultation efforts, but merely a reflection of the limits on the mandate that this Commission has been given.
25. Consultation appears nowhere directly in this Commission's Terms of Reference. Nevertheless, based on section 5(a) of the Order in Council, the Commissioner has interpreted the Inquiry's mandate as extending to inquiries into what consultation

occurred between “the established leadership of the Indigenous people and Nalcor as well as the Government prior to sanction.”

26. The Commissioner’s Interpretation mentions consultation only in the context of consultation with Indigenous leadership.
27. The Commissioner did *not* interpret the Terms of Reference as extending to considerations of consultation done with other organizations or stakeholders, such as GRL/LLP.
28. As such, Innu Nation has entered its evidence in this Commission on the understanding that this Commission would be considering consultation only in the context of consultation with Indigenous-identifying groups. Innu Nation did *not* enter its evidence with any idea that the Commission may turn its mind to the question of obligations to consult non-Indigenous groups.
29. It would be procedurally unfair for this Commission to take the approach suggested by the Commissioner during oral submissions, since this suggested approach was, from Innu Nation’s perspective, a new and unanticipated one.
30. Parties to a public inquiry are entitled to procedural fairness. It is trite law that this principle includes the right to be heard. The right to be heard necessarily involves the right to know the case to be made.

Reference See e.g. *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 SCR 3 at para. 29.

31. For these reasons, we reiterate our submission to the Commission that its mandate with respect to consultation is limited to outlining the experiences with consultation that the Commission has heard in this regard.

Risk Assessment Perspective

32. Separate from the issue of the obligation of GNL or Nalcor to consult, is the question of whether consultation, from a prudential perspective, would have been an effective means of mitigating risks to costs and scheduling of the Project.
33. To the extent that the Commission wishes to consider the prudential question of consultation, we wish to remind the Commission of certain limits on what it can do.
34. First, the Commission has stated that it will not make assessments of land claims.
35. The Commission has heard evidence that Nalcor did indeed turn its mind to the question of whether it should enter into an Impacts and Benefits Agreement (“IBA”) with NCC. It had concluded that it should not, based on an assessment of the strength of NCC’s land claim.
- Reference** Testimony of Gilbert Bennett, Hearing Transcript, February 27, 2019, at p 7.
36. Entering into a reassessment of that decision necessarily involves engaging in a rights analysis. The Commission has specifically stated on several occasions that it will not consider this question.
37. Thus, while the Terms of Reference state that the Commission may consider risk assessments conducted and whether Nalcor took appropriate measures to mitigate the risks identified, the Commission has limited what it can consider in looking at mitigation measures. It cannot look at whether an IBA would have been an appropriate mitigation measure, because it has rightly decided that this question is outside the scope of its mandate.

38. With respect to considering whether some other type of agreement may have been an appropriate mitigation measure, Innu Nation outlines the reasons for which the Commission is similarly constrained below.

Stakeholders and Cost Increases

39. It is conceivable that the protests organized by certain stakeholder groups may have led to project cost and schedule overruns. In that regard, the connection of this evidence to s.4(b) of the Terms of Reference is clear. Indeed, Dr Flyvbjerg had opined that “it does make sense to involve all stakeholders as early as possible. [...]It’s not like these stakeholders will go away peacefully and say: Okay, we weren’t taken into account, we accept that and then we’ll go home and do something else. That’s not what happens. And it’s much more expensive to take these things into account if you have to do it later on in the process.” NCC relies on these remarks in its submissions.

Reference

Testimony of Dr Flyvbjerg, Hearing Transcript, September 17, 2018, p. 22.
NCC Submissions dated August 9, 2019, para. 29 [NCC Submissions].

40. The public policy proposition put forward here is a weighty one. It is that any stakeholder group who threatens to disrupt a project should be mollified by an agreement. It is a decidedly different proposition than the premise behind consultation of Indigenous peoples, which is that recognition of Indigenous rights is an unfinished project in Canadian Confederation, and that development projects must take asserted Indigenous rights into account while the recognition of Indigenous rights is being litigated or negotiated.
41. The implications of Dr Flyvbjerg’s views are considerable. Taken to their extreme, they would upend the premise of representative democracy in which elected governments make policy decisions, some of which may negatively affect stakeholder groups.

42. Certain groups, such as Indigenous peoples, have legal rights which must be respected in the development process. But for others, representative democracy means having to conform to decisions made by the government elected by the majority of voters, even if they disagree with those decisions.
43. Innu Nation counsel sought to put the above policy proposition to the witness for the GNL, Mr. Aubrey Gover, because it is so weighty and because the Commission would have benefitted from hearing a perspective different from Dr. Flyvbjerg's on the matter. However, the Commissioner stated that "[I d]on't really care about the answer to that question. [...] So I don't really want him to answer it." Based on this exchange, Innu Nation reasonably concluded that the Commissioner viewed this subject as outside of the scope of the Inquiry. If Innu Nation had been permitted the right to fully explore this topic, it would have cross-examined a number of witnesses, including Mr Gover, on it.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018, p. 41.

44. It would be unfair for the Commission to make findings on the matter of the advisability of reaching agreements about development projects with stakeholder groups (including those claiming Indigenous identity) when Innu Nation was prevented from adducing evidence on the subject.

Insufficient evidence to determine whether costs stemming from NCC protests could have been reduced

45. As submitted above, the Commission should not make any findings about the advisability of IBAs or of other kinds of agreements with NCC. If the Commission disagrees with this position, we submit that the record is insufficient for the Commission to make any

findings regarding whether an IBA or other agreement with NCC would have saved the Project money compared to the cost of protests.

46. The only finding regarding consultation with NCC which could be within the scope of the Commission's mandate is the proposition that a different approach with NCC could have reduced project costs or reduced delays. This is the sole factor raised by NCC that does not go to consultation adequacy under s. 35(1) of the *Constitution Act, 1982*.

Reference NCC Submissions, para 71-75.

47. It appears from NCC's submissions that NCC acknowledges that its protests (and others) may have increased project costs and led to project delays. However, they also point out that the evidence is inconclusive as to the amount of increased costs and delays that NCC might have caused.

48. Although NCC faults Nalcor for not reaching an IBA with them, we also do not know the amount of benefits that NCC would have sought and accepted under an IBA.

Reference NCC Submissions, para 36.

49. Not knowing either of these pieces of evidence, it is impossible to know which would have been a costlier option: an agreement with NCC, or the cost of NCC protests.

50. The rest of the Commission's work has proceeded on the basis of analytical rigour based on detailed quantitative evidence, fully explored through oral examination by all parties. No comparable evidence has been adduced going to either the cost and schedule overruns caused by NCC protests, or the cost to the Project of a prior agreement between Nalcor and NCC. No reliable inferences can be drawn based on the evidence before the Commission that goes to the merits of entering into a prior agreement with NCC.

Innu Nation not able to cross-examine on NCC Community Development Agreement

51. NCC submits to this Commission that Nalcor and GNL's engagement with them was insufficient. As their own submissions acknowledge, one of the key elements of Nalcor's relationship with NCC was the Community Development Agreement ("CDA").

Reference NCC Submissions, para 97-101.

52. Innu Nation counsel sought to put the CDA on the record during the appearance of NCC President Todd Russell in October 2018, so as to allow him to comment on why he viewed the CDA as being insufficient. However, the Commissioner ruled at that time that the CBA should not go on the record, and thus no opportunity was afforded to the parties to cross-examine Mr. Russell on the basis of the CDA at that time.

Reference Testimony of Todd Russell, Hearing Transcript, October 4, 2018, p. 10.

53. Innu Nation only became aware that the CDA had been added to record in February 2019 during oral submissions in August 2019, and thus did not have the opportunity to cross-examine Mr. Russell on this question when he appeared again in February 2019. Innu Nation was not advised that the CDA had been entered into evidence, despite having specifically requested that it be added into evidence in October 2018.

54. Given this situation, it would be unfair for the Commissioner to find that consultation efforts for NCC were insufficient given that no party was cross-examined Mr. Russell on the CBA, despite Innu Nation's explicit desire to do so

NCC is asking the Commission to recommend an IBA for them

55. The Commission has clearly stated that it will not recommend an IBA.

Reference Testimony of Aubrey Gover, Hearing Transcript, October 3, 2018, p 16, 41.

56. NCC urges the Commission to make recommendations to: implement a consultation policy regarding NCC; fund NCC's work on that policy; require the Province to mitigate all concerns raised by NCC about projects planned on land claimed by it; and to proceed with no projects on land claimed by NCC without NCC's consent.

Reference NCC Submissions, paras 109-115.

57. These recommendations make up the constituent elements of an IBA. NCC is urging the Commission to do what it said it would not do. This attempt must be rejected by the Commission.

58. Whether an IBA is justified in any circumstances depends in large measure on the strength of the claim of any group to having an Indigenous right. Making the recommendation that NCC seeks would put the Commission in the place of concluding that NCC's claims to Indigenous rights have *prima facie* merit. The Commission must refrain from doing so.

Conclusion

59. It is squarely within the Commission's mandate to comment on each party's experiences of consultation by Nalcor and GNL. However, to make the findings and recommendations urged upon the Commission by NCC would bring the Commission far beyond the bounds of its mandate. These boundaries were clearly and repeatedly articulated by the Commission during the hearing and must be respected by the Commission in its findings as well.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Toronto, Ontario, this 16th day of August, 2019.

OLTHUIS KLEER TOWNSHEND LLP

A handwritten signature in black ink, appearing to read 'Senwung Luk', with a stylized, cursive script.

Senwung Luk

A handwritten signature in black ink, appearing to read 'Julia Brown', with a stylized, cursive script.

Julia Brown

TAB 2

 [Behn v. Moulton Contracting Ltd., \[2013\] 2 S.C.R. 227](#)

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: December 11, 2012;

Judgment: May 9, 2013.

File No.: 34404.

[\[2013\] 2 S.C.R. 227](#) | [\[2013\] 2 R.C.S. 227](#) | [\[2013\] S.C.J. No. 26](#) | [\[2013\] A.C.S. no 26](#) | [2013 SCC 26](#)

Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn and George Behn, Appellants; v. Moulton Contracting Ltd. and Her Majesty The Queen in Right of the Province of British Columbia, Respondents, and Attorney General of Canada, Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation, Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority, Chief Sally Sam Maiyoo Keyoh Society, Council of Forest Industries, Alberta Forest Products Association and Moose Cree First Nation, Interveners.

(43 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Civil procedure — Standing — Aboriginal law — Treaty rights — Duty to consult — Individual members of Aboriginal community asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether individual members have standing to assert collective rights in defence.

[page228]

Civil procedure — Abuse of process — Motion to strike pleadings — Members of Aboriginal community blocking access to logging site and subsequently asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether raising defences constituted abuse of process.

Summary:

After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation in British Columbia, a number of individuals from that First Nation erected a camp that,

in effect, blocked the company's access to the logging sites. The company brought a tort action against the members of the Aboriginal community, who argued in their defences that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated their treaty rights. The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community did not have standing to assert collective rights in their defence; only the community could invoke such rights. They also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the members of the community had failed to challenge the validity of the licences when they were issued.

Held: The appeal should be dismissed.

The duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them. While an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its Aboriginal or treaty rights, here, it does not appear from the pleadings that the First Nation authorized the community members to represent it for the purpose of contesting the legality of the licences. Given the absence of an allegation of authorization, the members cannot assert a breach of the duty to consult on their own.

Certain Aboriginal and treaty rights may have both collective and individual aspects, and it may well be that in appropriate circumstances, individual members can assert them. Here, it might be argued that because of a connection between the rights at issue and a specific geographic location within the First Nation's territory, the community members have a greater interest in the [page229] protection of the rights on their traditional family territory than do other members of the First Nation, and that this connection gives them a certain standing to raise the violation of their particular rights as a defence to the tort claim. However, a definitive pronouncement in this regard cannot be made in the circumstances of this case.

Raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process in the circumstances of this case. Neither the First Nation nor the community members had made any attempt to legally challenge the licences when the Crown granted them. Had they done so, the logging company would not have been led to believe that it was free to plan and start its operations. Furthermore, by blocking access to the logging sites, the community members put the logging company in the position of having either to go to court or to forego harvesting timber after having incurred substantial costs. To allow the members to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations.

Cases Cited

Referred to: *Garland v. Consumers' Gas Co.*, [2004 SCC 25](#), [\[2004\] 1 S.C.R. 629](#); *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#), [\[2004\] 3 S.C.R. 511](#); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), [\[2005\] 3 S.C.R. 388](#); *Beckman v. Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), [\[2010\] 3 S.C.R. 103](#); *R. v. Kapp*, [2008 SCC 41](#), [\[2008\] 2 S.C.R. 483](#); *Delgamuukw v. British Columbia*, [\[1997\] 3 S.C.R. 1010](#); *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004 SCC 74](#), [\[2004\] 3 S.C.R. 550](#); *Komoyue Heritage Society v. British Columbia (Attorney General)*, [2006 BCSC 1517](#), 55 Admin. L.R. (4) 236; *R. v. Sparrow*, [\[1990\] 1 S.C.R. 1075](#); *R. v. Sundown*, [\[1999\] 1 S.C.R. 393](#); *R. v. Marshall*, [\[1999\] 3 S.C.R. 533](#); *R. v. Sappier*, [2006 SCC 54](#), [\[2006\] 2 S.C.R. 686](#); *Toronto (City) v. [page230] C.U.P.E., Local 79*, [2003 SCC 63](#), [\[2003\] 3 S.C.R. 77](#); *R. v. Power*, [\[1994\] 1 S.C.R. 601](#); *R. v. Conway*, [\[1989\] 1 S.C.R. 1659](#); *R. v. Scott*, [\[1990\] 3 S.C.R. 979](#); *Canam Enterprises Inc. v. Coles* (2000), [51 O.R. \(3d\) 481](#), rev'd [2002 SCC 63](#), [\[2002\] 3 S.C.R. 307](#); *Blencoe v. British Columbia (Human Rights Commission)*, [2000](#)

[SCC 44](#), [\[2000\] 2 S.C.R. 307](#).

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJ.A.), [2011 BCCA 311](#), 20 B.C.L.R. (5) 35, [309 B.C.A.C. 15](#), 523 W.A.C. 15, [\[2011\] 3 C.N.L.R. 271](#), 335 D.L.R. (4) 330, [\[2011\] B.C.J. No. 1271](#) (QL), [2011 CarswellBC 1693](#), affirming a decision of Hinkson J., [2010 BCSC 506](#), [\[2010\] 4 C.N.L.R. 132](#), [\[2010\] B.C.J. No. 665](#) (QL), [2010 CarswellBC 889](#). Appeal dismissed.

Counsel

Robert J. M. Janes and *Karey M. Brooks*, for the appellants.

Charles F. Willms and *Bridget Gilbride*, for the respondent Moulton Contracting Ltd.

[page231]

Keith J. Phillips and *Joel Oliphant*, for the respondent Her Majesty the Queen in Right of the Province of British Columbia.

Brian McLaughlin, for the intervener the Attorney General of Canada.

Allisun Rana and *Julie Tannahill*, for the interveners Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation.

John Hurley and *François Dandonneau*, for the interveners the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

Christopher G. Devlin and *John W. Gailus*, for the interveners Chief Sally Sam and the Maiyoo Keyoh Society.

John J. L. Hunter, Q.C., *Mark S. Oulton* and *Stephanie McHugh*, for the interveners the Council of Forest Industries and the Alberta Forest Products Association.

Jean Teillet and *Nuri G. Frame*, for the intervener the Moose Cree First Nation.

The judgment of the Court was delivered by

LeBEL J.

I. Introduction - Overview

1 This appeal raises issues of standing and abuse of process in the context of relations between members of an Aboriginal community, a logging company, and a provincial government. After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation ("FNFN") in British Columbia, a number of individuals from that First Nation erected a camp that, in effect, blocked the company's access to the logging sites. The company brought a tort action against these members of the Aboriginal community, who argued in their defence that the licences were void because they had been [page232] issued in breach of the constitutional duty to consult and because they violated the community members' treaty rights.

2 The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community (the "Behns") did not have standing to assert collective rights in their defence; only the community could raise such rights. The courts below also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the Behns had failed to challenge the validity of the licences when they were issued.

3 The Court is asked to consider in this appeal whether an individual member or group of members of an Aboriginal community can raise a breach of Aboriginal and treaty rights as a defence to a tort action and, if so, in what circumstances. But, as this question of standing is not determinative for the purposes of this appeal, the Court must also decide whether the doctrine of abuse of process applies in this case.

4 For the reasons that follow, I would dismiss the appeal.

II. Facts

5 As this is an appeal from a decision on a motion to strike pleadings, the following facts are taken from the pleadings. The Behns are, with one exception, members of the FNFN, a "band" within the meaning of the *Indian*

Act, *R.S.C. 1985, c. I-5*. The FNFN is a party to Treaty No. 8 of 1899, which covers an area comprising parts of Alberta, British Columbia, Saskatchewan and the Northwest Territories. The Behns allege that they have traditionally hunted and trapped on a part of the FNFN's territory that has historically been allocated to their family.

[page233]

6 Moulton Contracting Ltd. ("Moulton") is a company incorporated pursuant to the laws of British Columbia. On June 27, 2006, the British Columbia Ministry of Forests ("MOF") granted Moulton two timber sale licences and a road permit (the "Authorizations") pursuant to the *Forest Act, R.S.B.C. 1996, c. 157*. These Authorizations entitled Moulton to harvest timber on two parcels of land within the FNFN's territory, both of which are within the Behn family trapline. The Behns stated in their Amended Statement of Defence that the FNFN manages its territory by allocating parts of it (called traplines) to specific families:

While the rights provided for in the Treaty # 8 extended throughout the tract described in the treaty, most of the aboriginal people comprising the Fort Nelson First Nation traditionally ordered themselves so that the rights to hunt and trap set out in Treaty 8 were exercised in tracts of land associated with different extended families. These extended families were headed by a headman. [A.R., at p. 89]

7 Before granting the Authorizations, the MOF had contacted representatives of the FNFN and individual trappers, including George Behn, the headman of the Behn family, in developing and amending its forest development plan ("FDP"). The MOF contacted the FNFN in August 2004 and individual trappers, including Mr. Behn, in September 2004 to notify them that additional harvesting blocks were being proposed. The trappers it contacted were invited to advise it of any concerns they had or provide it with comments by October 20, 2004. MOF officials met a representative of the FNFN in November 2004 to discuss consultation on the proposed amendment to the FDP. The issue of funding to enable the FNFN to provide information to the MOF was discussed at that meeting. Funding was ultimately refused. On January 31, 2005, the MOF wrote to the FNFN to advise it that archaeological impact assessments would be conducted for certain areas proposed for harvesting in the amendment to the FDP. Two archaeological impact assessments were completed in August 2005, and copies of them were delivered to the FNFN. The MOF and the FNFN met again [page234] on September 21, 2005 to discuss the proposed amendment further.

8 The MOF approved the amendment to the FDP. On June 2, 2006, it put the two timber sale licences relevant to this appeal up for sale. After granting the Authorizations to Moulton, the MOF wrote to George Behn on June 28, 2006, to advise him that Moulton had been awarded licences to harvest timber within his trapping area. In that letter, George Behn was advised to contact Moulton directly to confirm the date its harvesting operations were to commence. The MOF again wrote to Mr. Behn on July 17, 2006, to advise him that the operations would begin on August 1, 2006. On August 31, 2006, George Behn wrote to the MOF, requesting that the Authorizations granted to Moulton be cancelled and seeking consultation. No copy of this letter was sent to Moulton.

9 Between September 19 and September 22, 2006, Moulton started moving its equipment to one of the two sites to which the Authorizations applied. On September 25, 2006, the MOF notified Moulton that there was a potential problem with George Behn. The MOF requested that Moulton move its operations to the second site. Moulton replied that it could not do so because it had commitments to a mill to deliver timber from the first site.

10 In early October 2006, the Behns erected a camp on the access road leading to the parcels of land to which the Authorizations applied. The camp blocked access to the land where Moulton was authorized to harvest timber.

11 On November 23, 2006, Moulton filed a statement of claim in the British Columbia Supreme Court against the Behns, Chief Logan on behalf of herself and the FNFN, and the Crown. Moulton claimed damages from the Behns for interference with contractual relations. In their statement of [page235] defence, the Behns denied that their conduct was unlawful. They alleged that the Authorizations were illegal for two reasons. First, the Crown had failed to fulfil its duty to consult in issuing the Authorizations. Second, the Authorizations infringed their hunting and trapping rights under Treaty No. 8.

12 Moulton applied under Rule 19(24) of the *Supreme Court Rules, B.C. Reg. 221/90* [repealed] (now Rule 9-5(1), *Supreme Court Civil Rules, B.C. Reg. 168/2009*), to have a number of paragraphs struck out of the Behns' statement of defence on the ground (1) that it was plain and obvious that they did not disclose a reasonable defence, or (2) that the relief being sought in them constituted an abuse of process. In substance, the paragraphs Moulton sought to have struck related to the Behns' allegations that the Authorizations were invalid because they had been issued in breach of the Crown's duty to consult and because they violated the Behns' treaty rights, and to their allegations that their acts were neither illegal nor tortious. The Crown supported Moulton's application and further submitted that the Behns lacked standing to raise a breach of the duty to consult or of treaty rights, as only the FNFN had such standing.

III. Judicial History

A. *British Columbia Supreme Court, [2010 BCSC 506](#), [\[2010\] 4 C.N.L.R. 132](#)*

13 Hinkson J. held that the Behns lacked standing to raise the defences pertaining to the duty to consult and treaty rights. He stated that although Aboriginal and treaty rights are exercised by individuals, they are collective in nature. As a result, they are not possessed by nor do they reside with individuals. He mentioned that collective rights can be asserted by individuals only if the individuals are authorized to do so by the collective. Hinkson J. found that the FNFN had not authorized the Behns to assert these rights.

[page236]

14 Hinkson J. also held that the impugned paragraphs in which the Behns submitted that the Authorizations were invalid had to be struck out as an abuse of process under Rule 19(24) of the *Supreme Court Rules*. He reasoned that the Behns could not be permitted to introduce the subject matter of the invalidity of the Authorizations now in their statement of defence, as they should instead have applied for judicial review.

15 It should be noted that the trial then proceeded from September to November 2011 in the British Columbia Supreme Court on the basis of the paragraphs that had survived the motion to strike. The trial judge has reserved his judgment until this Court disposes of this appeal.

B. *British Columbia Court of Appeal, [2011 BCCA 311](#), [20 B.C.L.R. \(5th\) 35](#)*

16 Saunders J.A., writing for the Court of Appeal, agreed with Hinkson J. that the Behns lacked standing to assert that the duty to consult owed to the FNFN had not been met and that collective rights had been infringed by the issuance of the Authorizations. She said, at para. 39, that "an attack on a non-Aboriginal party's rights, on the basis of treaty or constitutional propositions, requires authorization by the collective in whom the treaty and constitutional rights inhere". In this case, the Behns had received no such authorization by the FNFN. Saunders J.A. was careful to point out that she was not suggesting that collective rights could never provide a defence to individual members of an Aboriginal community.

17 Saunders J.A. also concluded that the defences raised by the Behns constituted an impermissible collateral attack upon the Authorizations granted to Moulton. She added that this conclusion was not incompatible with the proper administration of justice, since the FNFN, as a collective, had the capacity to challenge the Authorizations through [page237] a number of legal avenues. She therefore upheld Hinkson J.'s conclusion that the impugned defences constituted an abuse of process.

IV. Analysis

A. *Issues*

18 Three issues must be addressed in this appeal. First, can the Behns, as individual members of an Aboriginal community, assert a breach of the duty to consult? This issue raises the question to whom the Crown owes a duty to consult. Second, can treaty rights be invoked by individual members of an Aboriginal community? These two issues relate to standing.

19 The third issue relates to abuse of process. Does it amount to an abuse of process for the Behns to challenge the validity of the Authorizations now that they are being sued by Moulton after having failed to take legal action when the Authorizations were first issued even though they objected to their validity at the time?

B. *Positions of the Parties*

(1) Behns

20 The Behns submit that the Court of Appeal erred in holding that they lacked standing to assert defences based on treaty rights and that challenging the validity of the Authorizations constituted an impermissible collateral attack. The Behns contend that the principles related to standing apply to the assertion of a claim, not of a defence. As a result, they do not apply in this case, since the Behns are simply defending against an action. In the alternative, the Behns assert that they have standing because, as members of the FNFN, they have a substantial and direct interest in their rights under Treaty No. 8.

21 On the collateral attack issue, the Behns argue, relying on *Garland v. Consumers' Gas Co.*, [page238] [2004 SCC 25](#), [\[2004\] 1 S.C.R. 629](#), that the defences they assert do not constitute a collateral attack, since they are not parties to the Authorizations. Alternatively, they submit that, if the impugned paragraphs do constitute a collateral attack, the attack is permissible, because the legislature did not intend that any attempt to question the lawfulness of the Authorizations could be made only by applying for judicial review.

22 Finally, the Behns submit that the principle of the rule of law will be violated if they cannot assert their defences. They contend that whether their conduct was lawful cannot be determined without also addressing the lawfulness of the Authorizations.

(2) Moulton

23 Moulton responds that the Behns have no standing to raise a defence based on Aboriginal or treaty rights, because only the FNFN, as the collective, can assert a claim that these rights have been infringed. Moulton also contends that the Crown's duty to consult is owed to the collective, not to individual members of the collective. Responding to the Behns' submission that they have standing because they are only seeking the dismissal of the action, Moulton submits that they are relying on an affirmative defence that requires an order declaring the Authorizations to be invalid. Moulton adds that the activity for which the Behns are now being sued - erecting and participating in a blockade - is not a right protected under Treaty No. 8. Finally, since the Behns could have challenged the legality of the Authorizations by applying for judicial review when they were issued, Moulton submits that it amounts to a collateral attack for the Behns to challenge their validity now as a defence to a tort claim.

(3) Crown

24 According to the Crown, the collective nature of Aboriginal and treaty rights means that claims in relation to such rights must be brought by, or on behalf of, the Aboriginal community. Although the Crown recognizes the Behns' interest in their [page239] treaty rights, it submits that their position on this issue disregards two factors: (1) the issue arising in the litigation concerns a defence to a claim related to a blockade, not to the exercise of hunting or trapping rights; and (2) the FNFN is named as a party to the proceedings and therefore represents the community in them. The Crown further submits that having a substantial and direct interest in a treaty right does not entitle an individual to bring a treaty rights claim or defence.

25 On whether the impugned paragraphs constitute an impermissible collateral attack, the Crown submits that the question is whether the claimant is content to let the government's decision stand. In the instant case, the impugned defences raise an unequivocal challenge to the validity and legal force of the Authorizations. Furthermore, the Crown submits that the Behns could have challenged the validity of the Authorizations by applying for judicial review instead of blockading a road.

C. Standing

(1) Duty to Consult

26 In defence to Moulton's claim, as I mentioned above, the Behns argue, *inter alia*, that their conduct was not illegal, because the Crown had issued the Authorizations in breach of the duty to consult and the Authorizations were therefore invalid. The question that arises with respect to this particular defence is whether the Behns can assert the duty to consult on their own in the first place.

27 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#), [\[2004\] 3 S.C.R. 511](#), this Court confirmed that the Crown has a duty to consult Aboriginal peoples and explained the scope of application of that duty in respect of Aboriginal rights, stating that "consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed [page240] is an essential corollary to the honourable process of reconciliation that s. 35 [of the *Constitution Act, 1982*] demands": para. 38. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), [\[2005\] 3 S.C.R. 388](#), the Court held that the duty to consult applies in the context of treaty rights: paras. 32-34. The Crown cannot in a treaty contract out of its duty to consult Aboriginal peoples, as this duty "applies independently of the expressed or implied intention of the parties": *Beckman v. Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), [\[2010\] 3 S.C.R. 103](#), at para. 61.

28 The duty to consult is both a legal and a constitutional duty: *Haida Nation*, at para. 10; *R. v. Kapp*, [2008 SCC 41](#), [\[2008\] 2 S.C.R. 483](#), at para. 6; see also J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-38. This duty is grounded in the honour of the Crown: *Haida Nation*, *Beckman*, at para. 38; *Kapp*, at para. 6. As Binnie J. said in *Beckman*, at para. 44, "[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose." The duty to consult is part of the process for achieving "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw v. British Columbia*, [\[1997\] 3 S.C.R. 1010](#), at para. 186, quoting *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#), at para. 31; *Haida Nation*, at para. 17; see also D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009).

29 The duty to consult is triggered "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": *Haida Nation*, at para. 35. The content of the duty varies depending on the context, as it lies on a spectrum of different actions to be taken by the Crown: *Haida Nation*, at para. 43. An important [page241] component of the duty to consult is a requirement that good faith be shown by both the Crown and the Aboriginal people in question: *Haida Nation*, at para. 42. Both parties must take a reasonable and fair approach in their dealings. The duty does not require that an agreement be reached, nor does it give Aboriginal peoples a veto: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004 SCC 74](#), [\[2004\] 3 S.C.R. 550](#), at paras. 2 and 22; *Haida Nation*, at para. 48.

30 The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, [2006 BCSC 1517](#), [55 Admin. L.R. \(4th\) 236](#).

31 In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other

person to represent it for the purpose of contesting the legality of the Authorizations. I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal.

[page242]

(2) Aboriginal or Treaty Rights

32 The Behns also challenge the legality of the Authorizations on the basis that they breach their rights to hunt and trap under Treaty No. 8. This is an important issue, but a definitive pronouncement in this regard cannot be made in the circumstances of this case. I would caution against doing so at this stage of the proceedings and of the development of the law.

33 The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

34 Some interesting suggestions have been made in respect of the classification of Aboriginal and treaty rights. For example, the interveners Grand Council of the Crees and Cree Regional Authority propose in their factum, at para. 14, that a distinction be made between three types of Aboriginal and treaty rights: (a) rights that are exclusively collective; (b) rights that are mixed; and (c) rights that are predominantly individual. These interveners also attempt to classify a variety of rights on the basis of these three categories.

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35 These suggestions bear witness to the diversity of Aboriginal and treaty rights. But I would not, on the occasion of this appeal and at this stage of the development of the law, try to develop broad categories for these rights and to slot each right in the appropriate one. It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.

36 In this appeal, the Behns assert in their defence that the Authorizations are illegal because they breach their treaty rights to hunt and trap. They recognize that these rights have traditionally been held by the FNFN, which is a party to Treaty No. 8. But they also allege that specific tracts of land have traditionally been assigned to and associated with particular family groups. They assert in their pleadings that the Authorizations granted to Moulton are for logging in specific areas within the territory traditionally assigned to the Behns, where they have exercised their rights to hunt and trap. On the basis of an allegation of a connection between their rights to hunt and trap and a specific geographic location within the FNFN territory, the Behns assert that they have a greater interest in the protection of hunting and trapping rights on their traditional family territory than do other members of the FNFN. It

might be argued that this connection gives them a certain standing to raise the violation of their particular rights as a defence to Moulton's tort claim. But a final decision on this issue of standing is not necessary in this appeal, because another issue will be determinative, that of abuse of process.

[page244]

D. Abuse of Process

37 The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they had standing, themselves or through the FNFN, they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move.

38 Had the Behns acted when the Authorizations were granted, clause 9.00 of the timber sale agreements provided that the Timber Sales Manager had the power to suspend the Authorizations until the legal issues were resolved: trial judgment, at para. 16. Moulton would not then have been led to believe that it was free to plan and start its logging operations. Moreover, legal issues like standing could have been addressed at the proper time and in the appropriate context.

39 In *Toronto (City) v. C.U.P.E., Local 79*, [2003 SCC 63](#), [\[2003\] 3 S.C.R. 77](#), Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [\[1994\] 1 S.C.R. 601](#), at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [\[1989\] 1 S.C.R. 1659](#), [page245] at p. 1667, as "oppressive treatment". In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [\[1990\] 3 S.C.R. 979](#), at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

40 The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* ([2000](#)), [51 O.R. \(3d\) 481](#) (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved ([2002 SCC 63](#), [\[2002\] 3 S.C.R. 307](#)), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [(C.A.)], at p. 358

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added.]

41 As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used [page246] to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000 SCC 44](#),

[2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

42 In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

[page247]

V. Conclusion

43 For these reasons, I would dismiss the appeal with costs to the respondent Moulton.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellants: Janes Freedman Kyle Law Corporation, Vancouver.

Solicitors for the respondent Moulton Contracting Ltd.: Fasken Martineau DuMoulin, Vancouver.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitors for the interveners Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation: Rana Law, Calgary.

Solicitors for the interveners the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority: Gowling Lafleur Henderson, Montréal.

Solicitors for the interveners Chief Sally Sam and the Maiyoo Keyoh Society: Devlin Gailus, Victoria.

Solicitors for the interveners the Council of Forest Industries and the Alberta Forest Products Association: Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the intervener the Moose Cree First Nation: Pape Salter Teillet, Toronto.

TAB 3

 [Haida Nation v. British Columbia \(Minister of Forests\), \[2004\] 3 S.C.R. 511](#)

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Heard: March 24, 2004;

Judgment: November 18, 2004.

File No.: 29419.

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[\[2004\] 3 S.C.R. 511](#) | [\[2004\] 3 R.C.S. 511](#) | [\[2004\] S.C.J. No. 70](#) | [\[2004\] A.C.S. no 70](#) | [2004 SCC 73](#)

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia, appellants; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents. And between Weyerhaeuser Company Limited, appellant; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements, interveners.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

Summary:

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the

government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which [page513] may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably [page514] with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which predated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: Delgamuukw v. British Columbia, [\[1997\] 3 S.C.R. 1010](#); referred to: RJR -- MacDonald Inc. v. Canada (Attorney General), [\[1994\] 1 S.C.R. 311](#); R. v. Van der Peet, [\[1996\] 2 S.C.R. 507](#); R. v. Badger, [\[1996\] 1 S.C.R. 771](#); R. v. Marshall, [\[1999\] 3 S.C.R. 456](#); Wewaykum Indian Band v. Canada, [\[2002\] 4 S.C.R. 245](#), [2002 SCC 79](#); R. v. Sparrow, [\[1990\] 1 S.C.R. 1075](#); R. v. Nikal, [\[1996\] 1 S.C.R. 1013](#); R. v. Gladstone, [\[1996\] 2 S.C.R. 723](#); [page515] Cardinal v. Director of Kent Institution, [\[1985\] 2 S.C.R. 643](#); Baker v. Canada (Minister of Citizenship and Immigration), [\[1999\] 2 S.C.R. 817](#); TransCanada Pipelines Ltd. v. Beardmore (Township) [\(2000\)](#), [186 D.L.R. \(4th\) 403](#); Mitchell v. M.N.R., [\[2001\] 1 S.C.R. 911](#), [2001 SCC 33](#); Halfway River First Nation v. British Columbia (Ministry of Forests), [\[1997\] 4 C.N.L.R. 45](#), aff'd [\[1999\] 4 C.N.L.R. 1](#); Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) [\(2003\)](#), [19 B.C.L.R. \(4th\) 107](#); R. v. Marshall, [\[1999\] 3 S.C.R. 533](#); R. v. Sioui, [\[1990\] 1 S.C.R. 1025](#); R. v. Côté, [\[1996\] 3 S.C.R. 139](#); R. v. Adams, [\[1996\] 3 S.C.R. 101](#); Guerin v. The Queen, [\[1984\] 2 S.C.R. 335](#); St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46; Paul v. British Columbia (Forest Appeals Commission), [\[2003\] 2 S.C.R. 585](#), [2003 SCC 55](#); Law Society of New Brunswick v. Ryan, [\[2003\] 1 S.C.R. 247](#), [2003 SCC 20](#); Canada (Director of Investigation and Research) v. Southam Inc., [\[1997\] 1 S.C.R. 748](#).

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History and Disposition:

APPEALS from a judgment of the British Columbia Court of Appeal, [\[2002\] 6 W.W.R. 243](#), [164 B.C.A.C. 217](#), 268 W.A.C. 217, [99 B.C.L.R. \(3d\) 209](#), [44 C.E.L.R. \(N.S.\) 1](#), [\[2002\] 2 C.N.L.R. 121](#), [\[2002\] B.C.J. No. 378](#) (QL), [2002 BCCA 147](#), [page516] with supplementary reasons [\(2002\)](#), [216 D.L.R. \(4th\) 1](#), [\[2002\] 10 W.W.R. 587](#), [172 B.C.A.C. 75](#), 282 W.A.C. 75, [5 B.C.L.R. \(4th\) 33](#), [\[2002\] 4 C.N.L.R. 117](#), [\[2002\] B.C.J. No. 1882](#) (QL), [2002 BCCA 462](#), reversing a decision of the British Columbia Supreme Court [\(2000\)](#), [36 C.E.L.R. \(N.S.\) 155](#), [\[2001\] 2](#)

[C.N.L.R. 83](#), [\[2000\] B.C.J. No. 2427](#) (QL), [2000 BCSC 1280](#). Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

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E. Ria Tzimas and Mark Crow, for the intervener the Attorney General of Ontario.

Pierre-Christian Labeau, for the intervener the Attorney General of Quebec.

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Allan Donovan, for the intervener the Haisla Nation.

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Hugh M. G. Braker, Q.C., Anja Brown, Arthur C. Pape and Jean Teillet, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and Dominique Nouvet, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and Kevin O'Callaghan, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their [page518] lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land -- title which they are in the process of trying to prove -- and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the [page519] Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [\[2001\] 2 C.N.L.R. 83](#), [2000 BCSC 1280](#). The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: [\(2002\), 99 B.C.L.R. \(3d\) 209](#), [2002 BCCA 147](#), with supplementary reasons [\(2002\), 5 B.C.L.R. \(4th\) 33](#), [2002 BCCA 462](#).

[page520]

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [\[1994\] 1 S.C.R. 311](#), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be [page521] suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#), at para. 31, and *Delgamuukw v. British Columbia*, [\[1997\] 3 S.C.R. 1010](#), at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation,

negotiation is a preferable way of reconciling state [page522] and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by [page524] stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act

honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow, supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

[page525]

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery ..., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[page526]

C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed

resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only [page527] a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow, supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)" (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The [page528] government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and [page529] title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow, Nikal*, and *Gladstone, supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the

contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will [page530] frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 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.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest [page531] pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require

the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

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41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. 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.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed

...

... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Maori opinion on those proposals
- informing Maori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Maori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised [page536] the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British

Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

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E. Do Third Parties Owe a Duty to Consult and Accommodate?

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. [page538] As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it [page539] a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" (*2002*), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do [page540] so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling, supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

60 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. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or [page541] mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. 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. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but

reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts [page542] to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

[page543]

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space... . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii

continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their [page544] rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

- (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
- (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

[page545]

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida [page546] prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management

plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

[page547]

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

[O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits... . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting ..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

[page548]

Solicitors

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

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Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

[page549]

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

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TAB 4

Labrador Métis Nation v. Newfoundland and Labrador (Minister of Transportation and Works), [2007] N.J. No. 421

Newfoundland and Labrador Judgments

Newfoundland and Labrador Supreme Court - Court of Appeal

D.M. Roberts, K.J. Mercer and L.D. Barry JJ.A.

Heard: November 14 and 15, 2007.

Judgment: December 12, 2007.

Dockets: 06/95 and 06/105

[2007] N.J. No. 421 | 2007 NLCA 75 | [2008] 1 C.N.L.R. 48 | 163 A.C.W.S. (3d) 330 | 272 Nfld. & P.E.I.R. 178 | 288 D.L.R. (4th) 641 | 163 A.C.W.S. (3d) 330 | 33 C.E.L.R. (3d) 220 | 2007 CarswellNfld 376

Between Her Majesty in Right of Newfoundland and Labrador, as represented by the Minister of Environment and Conservation and the Minister of Transportation and Works, Appellants, and The Labrador Métis Nation, a body corporate under the laws of the Province of Newfoundland and Labrador and Carter Russell, of Happy Valley-Goose Bay, Labrador, Respondents

(53 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights — Meaningful consultation — Inuit — Metis — Appeal by Crown from application judge's decision that the respondents, individuals of aboriginal descent who lived in southern Labrador, had a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them with regards to wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway — Appeal dismissed — The applications judge did not err when he concluded that the respondents had a credible but unproven claim, which gave rise to the Crown's duty to consult and that they were proper parties to enforce the duty to consult.

Appeal by the Crown from an applications judge's decision that the Crown had a duty to consult with the respondents. The underlying issue was whether individuals of aboriginal descent who lived in southern Labrador had a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them with regards to wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway. The applications judge concluded the Crown did. The Crown based its appeal primarily on the grounds that the respondents failed to produce sufficient evidence of a continuing aboriginal community and that neither the Labrador Metis Nation ("LMN") nor Russell should have had standing to pursue the claim. The LMN participated in the public environmental assessment process related to Phases II and III of the TLH project. Phase III was being constructed between Happy Valley-Goose Bay and Cartwright junction. In October 2004, the LMN requested that the Minister of Transportation and Works and the Minister of Environment and Conservation provide them with applications for all wetland and watercourse crossings along with adequate time to comment on them. The Ministers denied this request on the basis that providing these applications was not required by law, nor was it standard practice for government to distribute these materials to stake holders. On May 18, 2005, the LMN filed an originating application for certiorari seeking to quash the Ministers' decisions. The applications judge granted the application.

HELD: Appeal dismissed.

The respondents did not need to ethnically identify themselves definitively as Inuit or Metis before the Crown's duty to consult and accommodate arose. The applications judge erred when he identified the respondents as Metis, when the parties had made their submissions on the basis of Inuit rights, but this error did not invalidate his ultimate conclusion. The applications judge did not err when he concluded that the respondents had a credible but unproven claim, which gave rise to the Crown's duty to consult. The LMN and Carter Russell were proper parties to enforce the duty to consult. The respondents' claim was at least strong enough to trigger a duty to consult at the low level requested.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, s. 35

Appeal From:

On appeal from a judgment of the Supreme Court of Newfoundland & Labrador, Trial Division, 200508T0060.

Counsel

Counsel for the Appellants: Donald H. Burrage, Q.C. and Justin S.C. Mellor.

Counsel for the Respondents: D. Bruce Clarke and Cory J. Withrow.

Reasons for judgment by: L.D. Barry J.A. Concluded in by: D.M. Roberts and K.J. Mercer JJ.A.

L.D. BARRY J.A.

1 The underlying issue in this case is whether individuals of aboriginal descent living in southern Labrador have a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them concerning wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway ("TLH"). The applications judge concluded they did. The Crown bases its appeal primarily on the grounds that the respondents failed to produce sufficient evidence of a continuing aboriginal community and that neither the Labrador Métis Nation ("LMN") nor Carter Russell should have standing to pursue the claim.

Background Facts

2 The LMN participated in the public environmental assessment process relating to Phases II and III of the TLH project. Phase III is now being constructed between Happy Valley-Goose Bay and Cartwright junction. In October,

2004, the LMN requested that the Minister of Transportation and Works and the Minister of Environment and Conservation provide them with applications for all wetland and watercourse crossings along with adequate time to comment on them. The Ministers denied this request on the basis that providing these applications was not required by law, nor was it standard practice for government to distribute these materials to stake holders. On May 18, 2005, the LMN filed an originating application for certiorari seeking to quash the Ministers' decisions.

3 The applications judge concluded the Crown had an ongoing duty to engage in meaningful consultation with the LMN during construction of Phase III and quashed the decisions. The Crown appealed. The respondents cross-appealed on the basis that, while the applications judge was correct that there were sufficient Métis rights to give rise to a duty to consult, there were also sufficient Inuit rights to sustain the duty. In any event, the respondents maintain that there is no need to identify their members' aboriginal ethnicity in a duty to consult application. The respondents also submit the applications judge did not have sufficient evidence before him to determine that the effective date of European control was 1760 and suggest that, in fact, this may have been as late as the 1950s.

4 The LMN says that approximately 6,000 individuals in 24 communities in southern and central Labrador have authorized it as their agent to pursue an aboriginal rights claim and enforce their rights to consultation with government until the claim is resolved. Nine of its members (2 of which are honorary) have Micmac, Innu or Cree ancestry, but the remainder are of mixed Inuit and European descent.

5 Carter Russell claims a right to act as representative plaintiff for individuals of Inuit descent in southern and central Labrador in asserting the claim.

6 The 24 communities, where the members of the LMN reside, are (roughly from south to north):

L'Anse-Au-Clair, Forteau, L'Anse-Amour, L'Anse-Au-Loup, Capstan Island, West St. Modeste, Pinware, Red Bay, Lodge Bay, Mary's Harbour, St. Lewis, Port Hope Simpson, Williams Harbour, Pinsent's Arm, Charlottetown, Norman Bay, Black Tickle-Domino, Paradise River, Cartwright, Happy Valley-Goose Bay, Mud Lake, North West River, Churchill Falls and Labrador City-Wabush.

Of these, the 14 from Lodge Bay to North West River are most directly affected by Phase III of the TLH project.

7 The LMN alleges its members are beneficiaries of Inuit aboriginal rights, in that they are of Inuit descent and have continued the practices and traditions of the Inuit in their subsistence hunting, fishing and gathering. The LMN submits its members are the current manifestation of Inuit culture in southern and central Labrador.

8 While presenting their claim as beneficiaries of Inuit aboriginal rights, the respondents say it is possible that, as a matter of law, their claim may eventually be founded upon Métis rights. They submit, however, that they need not definitively take a position, at this stage, as to whether they are Inuit or Métis, saying that this will ultimately be determined by the courts, as a matter of law, once the essential facts have been established. For now, say the respondents, in order to trigger a duty on the Crown to consult with them, they need only establish a credible claim as aboriginal people.

9 The Crown submits that no duty to consult arises until the respondents have asserted a credible claim. It argues the claim must be based upon a specific ethnic identity, since this is essential to show rights claimed flow from an aboriginal community.

10 The Crown also submits that the LMN, as a body corporate, cannot have standing to enforce aboriginal rights because those rights cannot be transferred from the communities holding them. In addition, the Crown challenges Carter Russell's right to act as a representative plaintiff on the basis that sufficient evidence has not been presented to establish that he is a member of an aboriginal community.

The Evidence at Trial

11 Much of the evidence on the hearing of the application consisted of competing experts providing opinions whether the Inuit had a sufficient presence south of Hamilton Inlet between the period of Inuit and European contact and the date Europeans established effective control in the area.

12 Evidence relating to continuity of Inuit culture may be summarized as follows:

- * Each of the 14 communities most directly affected by Phase III of the TLH have inhabitants who are members of the LMN with mixed Inuit and European ancestry.
- * These individuals, who call themselves Inuit-Metis, comprise the majority population in most of these 14 communities.
- * These communities rely upon the lands and waters of this area for food, cultural, economical and spiritual purposes.

[Parr affidavit, para. 34] □ □

- * The majority of the population in many of the 14 communities is the modern manifestation of the south and central Inuit culture tracing back to before European contact, which occurred in Labrador in the mid-1500s.
- * The British became the only European country asserting sovereignty over Labrador after the Treaty of Paris in 1763.
- * Beginning in the late 1700s, occasional European males began to remain in Labrador and enter into family relationships with Inuit. The mixed-blood descendants merged with the Inuit families of the area.
- * The mixed-blood descendants lived within their ancestors' traditional Inuit-Metis lifestyle, in the summer fishing for cod, capelin, herring and salmon, hunting seals and seabirds, and gathering berries and greens. In the winter they hunted small game, such as partridge, rabbits and porcupine, gathered water and firewood, and ran trap lines.
- * Over 90% of Inuit-Metis still hunt, 93% fish for food, 90% collect their own wood, almost 70% trap, and almost all harvest berries and other flora.

[Affidavit of Carter Russell, paras. 8, 9, 13, 14]

The Decision Below

13 The applications judge made the following findings:

- (i) ... from the scholarly evidence presented so far, notwithstanding disagreement as to the time that the Inuit people fully occupied southern Labrador, ... generally it is agreed that the period from first contact around 1550, to the period of effective European control around 1760 that there were Inuit people using the southern regions of Labrador in one capacity or another. (para. 48)
- (ii) Whatever the date of full occupation by the Inuit it is the conclusion of this court that there is a very high probability that the Inuit people emerged along the southern coast of Labrador prior to and continuous with the gradual appearance and introduction of the Europeans for at least two hundred years before effective control by the British. (para. 49)

- (iii) In the present case all the Labrador Metis people belong to the same aboriginal community notwithstanding that this community of people is scattered in a number of villages throughout a well defined region of Labrador and for the most part along the coastal region of southern Labrador. (para. 52)
- (iv) ... I am more in agreement with Counsel for the [LMN] when he argues that the law of agency applies and that the aboriginal community can be represented by an agent, in this case, the ... LMN. (para. 60)
- (v) [Having treated the Labrador Inuit Association as the agent for the Inuit people of Labrador for the purposes of negotiating the Labrador Inuit Land Claims Agreement] I would think that [the Crown is] now estopped from refusing the same recognition to the Labrador Metis Nation as the agent representing the Labrador people claiming Aboriginal status as Metis people. (para. 70)
- (vi) ... I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis are descendants of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)
- (vii) ... there is a high degree of probability that the ancestral people of those people who call themselves Labrador Metis were of Inuit origin. (para. 74)
- (viii) I am satisfied that Mr. Russell's account of his cultural background satisfies the criteria to establish his Aboriginal status to a very high degree of probability (para. 76)
- (ix) ... the evidence strongly supports the position that the Inuit-Metis period began between first contact with the Europeans and the time ascribed to be effective control by the British over the coast of Labrador. That is from about 1550 A.D. to 1760 A.D. (para. 87)
- (x) The evidence is convincing that the customs and traditions of the Metis people ... included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador. (para. 90)

14 The parties agree that the hearing and submissions before the applications judge proceeded on the basis that the respondents were founding their right of consultation upon an Inuit rights claim. The Crown submits that the reasons of the applications judge indicate that his analysis, including following the ten step approach employed in **R. v. Powley**, [2003] 2 S.C.R. 207, a Métis claims case, proceeded on the basis of the respondents' rights being based upon a Métis claim.

15 The respondents, while admitting that the interspersing of Métis references with Inuit ones results in some confusion, argues that the applications judge made all the findings necessary to found the respondents' claim in Inuit rights but also, in the alternative, went on to show the right of consultation could also be founded upon a Métis claim. The respondents note that, throughout his reasons, the applications judge never made a specific finding that the claimants were Métis or Inuit and employed language such as "those people who call themselves Labrador Metis" (para. 74). The Crown notes, however, language such as:

It is helpful to consider how those who claim to be Metis come to that determination. While not all members of the Labrador Metis Nation can be identified and evaluated in this case, those whose affidavits have been entered into evidence are relevant to show that these individuals self-identify as Metis. (para. 26)

In the case of the Labrador Metis people there is no precise time that can be attached to their cultural emergence however, it is the very fact that the Europeans had arrived that gave them their distinctive cultural status. It made little difference to the emerging culture that this was prior to actual British control over the region. (para. 46)

... I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis are descendants of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)

16 The Crown argues references such as "self-identify as Metis", "their cultural emergence", "distinctive cultural status", "emerging culture" and "descendants of this early new culture", show the applications judge had concluded the respondents' claim flowed from Métis rights.

The Law

17 Section 35 of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982**, (U.K.), 1982, c. 11, provides:

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

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

18 The Supreme Court of Canada set out the test for identifying s. 35(1) aboriginal rights in **R. v. Van der Peet**, [1996] 2 S.C.R. 507, where Lamer C.J.C. stated for the majority, at para. 44:

In order to fulfill the purpose underlying s. 35(1) - i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions - the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

And further, at para. 46:

... the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

19 The Court held in **Van der Peet** that the evidence relied upon by the applicant simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

20 To succeed, an aboriginal group must also demonstrate that the connection with the land in its customs and laws has continued to the present day.

21 The Court dealt with Métis rights in **Powley**. It applied the basic elements of the **Van der Peet** test but modified

these to recognize that Métis communities evolved post-contact but prior to the entrenchment of European control, when the influence of European settlements and political institutions became pre-eminent. At para. 18 of **Powley**, the court referred to **Van der Peet** as the "template" for the discussion of Métis rights. It modified the pre-contact focus of the **Van der Peet** test to account for the important differences between Indian and Métis claims. The Court stated:

Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

22 The Court affirmed in **Powley** that aboriginal hunting rights, including Métis rights, are contextual and site-specific. It confirmed that aboriginal rights are communal rights and a historic rights-bearing community must be identified. The claimant's membership in the relevant contemporary Métis community must be verified by considering three factors as indicia of Métis identity: self-identification, ancestral connection, and community acceptance. (para. 30) The claimant must self-identify as a member of a Métis community and this self-identification should not be of recent vintage merely to benefit from a s. 35 right. Also, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a "real link" to the historic community whose practices ground the right being claimed. A minimum "blood quantum" is not required. Finally, the claimant must demonstrate he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. Membership in a Métis political organization is relevant but not necessarily sufficient on the question of community acceptance. (paras. 31-33)

23 By analogy from **Van der Peet**, the test for Métis practices was held to focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. (para. 37)

24 The constitutional duty to consult and accommodate was first set out by the Supreme Court of Canada in **Haida Nation v. British Columbia (Minister of Forests)**, [2004] 3 S.C.R. 511. At para. 25, the Court stated:

Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

25 In **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, [2004] 3 S.C.R. 550, a companion case to **Haida**, McLachlin C.J.C. stated, at para. 24:

... the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. ... The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

26 The right of an aboriginal people to be consulted by the Crown is a procedural right, not a substantive one. See **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)**, [2005] 3 S.C.R. 388, which dealt with consultation before construction of a winter road.

27 In assessing whether a duty to consult exists and the extent of any such duty, the Crown is not permitted to narrowly interpret the facts. See **Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)**, [2005] 3 C.N.L.R. 74 (B.C.S.C.), at para. 94:

The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution In its review, the Court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process. ...

28 Each case must be approached individually and with flexibility. The honour of the Crown does not permit sharp dealing. See **Haida**, at paras. 42 and 45.

29 The Crown obligation to undertake an analysis of whether the Crown owes a duty to consult is triggered at a low threshold. See **Mikisew Cree**, at para. 55. To trigger that obligation, the Crown must have knowledge, real or constructive, of the "potential" existence of an aboriginal right that "might" be adversely affected by conduct contemplated by the Crown. See **Haida**, at para. 35. All that is necessary is that the Crown have "some idea" of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights. See **Haida**, at para. 36.

30 There is a distinction between knowledge sufficient to trigger a duty to consult and the content or the scope of the duty to consult in a particular case. As the Court noted in **Haida**, at para. 37:

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. ... 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. ... 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.

31 In order to determine what the scope of the Crown's duty to consult may be in any given case, the Court must consider that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or the title claimed. See **Haida**, at para. 39.

32 The kind of duties to consult are discussed in **Haida**, at paras. 43-46, where the Court stated:

[43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation" in its technical definition is talking together for mutual understanding': T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.

[44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory

for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[45] Between the two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. ...

Issues

33 Five issues arise:

- (i) Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?
- (ii) Did the applications judge err in identifying the respondents as Métis when the parties had made their submissions on the basis of Inuit rights?
- (iii) Did the applications judge err in concluding that the respondents had a credible but unproven claim?
- (iv) Are the Labrador Métis Nation and Carter Russell proper parties to enforce the duty to consult?
- (v) What may be said on the scope of the duty to consult?

The Applicable Standard of Review

34 The appropriate standard of review was discussed by this Court in **Newfoundland v. Drew et al.** (2006), 260 Nfld. & P.E.I.R. 1 (NLCA), as follows:

[11] The standard of appellate review to be applied is determined by whether the question being considered is one of law, of fact, or of mixed fact and law. The standard of review for pure questions of law is correctness: **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235 ... at para. 8. This means that an appeal court is free to substitute its opinion for that of the trial judge on questions of law.

[12] As to findings of fact, including the weight to be given to evidence, an appeal court can only reverse a lower court decision where the trial judge has made a palpable and overriding error: **Housen** at paras. 10 & 23, and **K.L.B. et al. v. British Columbia et al.**, [2003] 2 S.C.R. 403 ... at para. 62. A palpable error is one that is plainly seen: **Housen** at para. 5. An overriding error is one that 'is sufficiently significant to vitiate the challenged finding of fact. ... The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error...'. In **H.L. v. Canada (Attorney General) et al.**, [2005] 1 S.C.R. 401 ... at para. 110, Fish J., for the majority, described the functional equivalents of palpable and overriding error as including 'clearly wrong', 'unreasonable' and 'not reasonably supported by the evidence.' Lamer C.J.C., in **Delgamuukw et al. v. British Columbia et al.**, [1997] 3 S.C.R. 1010 ... at para. 80 stated that interference with factual findings was warranted where the courts below have misapprehended or overlooked material evidence ...'. The standard of palpable and overriding error is also applicable to a review of the trial judge's inference of fact: **Housen** at para. 21.

[13] Questions of mixed fact and law are subject to a 'standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.'

35 Issue (i), the necessity of ethnic identification, is a pure question of law and the standard of review is correctness. Issue (ii) concerning identification as Métis, would normally be a mixed question of law and fact; if the issue were properly before him, the applications judge would have to apply the **Powley** legal standard to the facts of this case. But whether the issue was properly before him is a question of law. Issue (iii), assessing the credibility of the respondents' claim, is also a mixed question of law and fact; the legal principles earlier discussed had to be applied to the facts. Issue (iv), the matter of standing, is another mixed question of law and fact; legal questions of agency and entitlement to be a representative plaintiff must be applied to the circumstances of the LMN and Carter Russell. Issue (v), the scope of the duty to consult, depends on (a) legal principles relating to the extent and scope of the Crown's duty to consult; (b) the potential strength of the LMN communities' claim to aboriginal rights; (c) the extent of the potential adverse effects the construction of the TLH may have; and (d) whether the Crown failed in its constitutional duties to consult and accommodate. Question (a) is a pure question of law, (b) and (d) mixed questions of law and fact, and (c) a pure question of fact.

Analysis

(i) ***Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?***

36 I do not accept the appellants' submission that claimants always have to self-identify as either Inuit or Métis before the Crown's duty to consult and accommodate is triggered. I agree with the respondents that it was sufficient in the present case to assert a credible claim that the claimants belong to an aboriginal people within s. 35(1) of the **Constitution Act, 1982**. The respondents have established this by the affidavit evidence of Carter Russell, Todd Russell and Trent Parr, showing they are of mixed Inuit and European ancestry whose Inuit bloodlines have originated from those Inuit ancestors that resided in south and central Labrador prior to European contact. The unrefuted evidence before the applications judge was sufficient to demonstrate a credible claim that the members of the 24 LMN communities know they have genetic, cultural and land use continuity with their Inuit forebears, have a regional consciousness of a regional community, and occupy and use, for traditional hunter/gatherer purposes, lands and waters threatened with adverse effects by construction of the TLH.

37 Whether the present day LMN communities are the result of an ethnogenesis of a new culture of aboriginal peoples, that arose between the period of contact with Europeans and the date of the effective imposition of European control, is not yet established, although it is possible that such an ethnogenesis occurred. If so, the members of the LMN communities could be, in law, constitutional Métis.

38 However, it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. Or they may be the manifestation of a culture which developed only after effective European control in Labrador had occurred, in which case, on the basis of **Powley**, the culture could be viewed as involving non-aboriginal customs and practices, unprotected by s. 35(1). The fact that the actual bloodlines of the present-day aboriginal persons may have a mix of European and Inuit ancestry does not detract from the argument that the LMN communities may have "Inuit" aboriginal rights. The present-day manifestation of this authentic Inuit culture may simply have been impacted by centuries of Euro-Canadian encounter and influence.

39 The LMN communities have not refused to self-identify with a specific constitutional definition but they reasonably say they are unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues. In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown's obligation to consult arises. All the respondents had to do

was establish, as they did, certain essential facts sufficient to show a credible claim to aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis-based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

(ii) ***Did the applications judge err in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights?***

40 The respondents concede and the Crown agrees that the applications judge had insufficient evidence before him to conclude that an ethnogenesis in law occurred so as to result in the evolution of a Métis culture separate and distinct from the pre-existing Inuit culture. I agree with the respondents that the Crown in this case had sufficient information to know the respondents had a credible claim based on aboriginal rights, whether they be of Inuit or Métis origin. All the respondents had to do was set out, as they did, the essential facts underlying and supporting their aboriginal community's claim to aboriginal rights and the facts supporting their submission that the Crown's actions could adversely affect those aboriginal rights. The known facts had to be considered by the Crown in accordance with the applicable legal tests and doctrines for each such type of aboriginal claim. If the Crown was uncertain as to the type of aboriginal rights asserted, be they Indian, Inuit or Métis, the Crown had an obligation to analyze them in the alternative. If the facts as presented by the aboriginal community could reasonably support the conclusion that the aboriginal rights asserted are potentially Métis rights, then a legal analysis used in the case law applicable to Métis rights should be undertaken by the Crown. However, if the same rights could lead to the possibility that the aboriginal rights asserted could be Inuit rights instead, then the Crown should do an analysis on that basis as well.

41 In the present case, the Crown had a responsibility to carry out a dual-analysis of the potential strength of the aboriginal rights using both the Métis and the Inuit legal tests, in order to determine whether a duty to consult arose. In effect, the Crown carried out this dual-analysis case by initially preparing its submissions on the understanding that the respondents were basing their claim upon Métis rights. Subsequently, both the appellants and the respondents proceeded on the basis that the claim was founded on Inuit rights.

42 In their factum, the respondents submit that the applications judge followed the dual-analysis approach and first applied the facts to the tests for Métis aboriginal rights. At the appeal hearing, the respondents acknowledged that both parties made their submissions on the basis of an Inuit claim. They also concede there is some confusion in the language employed by the applications judge. That language does, however, particularly in paras. 26 and 46, where he refers to the emergence of a new culture, on balance indicate an analysis based upon Métis aboriginal rights. This conclusion is supported by the applications judge's utilization of the ten step **Powley** approach. I agree, therefore, with the Crown that the applications judge clearly erred in employing a Métis analysis, when the case was argued on the basis of an Inuit-based claim.

(iii) ***Did the applications judge err in concluding that the respondents had a credible but unproven claim?***

43 But what was the effect of this error by the applications judge? Accepting that the evidence before him was insufficient to establish an ethnogenesis or the actual date of effective control, his other findings were sufficient to satisfy the **Van der Peet** test and establish a credible claim based upon Inuit ancestry.

44 As previously noted, the Supreme Court in **Van der Peet** held that, in order to establish an aboriginal right protected by s. 35(1), an applicant must prove the continuing activity for which protection is sought was an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The applications judge found this to be established, particularly where he stated, at para. 72:

I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration.

And further, at para. 90:

The evidence is convincing that the customs and traditions of the Metis people ... included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador.

45 The Crown's analysis should have arrived at the same result, namely, that the respondents have a credible claim which triggers a duty to consult.

(iv) ***Are the LMN and Carter Russell proper parties to enforce the duty to consult?***

46 I reject the Crown's submission that a corporate plaintiff may not be the vehicle for enforcement of an aboriginal right to consultation. The Crown provided no authority for its submission that s. 35 rights could not be asserted and protected by an agent. Also, the Crown provided no authority for its proposition that, in order for an agent to assert and protect, the rights would have to be transferred, which is impossible with s. 35 rights. I know of no proposition in the law of principle and agent which requires that rights be transferred to an agent before the agent can act to protect them. In the present case, the LMN has established through its memorandum and articles of association, including the preamble to its articles, that it has the authority of its 6,000 members in 24 communities to take measures to protect aboriginal rights. The preamble states in part (after describing the basis of the aboriginal rights claim of LMN members):

We are entitled to consultation from government when any action they may take could impair or interfere with our rights. We have a right to involvement in the management, as an equal and full participant, of the natural resources of our lands.

47 Anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case. This well-publicized case has been proceeding since May, 2005. No evidence was presented that any of the 6,000 LMN members or any other aboriginal person questioned the authority of the LMN to act on their behalf.

48 The trial judge concluded the Crown should be estopped from questioning the authority of a corporation to deal with aboriginal rights because the Crown had signed a treaty with the Labrador Inuit Association, which is also a corporation, dealing with Inuit rights in Northern Labrador. I agree with the Crown that this was an error. The Crown has the authority to create new constitutionally protected rights through the treaty process. See **R. v. Sioui**, [1990] 1 S.C.R. 1025, at pp. 1042-43. The legitimacy of the LMN's involvement comes not from the LIA land claims process but from the authority granted the LMN by its members.

49 With respect to Carter Russell, as a representative plaintiff he had no obligation to show any authorization from other potential plaintiffs. It was sufficient for him to establish, as he has, that he has a credible claim, as a member of an aboriginal community situated at Williams Harbour where he resided and elsewhere, to aboriginal rights, which trigger a duty to consult on the part of the Crown. It is his assertion of the same interest as other members of his community which entitled him to act as a representative plaintiff.

(v) ***What may be said on the scope of the duty to consult?***

50 As noted in **Haida**, at paras. 37 and 39, the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the

potentially adverse effect upon the right or title claimed. The second aspect, seriousness of the potentially adverse effect of highway water crossings interfering with fish habitats, is not in dispute. On the first aspect, with the admitted paucity of the evidence on the process of ethnogenesis, which may or may not have occurred before effective European control, and on the date of effective European control in Labrador, it is difficult to see how the references of the applications judge to a "strong" case may be supported at this stage. A conclusion not reasonably supported by the evidence constitutes a palpable error. See **Drew**, at para. 12. But the error is not overriding here since the respondents did not need to show a strong case in order to trigger the low level of consultation here requested.

51 A "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in **Haida**, at paras. 37 and 39, supports the view in the present case that the claim is more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. The respondents have established a prima facie connection with pre-contact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing.

52 The scope of consultation requested by the respondents was set out in a letter to the Minister of Environment and Conservation on October 26, 2004:

We now request that your office forward to us any and all applications for water crossings and other relevant permit requirements under your legislated mandate during the construction phase of the Trans Labrador Highway - Phase III. We also request adequate time to review and comment on the various permit applications.

An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

Summary and Disposition

53 In summary:

- (i) The respondents need not ethnically identify themselves definitively as Inuit or Métis, before the Crown's duty to consult and accommodate arises.
- (ii) The applications judge erred in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights, but this error does not invalidate his ultimate conclusion.
- (iii) The applications judge did not err in concluding that the respondents had a credible but unproven claim, giving rise to the Crown's duty to consult.
- (iv) The LMN and Carter Russell are proper parties to enforce the duty to consult.
- (v) The respondents' claim is at least strong enough to trigger a duty to consult at the low level requested.
- (vi) The appeal is dismissed and the cross-appeal is allowed with party and party costs to the respondents.

L.D. BARRY J.A.

D.M. ROBERTS J.A.:— I agree.

K.J. MERCER J.A.:— I agree.

End of Document

TAB 5



**Québec (Procureur général) (Ministère des Ressources naturelles) c.
Corneau, [2015] J.Q. no 987**

Jugements du Québec

Cour supérieure du Québec

District de Chicoutimi

L'honorable J. Roger Banford J.C.S.

Entendu : les 11-15, 18-20 novembre

2013; les 10-13, 17-20 mars, 22-25,

28-30 avril, 1, 20-22, 26-28 mai, 16

et 17 juin, 8-12 septembre 2014.

Rendu : le 10 février 2015.

No : 150-17-000584-034

[2015] J.Q. no 987 | 2015 QCCS 463

Entre LE PROCUREUR GÉNÉRAL DU QUÉBEC, agissant aux droits du ministère des Ressources naturelles, Demandeur, et STÉPHANE CORNEAU, Défendeur, et LA COMMUNAUTÉ MÉTISSE DU DOMAINE-DU-ROY ET DE LA SEIGNEURIE DE MINGAN, Intervenante, et LA PREMIÈRE NATION DE MASHTEUATSH ET LA PREMIÈRE NATION DES INNUS ESSIPIT ET LA PREMIÈRE NATION DE NUTASHKUAN, Intervenantes, et MUNICIPALITÉ RÉGIONALE DE COMTÉ LE FJORD-DU-SAGUENAY et MUNICIPALITÉ DE SAINT-FULGENCE, Mises en cause

(40 paragr.)

Résumé

Droit des autochtones — Statut et droits — Statut — Autochtone — Métis — Il ressort clairement de la preuve que l'auto-identification du défendeur est subjective, récente et motivée par le besoin de protéger son "camp" et par le fait même, son territoire de chasse — Par conséquent, la preuve offerte par le défendeur ne rencontre pas les conditions requises pour démontrer son appartenance à une communauté actuelle au sens de l'arrêt Powley — Requête accueillie.

Le Procureur général du Québec (PGQ) demande au Tribunal d'ordonner à Corneau de délaisser un emplacement qu'il occupe illégalement sur les terres du domaine public. Corneau plaide en défense qu'il occupe l'emplacement litigieux tout à fait légalement, soit dans l'exercice d'un droit ancestral autochtone reconnu par l'article 35 de la Loi constitutionnelle de 1982.

DISPOSITIF : Requête accueillie.

Aux termes du "Test Powley", Corneau, pour réussir dans sa défense, avait le fardeau de démontrer, au moyen d'une preuve prépondérante, son appartenance à la communauté actuelle concernée. Il ressort clairement de la preuve que l'auto-identification de Corneau est subjective, récente et motivée par le besoin de protéger son "camp" et par le fait même, son territoire de chasse. Les liens ancestraux de Corneau, tout comme ceux de son père, sont loin d'être probants compte tenu de l'héritage colonial de son ancêtre Kichera. Quant à son appartenance à une communauté actuelle, elle s'avère insuffisante. En effet, de sa naissance à l'an 2000,

Corneau n'a jamais pris contact avec un collectif métis et n'a jamais été identifié autrement que comme un québécois. Par conséquent, la preuve offerte par Corneau ne rencontre pas les conditions requises pour démontrer son appartenance à une communauté actuelle au sens de l'arrêt Powley.

Législation citée :

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c. 11, art. 35, art. 35(1)

Loi sur les terres du domaine de l'État, L.R.Q., c. T-8.1, art. 54

Avocats

Me Leandro Isai Steinmander, Me Daniel Benghozi, Me Francis Demers, BERNARD, ROY, Procureurs du demandeur.

Me Daniel Côté, AUBIN GIRARD CÔTÉ, Me Pierre Montour, Procureurs du défendeur et de l'intervenante la Communauté métisse du Domaine-du-Roy et de la Seigneurie de Mingan.

Me Richard Bergeron, Me Nancy Fillion, Me Jean-François Delisle, CAIN LAMARRE CASGRAIN WELLS, Procureurs des intervenantes.

Municipalité régionale de comté le Fjord-du-Saguenay, mise en cause.

Municipalité de Saint-Fulgence, mise en cause.

JUGEMENT

1 Par requête en dépossession instituée en vertu de la Loi sur les terres du domaine de l'État¹ (la Loi) en juin 2003 et amendée en juillet 2008, le Procureur général du Québec demande au Tribunal d'ordonner au défendeur Stéphane Corneau de délaisser un emplacement qu'il occupe illégalement sur les terres du domaine public.

2 Les principaux faits allégués au soutien des conclusions de la procédure font l'objet d'une admission.

3 Toutefois, le défendeur plaide en défense qu'il occupe l'emplacement litigieux tout à fait légalement, soit dans l'exercice d'un droit ancestral autochtone reconnu par l'article 35 de la Loi constitutionnelle de 1982².

4 Ce moyen de défense, le défendeur n'est pas le seul à l'invoquer. Plusieurs autres personnes dans sa situation font l'objet de poursuites et invoquent le même moyen de droit, de sorte que le 1er mai 2009, [\[2009\] J.Q. no 4492](#), notre Cour prononçait un jugement joignant le dossier du défendeur, ainsi que plusieurs autres, à celui de Ghislain Corneau (C.S.C. : 150-05-002108-001), en vue d'une décision commune sur les questions de droit soulevées.

LE DROIT

5 Ainsi, dans chacun des dossiers réunis, la procédure introductive d'instance s'appuie principalement sur l'article 54 de la Loi :

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54. Nul ne peut ériger ou maintenir un bâtiment, une installation ou un ouvrage sur une terre sans une autorisation du ministre ayant l'autorité sur cette terre. Cette autorisation n'est pas requise dans l'exercice d'un droit, l'accomplissement d'un devoir imposé par une loi ou dans la mesure prévue par le gouvernement par voie réglementaire.

6 De plus, chacun des plaidoyers produits en défense invoque l'article 35 de la Loi constitutionnelle de 1982, dont il convient de reproduire les stipulations pertinentes :

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

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

[...]

7 En outre, chaque partie invoque l'autorité jurisprudentielle la plus récente en la matière.

8 Ainsi, en septembre 2003, dans l'arrêt *R. c. Powley*³, la Cour suprême du Canada indiquait la démarche juridique à suivre pour identifier les droits ancestraux reconnus et confirmés par le paragraphe 35(1) de la Loi constitutionnelle.

9 Ce processus, communément appelé le "Test Powley", comporte l'examen de dix critères. Ces derniers font l'objet d'une analyse et d'une décision dans le dossier Ghislain Corneau (le dossier principal), [\[2015\] J.Q. no 1026](#), suivant un jugement du 10 février 2015.

10 Bien que les motifs énoncés dans ce jugement suffisent à trancher tous les litiges réunis, le Tribunal tient tout de même à ajouter certains commentaires concernant la situation personnelle du défendeur Stéphane Corneau, soit, plus particulièrement, en regard du critère d'appartenance du défendeur à une communauté métisse actuelle.

LA SITUATION DU DÉFENDEUR

11 Aux termes du "Test Powley", le défendeur, pour réussir dans sa défense, avait le fardeau de démontrer, au moyen d'une preuve prépondérante, son appartenance à la communauté actuelle concernée.

12 Tel que plus amplement explicité dans le dossier principal, pour satisfaire la condition identitaire, le défendeur devait rencontrer trois critères principaux, lesquels, selon la Cour suprême, constituent des "indices tendant à établir l'identité métisse dans le cadre d'une revendication fondée sur l'article 35 : auto-identification, liens ancestraux et acceptation par la communauté"⁴.

13 À cet effet, le défendeur témoigne être le fils de Ghislain Corneau et ainsi détenir le même lien ancestral avec la montagnaise Christine Kichera.

14 Se déclarant âgé de 44 ans lors de l'audition, il serait né en 1969. Élevé à Saint-Fulgence, il a poursuivi ses études secondaires à Chicoutimi-Nord. Il possède une formation en soudure et opère à son compte, en compagnie de son épouse à Saint-Fulgence.

15 Son père l'a initié à la pratique de la chasse et depuis qu'il est tout jeune qu'il dit "vivre dans le bois", comme un métis.

16 Son père et sa grand-mère paternelle l'auraient informé de ses origines "sauvages".

[17] Toutefois, c'est au cours de l'année 2000 qu'il aurait intégré un organisme de défense des droits des Indiens, en vue de protéger son camp de chasse⁵ :

Q. Savez-vous en quelle année vous avez adhéré à l'Alliance autochtone?

R. Je crois que c'est dans les alentours des années peut-être 2000.

Q. Pourquoi vous êtes devenu membre de l'Alliance autochtone?

R. Bien, on était fiers d'être de descendance indienne.

Q. Oui?

R. Et puis, nous, c'était pour défendre nos droits d'occuper le territoire. Pour chasser l'original, on a besoin des camps, fait que c'était pour ça. Pour sauver nos camps c'était, à prime abord, pour ça.

17 Par la suite, il a suivi son père en devenant membre de la Communauté métisse du Domaine-du-Roy et de la Seigneurie de Mingan (CMDRSM), en 2005, toujours pour les mêmes motifs. Ses pratiques culturelles comprennent les méthodes et techniques de chasse, de pêche et de trappe enseignées par son père, les parties de plaisir après l'abattage de l'original et le Pow-wow annuel de la CMDRSM.

18 De plus, en tant que membre de la communauté, il s'identifie ouvertement comme Métis, porte chandail et casquette métis. Il parle de son appartenance à la Communauté métisse du Domaine-du-Roy-Mingan au travail et à son entourage.

19 Il connaît d'autres métis qu'il identifie par leur participation aux activités de la CMDRSM.

20 Cependant, la preuve précise aussi que Stéphane Corneau, lorsqu'il fréquentait l'école, ne se différenciait pas des autres par ses origines.

21 Ainsi, lorsque contre-interrogé sur la perception identitaire des élèves de sa classe au primaire, dans un milieu, Saint-Fulgence où "tout le monde est métis", prétend-il, il indique⁶ :

Q. Ces enfants-là, ils arrivent, la maîtresse d'école qui dit : "Mais qu'est-ce que nous sommes?", qu'est-ce qu'ils auraient répondu?

R. Bien, on est des... ils auraient dit : "Nous sommes des québécois, nous sommes des canadiens."

Q. Et dans la réponse vous aviez... vous pensez qu'un quelconque enfant aurait été gêné de dire : "Oui, on est des québécois, mais..."

R. Oui, oui, oui. Ça, ça ne se parlait pas tellement, là, si t'avais de l'indien, ou ils ne disaient pas t'es un québécois indien, non ça ne se parlait pas dans mon école.

Q. Non? Mais ceux qui en avait...

R. Ça ne veut pas dire qu'on ne l'était pas...

Q. Non?

R. ... mais ça ne se disait pas, là.

Q. Et ça ne se disait pas, on parle des années soixante-dix (70) m hein?

R. Hum hum. Ils disaient même, que c'était des sujets qui ne se parlaient pas, qui étaient tabous un peu, ils ne disaient pas : "Moi, je suis un sauvage, je suis un indien." Je pense que c'était plus ou moins bien vu, là. Le monde qui... les Indiens avaient peur de faire rire d'eux autres, là. Je ne sais pas. Je sais que ça ne se parlait pas, là, dans mon école, là.

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Q. Si je vous dis que ça ne se parlait pas parce que ça ne comptait pas du tout?

R. Ah, peut-être.

Q. Ça ne changeait rien à la vie de personne, ça ?

R. Oui, c'est ça, peut-être, peut-être que ça ne changeait rien.

22 De même, lorsqu'il se retrouve à l'école secondaire, à Chicoutimi⁷ :

Q. À l'époque où vous allez au secondaire, vous rentrez dans les classes, la première fois que vous cessez d'être scolarisé à Saint-Fulgence, vous allez à Chicoutimi?

R. Oui.

Q. Et, avez-vous senti qu'on vous étiquetait d'une quelconque façon quand vous arrivez là, dans ce milieu?

R. Non.

Q. Pourquoi vous dites ça?

R. Étiqueté, à part que j'étais un gars de bois, la seule chose que je pouvais être étiqueté de temps en temps c'est que je pensais beaucoup au bois. Je pensais beaucoup à la chasse, à la pêche. C'est pas mal le seul étiquetage que j'aurais pu avoir.

Q. C'est quelque chose de relié à votre personnalité?

R. J'étais plus particulier un peu de ce côté-là. Fait que souvent mes chums m'en parlaient que j'étais peut-être un peu passionné du bois.

Q. Des chums de Chicoutimi-Nord?

R. Oui, mes chums d'école, là.

Q. Mais pourtant vous veniez d'un village où tout le monde est Métis ou presque?

R. Oui. Pour les autres je le sais pas, mais pour moi c'était ça. La seule particularité que je voyais c'était ça.

23 En somme, il ressort clairement de la preuve que l'auto-identification du défendeur est subjective, récente et motivée par le besoin de protéger son "camp" et par le fait même, son territoire de chasse. De plus, la conception de l'identité métisse, selon le défendeur, se limite à son lien de sang et son intérêt développé pour les activités de chasse et de pêche, ce qui ne le distingue guère d'une grande partie de la population saguenéenne.

24 Les liens ancestraux du défendeur Stéphane Corneau, tout comme ceux de son père, sont loin d'être probants compte tenu de l'héritage colonial de son ancêtre Kichera. On cherchera en vain, dans son témoignage, un indice d'une participation à des activités ou d'une acceptation par une communauté autre que la population locale canadienne française, avant son adhésion à la CMDRSM.

25 Quant à son appartenance à une communauté actuelle, elle s'avère insuffisante, compte tenu des commentaires émis dans le dossier principal en regard de la représentativité de la CMDRSM, voire même totalement absente de la preuve.

26 En effet, de sa naissance à l'an 2000, le défendeur n'a jamais pris contact avec un collectif métis et n'a jamais été identifié autrement que comme un québécois.

27 On notera qu'en dehors du cadre familial et de la CMDRSM, il n'existe aucun élément factuel objectif ou témoignage indépendant qui soutienne la prétention du défendeur à son appartenance à une communauté métisse actuelle, vraisemblablement parce qu'une telle collectivité n'existe pas sur le territoire concerné.

28 De plus, une réflexion semblable s'impose devant la preuve qui limite la participation du défendeur à des activités "culturelles" à l'intérieur du milieu familial et celui de l'organisation (CMDRSM).

CONCLUSION

29 Par conséquent, la preuve offerte par le défendeur ne rencontre pas les conditions requises pour démontrer son appartenance à une communauté actuelle au sens de l'arrêt *Powley*.

30 La défense doit être rejetée et la requête en dépossession du Procureur général du Québec, accueillie avec les dépens selon les motifs exposés au dossier principal.

31 Le sort des diverses interventions doit aussi suivre celui décidé à ce même dossier de référence, pour les mêmes motifs.

32 POUR CES MOTIFS, LE TRIBUNAL :

33 ACCUEILLE la requête pour dépossession;

34 ORDONNE au défendeur Stéphane Corneau de délaisser et de livrer possession au ministre des Ressources naturelles et de la Faune d'un emplacement et les bâtiments qui s'y trouvent, faisant partie intégrante des terres du domaine de l'État à savoir :

"Un emplacement situé dans le Canton de Harvey, rang VI, lot 51, aux coordonnées MTM Nord 5374665 et Est 286613, feuillet 22D10-0102, district de Chicoutimi."

35 ORDONNE au défendeur Stéphane Corneau de remettre les lieux en état dans un délai de cent vingt jours du jugement et à défaut, **AUTORISE** le demandeur à effectuer ou à faire effectuer les travaux requis à cette fin aux frais du défendeur;

36 DÉCLARE que le cent trentième jour du jugement, tous les biens, tant meubles qu'immeubles se trouvant sur ledit emplacement, seront dévolus sans indemnité et en pleine propriété au domaine public, conformément aux prescriptions de l'article 61 *in fine* de la Loi sur les terres du domaine public (L.R.Q., c. T-8.1);

37 REJETTE la défense consolidée du défendeur;

38 REJETTE l'intervention de la Communauté métisse du Domaine-du-Roy et de la Seigneurie de Mingan, sans frais;

39 ACCUEILLE l'intervention limitée de la Première nation de Mashteuiatsh et la Première nation des Innus Essipit et la Première nation de Nutashkuan, sans frais;

40 CONDAMNE le défendeur Sylvain Corneau aux frais sur la requête introductive d'instance en dépossession, limités aux dépens d'une cause réglée avant défense (classe IIA) selon le *Tarif des honoraires judiciaires des avocats* (R.R.Q.R. 1981, c.B-1, r.13) et sans les frais d'expertise.

L'HONORABLE J. ROGER BANFORD J.C.S.

1 L.R.Q., c. T-8.1.

Québec (Procureur général) (Ministère des Ressources naturelles) c. Corneau, [2015] J.Q. no 987

- 2 Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.
- 3 *R. c. Powley*, [\[2003\] 2 R.C.S. 207](#).
- 4 Supra note 3, par. 30.
- 5 Notes d'audience du 15 novembre 2013, interrogatoire de Stéphane Corneau par Me Daniel Côté, p. 12.
- 6 SC-P-6, pp. 45-46.
- 7 Notes d'audience du 15 novembre 2013, contre-interrogatoire de Stéphane Corneau par Me Steinmander, p. 60-61.

End of Document

TAB 6

🚩 Consortium Developments (Clearwater) Ltd. v. Sarnia (City), [1998] 3 S.C.R. 3

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Bastarache and Binnie JJ.

Hearing and judgment: March 16, 1998.

Reasons delivered: October 22, 1998.

File No.: 25604.

[1998] 3 S.C.R. 3 | [1998] 3 R.C.S. 3 | [1998] S.C.J. No. 26 | [1998] A.C.S. no 26

Consortium Developments (Clearwater) Ltd., appellant; v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, respondents. And between Kenneth MacAlpine, James Pumble and MacPump Developments Ltd., appellants; v. The Corporation of the City of Sarnia and the Lambton County Roman Catholic Separate School Board, respondents, and The Attorney General for Saskatchewan, intervener.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Municipal law — Judicial inquiry — Municipality passing resolution to establish judicial inquiry concerning certain land transactions — Land developers causing summonses to be issued to municipal officials — Whether resolution complies with requirements of Municipal Act — Whether judicial inquiry trenches on federal criminal law power — Whether quashing of summonses issued to municipal officials prevented land developers from assembling proper record — Whether requirements of natural justice breached by procedure adopted at inquiry pre-hearing — Municipal Act, R.S.O. 1990, c. M.45, s. 100(1) — Constitution Act, 1867, s. 91(27).

Constitutional law — Division of powers — Judicial inquiry — Municipality authorizing judicial inquiry concerning certain land transactions — Whether judicial inquiry trenches on federal criminal law power — Municipal Act, R.S.O. 1990, c. M.45, s. 100(1) — Constitution Act, 1867, s. 91(27).

Administrative law — Natural justice — Judicial inquiry — Municipality authorizing judicial inquiry concerning certain land transactions — Whether requirements of natural justice breached by procedure adopted at inquiry pre-hearing — Municipal Act, R.S.O. 1990, c. M.45, s. 100(1).

As a result of a series of land transactions with the appellant Consortium Developments (Clearwater) Ltd. ("Consortium"), a private developer, the town of Clearwater acquired a 40-acre park and some rights to adjoining land, and Consortium emerged with 107 acres of unserviced land intended for residential development. Clearwater and the former city of Sarnia were subsequently amalgamated. Questions arose soon after amalgamation regarding the propriety of the land transactions. It was alleged that the town had paid inflated prices for the land it acquired as a park, while Consortium paid too little. Local taxpayers petitioned the Minister of Municipal Affairs to convene an inquiry under s. 178 of the Municipal Act. The Ministry investigated and decided not to order a provincial inquiry, but referred the matter to the provincial police. The police eventually issued a press release advising that their investigation had been concluded and revealed no evidence of the

commission of any criminal offence. While the police investigation was still ongoing, Sarnia city council passed a resolution to establish a judicial inquiry into the transactions pursuant to s. 100(1) of the Municipal Act, which grants a broad power to Ontario municipalities to authorize judicial inquiries into matters of municipal concern. The first branch of this power contemplates an investigation into specific misconduct, while the second branch contemplates an inquiry more generally into "the good government of the municipality or the conduct of any part of its public business". Consortium has consistently taken the position that the proposed judicial inquiry is not directed at concerns with respect to "good government" or "the public business" but constitutes a substitute police investigation. It sought to develop the factual foundation for this allegation by causing summonses to be issued to members of the city council and some of its senior officials. These summonses were ultimately quashed by the Divisional Court on the basis that evidence about the intent of individual members would be irrelevant to the validity of the council resolution. The s. 100 resolution was also quashed, for vagueness. Approximately a month later, and more than 16 months after termination of the police investigation, city council passed a longer and more detailed authorizing resolution that referred specifically to the "good government" and "conduct of public business" branch of s. 100(1) of the Municipal Act. The appellants brought applications for judicial review. The Commissioner then opened his inquiry, indicating that he intended to proceed without awaiting the final resolution of the judicial review applications and outlining the general inquiry procedure he would follow. The appellants' motion to seek his removal from the inquiry was dismissed by the Divisional Court. Their application for judicial review to quash the new resolution was dismissed by a majority of the Divisional Court. The Court of Appeal affirmed that decision, as well as the decisions of the Divisional Court dismissing the motion to remove the inquiry Commissioner for partiality and quashing the summonses.

Held: The appeal should be dismissed.

The power of a municipality to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, individuals who played a role in the events being investigated are also entitled to have their rights respected. The fact a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry. While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceeding by the principles of natural justice and the fairness of the Commissioner, and thereafter by the inadmissibility of compelled testimony in subsequent proceedings. The attack on the legislative validity of the second resolution in this case must be rejected. The resolution is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the resolution is a matter of legitimate municipal concern within the ambit of the matters referred to in s. 100.

Inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into.

The courts below were correct to quash the summonses to city councillors and city officials. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications.

The second resolution is not ultra vires on the ground that the inquiry it creates is in reality a substitute police investigation invading the exclusive jurisdiction of Parliament in relation to criminal law and procedure. The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may

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incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. The second resolution is not directed to specific allegations of criminal misconduct by named individuals.

The new amalgamated municipal body may lawfully undertake an inquiry into the affairs of its predecessor municipality. Section 9 of the amalgamating legislation, which puts the new city "in the place of the former" municipality for purposes relevant to assets and liabilities, brings Sarnia within s. 100 of the Municipal Act.

The Commissioner did not breach the requirements of natural justice and irrevocably lose jurisdiction by the procedure he adopted at the inquiry pre-hearing. While he stated that he would proceed notwithstanding the filing of the judicial review application, at the time he made this statement neither the Commissioner nor Commission counsel had received any application from the appellants for an adjournment. His decision to proceed and the proposed arrangements for the hearing were decisions properly made within the ambit of his procedural discretion. The appellants were not denied a hearing and the Commissioner's conduct disclosed no bias.

Cases Cited

Referred to: MacPump Developments Ltd. v. Sarnia (City) (1994), 20 O.R. (3d) 755; Thorne's Hardware Ltd. v. The Queen, [1983] 1 S.C.R. 106; Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System), [1997] 3 S.C.R. 440; Di Iorio v. Warden of the Montreal Jail, [1978] 1 S.C.R. 152; Dubois v. The Queen, [1985] 2 S.C.R. 350; Godson v. City of Toronto (1890), 18 S.C.R. 36; Starr v. Houlden, [1990] 1 S.C.R. 1366; British Columbia (Milk Board) v. Grisnich, [1995] 2 S.C.R. 895; Re Canada Metal Co. and Heap (1975), 7 O.R. (2d) 185; Re Nelles and Grange (1984), 46 O.R. (2d) 210; Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; O'Hara v. British Columbia, [1987] 2 S.C.R. 591; Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97; Hydro Electric Commission of Mississauga v. City of Mississauga (1975), 13 O.R. (2d) 511.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C., 1985, c. C-5, s. 5(2). Canadian Charter of Rights and Freedoms, s. 13. Constitution Act, 1867, ss. 91(27), 92(8), (13), (16). Criminal Code, R.S.C., 1985, c. C-46, s. 121. Inquiries Act, R.S.C., 1985, c. I-11, s. 13. Municipal Act, R.S.O. 1990, c. M.45, ss. 100(1), 178. Planning Act, R.S.O. 1990, c. P.13. Public Inquiries Act, R.S.O. 1990, c. P.41, ss. 5(2), 9(1). Sarnia-Lambton Act, 1989, S.O. 1989, c. 41, s. 9.

APPEAL from a judgment of the Ontario Court of Appeal (1996), 30 O.R. (3d) 1, 138 D.L.R. (4th) 512, 92 O.A.C. 321, 34 M.P.L.R. (2d) 291, [1996] O.J. No. 3004 (QL), affirming a decision of the Divisional Court (1995), 23 O.R. (3d) 498, 83 O.A.C. 241, 27 M.P.L.R. (2d) 157, [1995] O.J. No. 1649 (QL), dismissing an application for judicial review. Appeal dismissed.

Harvey T. Strosberg, Q.C., and Susan J. Stamm, for the appellants. George H. Rust-D'Eye, Barnet H. Kussner and Valerie M'Garry, for the respondent the City of Sarnia. Thomson Irvine, for the intervener.

Solicitors for the appellant Consortium Developments (Clearwater) Ltd.: Gowling, Strathy & Henderson, Toronto. Solicitors for the appellants Kenneth MacAlpine, James Pumble and MacPump Developments Ltd.: Gignac, Sutts, Windsor. Solicitors for the respondent the City of Sarnia: Weir & Foulds, Toronto. Solicitor for the intervener: John

D. Whyte, Regina.

The judgment of the Court was delivered by

BINNIE J.

1 This appeal involves an attack on the validity and conduct of a municipally authorized judicial inquiry into alleged conflicts of interest and alleged irregularities in certain land transactions in the City of Sarnia, Ontario. The appellants, who include private developers, allege that the judicial inquiry trenches on the federal criminal law power, was otherwise improperly constituted and ultra vires the municipality, and that they were wrongly prevented by the courts below from assembling a proper record to demonstrate the facts in support of their various allegations of invalidity. At the conclusion of the hearing in this Court, the appeal was dismissed from the bench with reasons to follow. These are the reasons.

Factual Background

2 In the fall of 1989 and spring of 1990, a number of transactions took place involving vacant land near the intersection of Highways 402 and 40, in the Town of Clearwater, just east of the old City of Sarnia. As a result of these land transactions, which included reciprocal sales of land between the municipality and a developer, the appellant Consortium Developments (Clearwater) Ltd. ("Consortium"), lands were transferred between the public and private sectors. The Lambton County Roman Catholic Separate School Board emerged with a school site, the Town of Clearwater emerged with a park and some rights to adjoining land, and Consortium emerged with 107 acres of unserviced land intended for residential development. It was later alleged that the Town of Clearwater had paid inflated prices for the 40 acres it acquired as a park, while the appellant, Consortium (which had acquired a right of first refusal on the municipal lands as part of the purchase price of its lands by Clearwater) paid too little. The sale to Consortium was by public tender. Consortium, as purchaser, gave back a mortgage to the Town of Clearwater as vendor for \$3,390,812 (the "Consortium mortgage").

3 On January 1, 1991, Clearwater and the former City of Sarnia were amalgamated. By the terms of the Sarnia-Lambton Act, 1989, S.O. 1989, c. 41, the newly amalgamated municipality inherited the assets and liabilities of Clearwater, including the Consortium mortgage. The respondent Sarnia says that the effect of the amalgamating Act is that the City and its local boards stands in the place of the former municipalities and their local boards. If the Town of Clearwater could have authorized the inquiry, it is argued, so too could the newly amalgamated City of Sarnia.

4 Questions arose soon after amalgamation regarding the propriety of the land transactions. The Mayor of Sarnia wrote to the solicitor for Consortium requesting information and, in particular, disclosure of the identities of the shareholders and principals of Consortium. The request was refused. The political pot boiled over.

The Consortium Mortgage

5 The Consortium mortgage has a number of controversial features. It provides that neither interest nor principal will be payable until the municipality has completed a secondary plan for the subject property and assumed the services on the lands. These steps would open the way to Consortium to develop the lands for residential homes under a plan of subdivision in accordance with the Planning Act, R.S.O. 1990, c. P.13. Payment of the principal monies is not tied to any calendar date, but is scheduled to begin three years after interest begins to accrue. Consortium explained this arrangement on the basis that, until Clearwater (now Sarnia) satisfies this condition, which it was anticipated would be done "almost immediately" after the sale, Consortium would be the owner of undeveloped land worth only a fraction of the purchase price. From Sarnia's perspective, these financial terms mean that the \$3,390,812 Consortium mortgage generates no immediate benefit for the City and, further, could be

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criticized as an inducement to facilitate the development of the Consortium lands ahead of other raw lands in the municipality, perhaps contrary to the priority that ordinary planning considerations might otherwise dictate.

6 Another controversial feature of the Consortium transaction is the continuing insistence of the shareholders and principals on anonymity. The Town of Clearwater had not insisted on disclosure, and its dealings had all been with the developer's lawyer. Accordingly, Consortium now argues that anonymity has somehow become a contractual term of the sale of the park binding on the new City of Sarnia. The identity of the shareholder(s) remained undisclosed at the date of the hearing of this appeal. The other appellants, Kenneth MacAlpine, James Pumble and MacPump Developments Ltd., were (or were involved with) the predecessors in title of the lands involved in some of the transactions, and have joined in the challenge to the judicial inquiry on the basis that they consider themselves to be potential targets. In earlier judicial review proceedings, the Sarnia City Solicitor filed an affidavit stating:

One councillor and the Mayor of Clearwater Council and two of the principals of MacPump were all employed by the same Real Estate Company during the relevant time. As a result, questions are raised concerning Conflict of Interest legislation.

The Investigations

7 Local taxpayers petitioned the Minister of Municipal Affairs to convene an inquiry under s. 178 of the Municipal Act, R.S.O. 1990, c. M.45. The Ministry investigated and decided not to order a provincial inquiry, but referred the matter to the Ontario Provincial Police Anti-Rackets Branch. On August 18, 1993, the Ontario Provincial Police issued a press release advising that the police investigation had been concluded and revealed "no evidence of the commission of any criminal offence". On two occasions, the role of the solicitors for Consortium in the land transactions was investigated by the Law Society of Upper Canada. On both occasions, the Law Society found no evidence of professional misconduct or conduct unbecoming a solicitor and took no action.

The First Sarnia City Council Resolution

8 On November 23, 1992, Sarnia City Council passed a Resolution pursuant to s. 100(1) of the Municipal Act to establish a judicial inquiry concerning the land transactions. Section 100(1) grants a broad power to Ontario municipalities to authorize judicial inquiries into matters of municipal concern. The appellants say that this power is divided into two distinct branches. The first branch contemplates an investigation into specific misconduct and the second branch contemplates an inquiry more generally into the good government of the municipality, "or the conduct of any part of its public business", as follows:

100. -- (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [the first branch] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [the second branch] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors

9 The operative portion of the text of the first Sarnia City Council Resolution provided as follows:

THAT Sarnia City Council ask for the appointment of a Judge under the appropriate legislation to carry out an inquiry for the City concerning the sale of City lands to Consortium and the sale from Consortium to the Lambton County Separate School Board of land in OPA #7, and Lottie Neely Park.

10 Consortium has consistently taken the position that the proposed judicial inquiry is not directed at concerns with respect to "good government" or "the public business" but constitutes a substitute police investigation. Consortium

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supports its case not only by reference to the inconclusive OPP investigation and Law Society inquiries already mentioned, but also by reference to local press reports of the various statements by Sarnia municipal politicians, including the following:

- (i) On July 17, 1993, Alderman John Vollmar is quoted as saying, "People who talked to me want answers, who's involved . . . the legality and the morality of it".
- (ii) On August 19, 1993, Alderman Elizabeth Wood is quoted as saying that "council is interested in finding out about 'mistakes in judgment and possible conflicts of interest'".
- (iii) On August 31, 1993, Mayor Mike Bradley is quoted with respect to his views on why the city wanted to proceed with the judicial inquiry:

He said council wants to find out who the unnamed principals are behind Consortium, since the city inherited from Clearwater its purchase arrangement with the group, which includes a \$3.4 million mortgage.

[Council] also wants to know why Clearwater acted as it did and whether any public official had a conflict of interest.

- (iv) On September 3, 1993, Alderman Terry Burrell is quoted as saying that the OPP investigations "did not examine whether members of public bodies, like Clearwater council, were in conflict of interest . . . that is the outstanding question here". Alderman Wood is quoted as saying that a judicial inquiry is a powerful instrument to get at the truth of whether public officials or staff "misused" their positions.
- (v) On February 14, 1994, Alderman Dave Boushy is quoted as saying that "the issue is whether there were any laws broken when the transactions took place".
- (vi) On February 16, 1994, while commenting on the OPP finding that there was no evidence of commission of a criminal offence, Mayor Mike Bradley is quoted as stating that such a finding does not mean everything was above board.

11 Consortium sought to develop the factual foundation for the allegation that the inquiry was a colourable attempt to create a substitute criminal inquiry by causing summonses to be issued to members of the Sarnia City Council and some of its senior officials. These summonses were ultimately quashed by the courts below, and this quashing gives rise to one of the grounds of appeal to this Court.

Quashing the First Sarnia City Council Resolution

12 The first Resolution was quashed for vagueness; see *MacPump Developments Ltd. v. Sarnia (City)* (1994), 20 O.R. (3d) 755 (C.A.). However, the Court of Appeal did hold on that occasion that as Sarnia now included within its boundaries the whole of the former municipality of Clearwater, and stood in its place under s. 9 of the amalgamating statute, the new City of Sarnia had the power under s. 100 to pass a properly framed resolution to inquire into the affairs of the former municipality of Clearwater. Doherty J.A. observed at p. 771:

. . . matters connected with the good government or public business of Clearwater are after amalgamation matters connected with the good government and public business of Sarnia.

The Second Sarnia City Council Resolution

13 On January 9, 1995, only a month after the quashing of its previous Resolution authorizing a judicial inquiry, and more than 16 months after termination of the OPP investigation, the City of Sarnia passed a longer and more detailed authorizing Resolution that referred specifically to the "good government" and "conduct of public business" branch of s. 100 of the Municipal Act. As its terms formed a significant part of the argument on the appeal, I

reproduce it in full:

Being a Resolution to request a Judicial Inquiry pursuant to Section 100 of the Municipal Act, and to provide the Terms of Reference therefor

WHEREAS, under section 100 of the Municipal Act, R.S.O. 1990, c. M.45, a Council of a municipality may, by resolution, request a Judge of the Ontario Court (General Division), to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business;

AND WHEREAS any Judge so requested shall make the Inquiry and shall report with all convenient speed, to Council, the result of the Inquiry and the evidence taken, and for that purpose shall have all the powers of a commission under Part II of the Public Inquiries Act, R.S.O. 1990, c. P.41;

AND WHEREAS the Corporation of the City of Sarnia has become the owner of certain lands, shown on the attached map, and known as the "Lottie Neely lands" or "Lottie Neely Park", as a result of the amalgamation of the former Town of Clearwater ("Clearwater") with the former City of Sarnia, and as a result of the purchase of these lands from MacPump Developments Ltd. ("MacPump") by Clearwater;

AND WHEREAS the consideration for the purchase by Clearwater of the Lottie Neely lands included, in addition to the purchase price of \$1,200,000.00, the granting to MacPump of a right of first refusal on a 142 acre parcel of land owned by Clearwater, also shown on the attached map, and known as the "Parklands";

AND WHEREAS Clearwater sold the Parklands to Consortium Developments (Clearwater) Ltd. ("Consortium") following a public tender process, which was subject to the right of first refusal;

AND WHEREAS, prior to the sale of the Parklands to Consortium, Clearwater declined to negotiate with the Lambton County Roman Catholic Separate School Board (the "Board"), the Board's offer to purchase a portion of the Parklands;

AND WHEREAS the right of first refusal granted by Clearwater to MacPump, was assigned by MacPump, to a trustee (the "Trustee");

AND WHEREAS the Trustee agreed to sell a 35 acre parcel of the Parklands to the Board;

AND WHEREAS the Parklands which Clearwater sold to Consortium were conveyed in two parcels, as follows:

1. a 35 acre parcel conveyed to the Trustee, and
2. a 107 acre parcel conveyed to Consortium.

AND WHEREAS, on the same day that the Parklands were conveyed by Clearwater to the Trustee and Consortium, the Trustee conveyed the 35 acre parcel of land, to a trustee, in trust for the Board;

AND WHEREAS, as a result of the sale to Consortium, the Corporation of the City of Sarnia is now the holder of a mortgage in the amount of \$3,390,812.20 on the 107 acre portion of the Parklands, which mortgage was registered April 5th, 1990 and provides, in part, that:

"The said principal sum shall be repayable as follows:

- a) interest shall be calculated at the rate of 10% per annum, half yearly not in advance, and shall be payable yearly. Interest shall commence on the completion by the Chargee of the secondary plan for the subject property and upon completion and assumption by the Chargee of the infrastructure in relation thereto in order that the lands being charged can proceed to be developed by plan of subdivision in accordance with the Planning Act.
- b) all outstanding principal and interest to be due and payable three (3) years from the date upon which interest commences as set out in clause (a) above."

AND WHEREAS the conditions precedent for the commencement of interest on the principal sum secured by the mortgage have not been satisfied;

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AND WHEREAS, by virtue of section 9 of the Sarnia-Lambton Act, S.O. 1989, c. 41, the assets and liabilities of Clearwater have become assets and liabilities of the City of Sarnia, and the City stands in the place of Clearwater;

AND WHEREAS a public inquiry would permit the public to understand and evaluate fully the above noted transactions, and would permit the Commissioner to make recommendations that would be of benefit for the future conduct of the public business of the municipality;

AND WHEREAS the City of Sarnia has received delegations and petitions calling for the City to inquire into these transactions;

AND WHEREAS the Ontario Court of Appeal has affirmed the City's right to pass such a Resolution;

NOW THEREFORE THE MUNICIPAL COUNCIL OF THE CORPORATION OF THE CITY OF SARNIA DOES HEREBY RESOLVE THAT:

1. An Inquiry is hereby requested to be conducted pursuant to that portion of Section 100 of the Municipal Act which authorizes the Commissioner to, "inquire into, or concerning, any matter connected with the good government of the municipality, or the conduct of any part of its public business", and
2. The Honourable Mr. Justice Gordon P. Killeen be requested to act as Commissioner for the Inquiry.

AND IT IS FURTHER RESOLVED THAT the Terms of Reference of the Inquiry shall be:

To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry.

AND IT IS FURTHER RESOLVED THAT the Commissioner, in conducting the Inquiry into the transactions in question to which the Town of Clearwater was a party, and without expressly inquiring into the internal affairs and conduct of the Board, except as is incidental to his primary inquiry, is empowered to ask any questions which he may consider as necessarily incidental or ancillary to a complete understanding of these transactions.

AND, for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, and without infringing on the Commissioner's discretion in conducting the Inquiry in accordance with the Terms of Reference stated herein, it is anticipated that the Inquiry may include the following:

1. an inquiry into all relevant circumstances pertaining to the various transactions referred to herein, including: their relationship to one another; the consideration provided by the parties in each instance; the granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia;
2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;
3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and
4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

14 On February 28, 1995, several weeks after passage of the Second Sarnia City Council Resolution, the present applications for judicial review were commenced. Included in the grounds was the allegation that the Second Sarnia City Council Resolution had a colourable purpose in that it:

. . . creates an inquiry into the supposed misconduct of named and unnamed individuals while purporting to create an inquiry into the good government of the municipality.

Opening of the Commission of Inquiry

15 On March 6, 1995, Commissioner Gordon P. Killeen, a justice of the Ontario Court (General Division), opened his inquiry. His opening statement indicated an intention to proceed without awaiting the final resolution of the judicial review applications together with an outline of the general inquiry procedure he would follow. The appellants took the position that Commissioner Killeen had made up his mind not only to proceed without hearing their submissions, but also how he would proceed. They brought a motion to seek his removal from the inquiry. This removal motion was dismissed by a unanimous Divisional Court by order dated March 10, 1995.

Subpoena to Members of City Council

16 As stated, in an effort to advance its allegation of colourable purpose Consortium caused summonses to be issued to various members of City Council and senior city officials to testify as witnesses in the pending motions for judicial review. The Divisional Court, on a preliminary motion with written reasons released on April 12, 1995, 81 O.A.C. 102, quashed the summonses on the basis that evidence about the intent of individual members would be irrelevant to the validity of the Council resolution, citing *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106.

Relevant Statutory Provisions

17 Section 100(1) of the Municipal Act, R.S.O. 1990, c. M.45, provides:

100.--(1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors, the judge shall make the inquiry and for that purpose has all the powers of a commission under Part II of the Public Inquiries Act, which Part applies to such investigation as if it were an inquiry under that Act, and the judge shall, with all convenient speed, report to the council the result of the inquiry and the evidence taken.

Judgments

18 The appellant's application for judicial review to quash the new Resolution of January 9, 1995 was dismissed by a majority of the Divisional Court (Steele J. and Rosenberg J. concurring, with Borins J. dissenting) on June 8, 1995. The Court of Appeal, on September 6, 1996, dismissed the appeals of the decisions of the Divisional Court rendered on March 10 (the application to remove Commissioner Killeen), April 12 (the quashing of the subpoenas) and June 8, 1995 (dismissal of the judicial review applications on their merits).

Ontario Court (General Division), Divisional Court (1995), 23 O.R. (3d) 498

Per Steele J., for the majority

19 A by-law or resolution is presumed to be valid and the onus was on the applicants to show that it should be

quashed. Doubtful expressions should be resolved in favour of an *intra vires* interpretation. City council had the authority to pass a resolution appointing the inquiry unless on the face of the resolution it is vague or infringes upon federal criminal law powers. Even if the alleged oral contract of non-disclosure regarding the names of Consortium's principals was binding on Sarnia, this would not preclude Sarnia from passing the Resolution. The Resolution was not vague. It made the necessary connection required by s. 100 of the Act between the particular subject-matter and the good government or business affairs of the municipality. "The . . . resolution raises the issue to be investigated in a sufficient manner to show valid connection to the public business and good government of the municipality and the purpose of the inquiry" (p. 515). The pith and substance of the Resolution is to inquire into good government of the municipality and, in particular, the conduct of its public business. All inquiries may result in evidence showing bad conduct, and this possibility alone is not sufficient to hold that the Resolution is invalid. It should be presumed that the Commissioner knows the law and would respond appropriately if a question about evidence or the invasion of individual rights should arise. The application for judicial review should be dismissed.

Per Rosenberg J., concurring

20 The inquiry should be permitted to proceed for the reasons of Steele J. and for the following reasons. The inquiry was being conducted by a superior court judge well aware of the limits imposed on an inquiry. It would be wrong to take too technical a view of the requirement that terms of reference define the questions to be answered. Only when the full details of the various land transactions have been explored can the true questions be knowledgeably formulated and recommendations made.

Per Borins J., dissenting

21 Borins J. concluded that this was, in reality, a first branch inquiry, the focus of which was to determine whether there was anything corrupt respecting the land transactions, and not a second branch inquiry concerning good government or public business of the municipality. He concluded (at p. 521) that its true purpose

was to determine whether there was unspecified malfeasance, breach of trust, conflict of interest, or some other type of impropriety on the part of MacPump and Consortium, or their principals, or the representatives of the school board, or the representatives of the former Town of Clearwater.

Borins J. held that particulars are required for either branch of s. 100, but especially the first branch, and that this Resolution was improper because it "identifies nothing about the land transactions which may be suspect, such as a conflict of interest or improper use of funds" (p. 527). He said (at pp. 531-32):

In short, there is nothing on the face of the resolution, or in the evidence, that demonstrates that the subject matter of the proposed inquiry affects the good government or public business of Clearwater. Similarly, if characterized as a first branch inquiry, the resolution also lacks particularity as it fails to state any act of alleged malfeasance.

The Resolution offends the principle that a by-law, or resolution, must express its meaning with sufficient certainty to enable those persons affected by it to understand it in order to be able to comply with it. Furthermore, the Resolution was void on constitutional grounds. A review of all the circumstances led to the conclusion that the true purpose of the inquiry was a criminal investigation. The Resolution was an unconstitutional exercise by a municipal council of federal criminal law powers under s. 91(27) of the Constitution Act, 1867. Borins J. would have quashed the second City of Sarnia Resolution and halted the inquiry.

Court of Appeal (1996), 30 O.R. (3d) 1

22 The appeal was dismissed. Section 100(1) of the Municipal Act has two branches. Under the first branch, the council can pass a resolution to investigate supposed misconduct on the part of officials or any person dealing with the municipality. Under the second branch, the council can pass a resolution to inquire into "any matter connected with the good government of the municipality or the conduct of any part of its public business". The court rejected

the argument that the City's Resolution was unlawful because it was drafted as a second branch inquiry, when in reality it created a first branch inquiry without the appropriate procedural safeguards. The court concluded that it was not necessary for the municipality to specify the branch under which it purports to act as it had jurisdiction to act under either branch.

23 The argument that the Resolution was too vague and lacked particularity was rejected. The preamble to the Resolution described the land transactions in considerable detail. "It is clear that the land transactions are 'the matter' to be investigated within the meaning of s. 100(1) of the Municipal Act" (p. 20). The Resolution was sufficiently particular to comply with the requirements of s. 100(1) of the Act. McMurtry C.J.O. for the court observed (at p. 22) that:

The City of Sarnia has specified the "matter" to be investigated, and that matter is a limited, defined series of transactions. The resolution does not need to spell out specific allegations for the commissioner to understand the potential problem areas that might be related to the public interest. Public funds were used to purchase two properties at what appears to be substantially inflated prices, the City is holding a mortgage which may be unenforceable and Consortium has steadfastly refused to disclose its principals. Again, the transactions are described in sufficient detail to direct the commissioner as to the subject-matter of the inquiry.

The court was of the opinion that the appellants appeared to be asking for particulars that might be available only after the inquiry had concluded its investigation.

24 As to the argument that the Resolution infringed upon federal criminal law powers under s. 91(27) of the Constitution Act, 1867, McMurtry C.J.O. stated that the land transactions had generated considerable public concern, and the Resolution on its face addressed policy issues by asking the commissioner to inquire into all aspects of these transactions including their impact on the ratepayers of the City. This was a matter of municipal good governance and the conduct of public business. The Municipal Act authorizes such an inquiry, and the constitutional division of powers did not invalidate the inquiry. Even if the inquiry incidentally touches on what may be criminal conduct, the inquiry itself was established for a valid provincial purpose. The pith and substance of the Resolution fell within provincial jurisdiction. All of the other grounds of appeal were dismissed.

Issues

25 In this Court the appellants advanced the following issues:

1. Is the Resolution unlawful in that it fails to comply with the requirements of s. 100(1) of the Act?
 2. Should the appellants' attempt to create a record of surrounding circumstances have been restricted by the quashing of the summonses issued to the mayor and the Sarnia City councilors, and city officials?
 3. Is the Resolution ultra vires because the inquiry it creates is in reality a substitute police investigation and preliminary inquiry infringing the federal criminal law powers under s. 91(27) of the Constitution Act, 1867?
 4. Is the Resolution unlawful in that it requires an investigation by Sarnia into the affairs of Clearwater?
 5. Did the Commissioner breach the requirements of natural justice and irrevocably lose jurisdiction by the procedure he adopted at the inquiry pre-hearing?
1. Is the Resolution Unlawful in That It Fails to Comply with the Requirements of s. 100(1) of the Act?

26 The power of an Ontario municipality to authorize a judicial inquiry into matters touching the good government of the municipality, or "any part of its public business", and any alleged misconduct in connection therewith, reaches

back prior to Confederation. Apart from a few amendments to harmonize this power with other legislative changes in the province, s. 100 of the Municipal Act is substantially unchanged from its predecessor section in 1866. This reflects a recognition through the decades that good government depends in part on the availability of good information. A municipality, like senior levels of government, needs from time to time to get to the bottom of matters and events within its bailiwick. The power to authorize a judicial inquiry is an important safeguard of the public interest, and should not be diminished by a restrictive or overly technical interpretation of the legislative requirements for its exercise. At the same time, of course, individuals who played a role in the events being investigated are also entitled to have their rights respected. The basic issue in this appeal is how a balance is to be struck between those two requirements.

27 Counsel for Consortium expressed his client's opposition to the apparent sweep of s. 100 with the comment that it gives every municipality in the province the power to compel a private citizen "to come to the town square to be interrogated". It should be remembered, however, that Consortium elected to do business with a public body, whose successor is now accountable to its taxpayers for a \$3.39 million unperforming mortgage and 40 acres of parkland allegedly purchased at an excessive price. The interrogation of Consortium's shareholders or principals (if and when they are identified) will be under the direction of a Commissioner who is (as he must be) a judge of the Ontario Court (General Division). The fact a s. 100 inquiry is a judicial inquiry clearly seeks to balance the municipality's desire to have accurate information and useful recommendations from an independent Commissioner against the right of private citizens and others to have their legitimate interests recognized and protected. A good deal of confidence is inevitably and properly placed in the ability of the Commissioner to ensure the fairness of the inquiry.

Procedural Fairness

28 Some of the arguments advanced on behalf of the appellants did, in fact, seem to overlook the distinction between the requirements for a valid exercise of the s. 100 power to establish an inquiry, on the one hand, and the procedural protections to which the appellants are entitled in the course of an inquiry once validly established on the other hand. The municipal council resolution contemplated by s. 100 must, to be sure, be intelligible. It must convey to the Commissioner and every other interested person the subject matter of the inquiry, and it must connect the subject matter to one or more of the matters referred to in s. 100 of the Municipal Act. It must provide those who appear before the Commissioner with a reasonable understanding of the scope, as well as the limits, of the inquiry, so as to avoid the possibility, however remote, that an overly enthusiastic Commissioner or commission counsel could, in effect, draw their own terms of reference. The s. 100 resolution must provide sufficient particularity to satisfy these legislative requirements.

29 That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself. Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

30 The conceptual distinctions between legislative validity and the fair inquiry interests of the participants is important. If the municipality had a sufficient grip on the relevant facts to give detailed particulars there might be no need for an inquiry. At the same time, the municipality's lack of knowledge does not license it to trample on the rights of its employees, former employees, persons with whom it has done business, or others. Aspects of procedural fairness, such as the need for particulars, should not defeat an inquiry at the outset unless it is

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concluded that in the particular circumstances of the case a fair inquiry simply cannot be had based upon the wording of the particular resolution under consideration. Otherwise the inquiry should be allowed to proceed, and procedural objections dealt with at a later stage when the Commissioner has had an opportunity to consider the fairness issues and deal with them.

31 It is true, as pointed out by Borins J. dissenting in the Divisional Court, at p. 525, that s. 100, unlike s. 13 of the federal Inquiries Act, R.S.C., 1985, c. I-11, and s. 5(2) of the Ontario Public Inquiries Act, R.S.O. 1990, c. P.41, does not explicitly state that no finding of misconduct shall be made against a person unless that person is given reasonable notice of the substance of the alleged misconduct, and given an opportunity to be heard during the inquiry in person or by counsel. Borins J. considered that this omission meant:

. . . that the commissioner, in reporting the result of his or her inquiry to the municipal council, may make findings of misconduct without the necessity of [such notice].

I do not agree. Section 13 of the federal Inquiries Act and s. 5(2) of the Ontario Public Inquiries Act reflect the applicable principles of natural justice dealing with notice and the opportunity to be heard where misconduct is alleged, and a Commissioner under s. 100 is bound to govern himself accordingly even though s. 100 is silent on the requirement.

Legislative Validity of the Second Sarnia City Resolution

32 With these principles in mind, I turn to the argument that the second Sarnia Council Resolution fails to meet the minimum legislative requirements for a valid exercise of the s. 100 power. The Resolution first identifies s. 100 as the source of the municipality's jurisdiction, and then recites in considerable detail each step of the transactions involving the subject lands, including the controversial terms of the Consortium mortgage mentioned above, and then describes the successor relationship between Sarnia and the former Town of Clearwater. Having identified the subject matter of the inquiry, and appointed Mr. Justice Killeen as the Commissioner, the Resolution then relates the terms of inquiry to s. 100 as follows:

To inquire into all aspects of the above transactions, their history and their impact on the ratepayers of the City of Sarnia as they relate to the good government of the municipality, or the conduct of its public business, and to make any recommendations which the Commissioner may deem appropriate and in the public interest as a result of his Inquiry. [Emphasis added.]

33 The Commissioner is thus directed to, and limited by, the municipality's interest in good government and the conduct of public business. The limitation is important and counsel for the various participants are entitled to see that it is respected. The Resolution then provides:

for the purpose of providing fair notice to those individuals who may be required to attend and give evidence, ... it is anticipated that the Inquiry may include ... [in respect of the various transactions] their relationship to one another; the consideration provided by the parties in each instance; the granting by Clearwater of a right of first refusal to MacPump upon the purchase of the Lottie Neely lands by Clearwater; the acceptance by Clearwater of a mortgage given by Consortium upon its purchase of the Parklands; and the timing of the various transactions in relation to one another and in relation to the amalgamation of Clearwater and the former City of Sarnia; [Emphasis added.]

34 In terms of "good government" and the conduct of "public business" the Resolution specifically recites its "anticipation" of

2. an inquiry into the nature and extent of the information which was available to the parties to the various transactions at all relevant times;

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3. an inquiry into the relationships, if any, between the elected and administrative representatives of Clearwater, and the principals and representatives of the Board, MacPump, the Trustee and Consortium at all relevant times; and
4. an inquiry into the legal or other professional advice obtained by Clearwater in connection with its negotiations.

35 The appellants complain that there is no mention here of specific acts of "supposed malfeasance, breach of trust or other misconduct". Their objective, apparently, is to limit the inquiry to particulars the municipality already knows about, if indeed there are any such particulars. Section 100, however, does not compel a municipality to advance more extravagant allegations than it is ready, willing and able to make. Item 3 in the Resolution talks about an inquiry into the "relationships" between representatives of the developer and City officials. This item clearly raises the topic of potential conflicts of interest. There is no obligation on the City to allege as a fact that such conflicts of interest existed. Item 4 raises the issue whether Clearwater ignored its professional advisors. Such matters as potential conflicts of interest and possible disregard of professional advice have a good government aspect as well, potentially, as a misconduct aspect. Section 100 creates a broad power, and it was open to Sarnia City Council to authorize the more general inquiry into the conduct of public business expressed in its Resolution as opposed to the narrower inquiry into specific acts of misconduct that the appellants think would have been preferable.

36 The appellants argue that the connection between "good government" and the subject land transactions should be spelled out in the s. 100 Resolution, but the Resolution, taken as a whole, makes it clear to a mind willing to understand that the City believes that as a result of "public business" that may have involved "relationships" between public officials and private developers, the City is now stuck with an unperforming mortgage and an overpriced park, which have generated "delegations and petitions", and the City believes it would benefit from the Commissioner's recommendations for the "future conduct of the public business of the municipality". It is evident that an inquiry under the second branch of s. 100 into an item of public business may disclose misconduct. Equally, an inquiry under the first branch may look into "supposed malfeasance", and discover the conduct was entirely innocent, but ought nevertheless to result in recommendations for the good government of the municipality. While it may therefore be useful for some purposes to think of s. 100 as having two branches, it is but a single power, and the preconditions for its valid exercise to establish a judicial inquiry do not vary with the subject matter. A more compartmentalized interpretation would undermine the utility of the power and contradict the broad legislative intent evident on the face of s. 100. The concern, which I believe is a legitimate concern, about the need for greater particularity in cases where misconduct may be found can best be handled, in my view, within the framework of procedural fairness at the inquiry stage.

37 It must be remembered that the report of the Commissioner to the City Council will represent only his views, and will not determine civil or criminal liability, if any. As this Court recently emphasized in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (the "Blood Inquiry case"), per Cory J. at para. 34:

A commission of inquiry is neither a criminal trial nor a civil action for the determination of liability. It cannot establish either criminal culpability or civil responsibility for damages. Rather, an inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner. They are not enforceable and do not bind courts considering the same subject matter.

While the public benefits sought to be achieved by the judicial inquiry cannot be purchased at the expense of violating the rights of the appellants and others involved in the land transactions, those rights will be protected in the course of the proceeding by the principles of natural justice and the fairness of the Commissioner, and thereafter by

the inadmissibility of compelled testimony in subsequent proceedings federally under s. 5(2) of the Canada Evidence Act, R.S.C., 1985, c. C-5, and s. 13 of the Canadian Charter of Rights and Freedoms (*Di Iorio v. Warden of the Montreal Jail*, [1978] 1 S.C.R. 152; *Dubois v. The Queen*, [1985] 2 S.C.R. 350), and provincially under s. 9(1) of the Ontario Public Inquiries Act, which is incorporated by reference into s. 100(1) of the Municipal Act.

38 The appellants rely, as did Borins J., dissenting, in the Divisional Court, on the dissenting reasons of Gwynne J. in this Court in *Godson v. City of Toronto* (1890), 18 S.C.R. 36. In that case, the majority upheld a very sweeping municipal resolution to establish a judicial inquiry into the conduct of a municipal inspector suspected of malfeasance. The resolution lacked particulars. A majority of this court, per Sir W. J. Ritchie C.J., held at p. 40 that "[t]he city was empowered by law to issue the commission to the county judge to make the inquiries directed in this case". The sole dissenting judgment of Gwynne J. was based on his view that the municipal power to authorize a judicial inquiry was so "open to abuse" that the legislation should be "so construed as to confine the powers . . . within the strictest construction of its letter" (p. 41). Clearly a restrictive interpretation was rejected by the majority of the Court. Gwynne J. went on to hold that jurisdiction under the first branch required the municipal resolution to "specify some act, matter or thing, either in the nature of malfeasance, breach of trust, or other named misconduct" (p. 42). It seems to me that Gwynne J. was merely pointing out that the subject matter of an inquiry has to be specified, a proposition with which I agree. It hardly bears repetition that an inquiry into misconduct must identify the misconduct to be inquired into. However, to the extent that Gwynne J. is taken by the appellants as advancing the broader proposition that, in the absence of such specification of misconduct, a municipality cannot initiate a more general inquiry under the second branch of s. 100 to get to the bottom of some controversial item of public business, I do not agree that Gwynne J. was advancing such a proposition. If he was, I think the majority of this Court in *Godson* can be taken as having rejected it, and rightly so.

39 A more recent and instructive case is the *Blood Inquiry* case, *supra*. That case involved a challenge to the authority of Commissioner Horace Krever to find not only the "facts" about Canada's blood supply in the early 1980s, but to draw inferences that might indicate that there had been conduct on the part of the corporations or individuals which could attract criminal culpability or civil liability. The terms of reference in that case, as here, did not make any allegations of misconduct. In that aspect, it provides a striking parallel to the present case. This Court unanimously rejected the challenge to Commissioner Krever's notices of potential misconduct, and his authority eventually to make findings that disclosed misconduct if he were to think it fit to do so. The ruling in that case ought to be applied to the present case to hold that not only may the Commissioner acting under the second branch of s. 100 inquire into, as part of his larger mandate, conduct which may have potential criminal or civil consequences, but may in his report (per Cory J. at para. 57):

. . . make findings of misconduct based on the factual findings, provided that they are necessary to fulfill the purpose of the inquiry as it is described in the terms of reference.

40 The s. 100 Resolution in this case is perfectly intelligible. It identifies not only what is to be inquired into but the limits of the municipality's interest. The subject matter of the inquiry as set out in the second Sarnia City Council Resolution is a matter of legitimate municipal concern within the ambit of the matters referred to in s. 100. The attack on the legislative validity of the s. 100 Resolution must therefore be rejected.

Procedural Fairness at the Inquiry

41 Before leaving the appellants' first ground of appeal, I want to emphasize that the concerns of individuals caught up in judicial inquiries are real and understandable. Unlike an ordinary lawsuit or prosecution where there has been preliminary disclosure and the trial proceeds at a measured pace in accordance with well-established procedures, a judicial inquiry often resembles a giant multi-party examination for discovery where there are no pleadings, minimal pre-hearing disclosure (because commission counsel, at least at the outset, may have little to disclose) and relaxed rules of evidence. The hearings will frequently unfold in the glare of publicity. Often, of course, at least some of the participants will know far in advance of commission counsel what the documents will show, what the key witnesses will say, and where "misunderstandings" may occur. The inquiry necessarily moves in a convoy carrying participants of widely different interests, motives, information, involvement, and exposure. It is a tall order to ask any

Commissioner to orchestrate this process to further the public interest in getting at the truth without risking unnecessary, avoidable or wrongful collateral damage on the participants. While the appellants go too far in arguing that the particulars they seek must be built into the s. 100 Resolution, inquiry participants are entitled to particulars of what, if any, misconduct is alleged against them sufficiently in advance of the conclusion of the hearings (and ordinarily to each of them in advance of giving testimony) to reasonably enable each of them to respond (if they have not already responded) as each of them may consider appropriate. Witnesses are routinely required to make disclosure of relevant documents to Commission counsel, and in the spirit of even-handedness it should be customary for Commission counsel, to the extent practicable, to disclose to witnesses, in advance of their testimony, any other documents obtained by the Commission which have relevance to the matters proposed to be covered in testimony, particularly documents relevant to the witness's own involvement in the events being inquired into. Judicial inquiries are not ordeals by ambush. Indeed, judicial inquiries often defend the validity of their existence and methods on the ground that such inquiries are inquisitorial rather than adversarial, and that there is no lis between the participants. Judicial inquiries are not, in that sense, adversarial. On this basis the appellants and others whose conduct is under scrutiny can legitimately say that as they are deemed by the law not to be adversaries, they should not be treated by Commission counsel as if they were.

2. Should the Appellants' Attempt to Create a Record of Surrounding Circumstances Have Been Restricted by Quashing the Summonses to the Mayor, the Sarnia City Councillors, and City Officials?

42 This point is governed by the principles already discussed. The appellants submit that evidence of the surrounding circumstances, including the intent of the individual members of the Sarnia City Council, is admissible and relevant to show whether or not the true purpose of the Resolution was to uncover and disclose unspecified misconduct. The evidence would be directed to whether the Councillors really intended to constitute a "first branch" inquiry masquerading as a "second branch" inquiry within the general framework of s. 100 so as to avoid the necessity of providing appropriate particulars of misconduct. Beyond this, the appellants want to demonstrate that, even as a "first branch" inquiry, the supporters of the Resolution were, in fact, seeking a substitute police investigation into the commission of specific criminal offences, by specific individuals, thus attracting the prohibition of *Starr v. Houlden*, [1990] 1 S.C.R. 1366.

43 I will address the *Starr* issue below. Subject to that, it is clear that the evidence directed to a "first branch" versus "second branch" argument is irrelevant. The doctrine of colourability applies where a legislature purports to exercise its power in relation to a matter within its jurisdiction but, in fact, is directing its legislative effort to a matter outside its jurisdiction. To put the matter another way, the appellants argue that while the s. 100 Resolution "in form" authorizes a second branch inquiry, it is "in substance" a first branch inquiry, and should attract what the appellants contend should be the more rigorous procedural requirements of a "first branch" inquiry. Leaving aside the division of powers issue that prevailed in *Starr* the appellants cannot succeed simply by showing that some members of Council may have had in mind one aspect of the s. 100 jurisdiction while others had in mind a different aspect of the s. 100 jurisdiction. The Resolution was in writing. Members of Council voted for the written text. The Commissioner is bound by the written text. The question is whether the municipality, as opposed to the individual members of its Council, had jurisdiction to do what it did. See *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895, at para. 5.

44 This case provides a good illustration of why the rule in *Thorne's Hardware*, *supra*, is salutary. In that case the Court was invited to conclude that the federal Cabinet was motivated by crass and improper financial considerations to extend the boundaries of St. John Harbour to include new deep water liquid bulk terminal facilities which Irving Oil and its wholly owned subsidiaries had carefully located outside the previous harbour limits. The result was that harbour dues not previously payable at the new facility became payable. *Dickson J.* for the Court said, at p. 112:

Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an

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examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the Order in Council. . . .

45 The motives of a legislative body composed of numerous persons are "unknowable" except by what it enacts. Here the municipal Council possessed the s. 100 power and exercised it in the form of a resolution which speaks for itself. While some members of the present or previous Sarnia Council may have made statements which suggest a desire to unmask alleged misconduct, the inquiry will not be run by city councillors but by Commissioner Killeen, a Superior Court judge, who will take his direction from the s. 100 Resolution, not from press reports of comments of some of the city politicians. Accordingly the courts below were correct to quash the summonses and strike from the record certain other evidence. While courts should be slow to interfere with a party's effort to build its case, they should set aside summonses where, as here, the evidence sought to be elicited has no relevance to a live issue in the judicial review applications: *Re Canada Metal Co. and Heap* (1975), 7 O.R. (2d) 185 (C.A.), per Arnup J.A., at p. 192.

3. Is the Resolution Ultra Vires Because the Inquiry It Creates Is in Reality a Substitute Police Investigation and Preliminary Inquiry Infringing the Federal Criminal Law Power Under s. 92(27) of the Constitution Act, 1867?

46 An issue of colourability would properly be raised if it were established that this judicial inquiry, purportedly authorized under provincial law, was in fact a substitute police investigation invading the exclusive jurisdiction of Parliament in relation to criminal law and procedure. Extrinsic evidence would be admissible to demonstrate colourability: *Starr*, supra, at p. 1403. If the appellants are correct the Resolution would be ultra vires s. 100, which authorizes only inquiries within provincial jurisdiction, and the s. 100 Resolution would be invalid on division of powers grounds.

47 The constitutional validity of s. 100 itself is undoubted. It can be supported under various provisions of s. 92 of the Constitution Act, 1867: (a) s. 92(8), Municipal Institutions in the Province; (b) s. 92(13), Property and Civil Rights in the Province; and (c) s. 92(16), Generally all Matters of a merely local or private Nature in the Province. The question is whether this particular resolution, passed pursuant to that authority, is itself ultra vires.

48 The appellants' allegation is that members of Sarnia City Council were frustrated by the failure of investigations of the police and the provincial Ministry of Municipal Affairs to produce evidence of "wrongdoing". The appellants' solicitor points to a meeting he had with some city officials on March 3, 1995 in which three municipal Councillors mentioned an in camera meeting within a month prior to passing the January 9, 1995 Resolution in which there was talk of getting to the bottom of "wrongdoing" and the city's solicitor allegedly reported she had been told by an OPP officer "off the record" that the Council should go ahead with the inquiry. Implicit in this statement, it is argued, was the OPP officer's belief that criminality might well be uncovered if there was an inquiry. The appellants seek to attribute this motive to City Council.

49 The first problem with this line of argument is that wishful thinking on the part of municipal councillors, even if established, could not turn a s. 100 inquiry into a substitute police investigation. The reason why the jurisdictional challenge succeeded in *Starr* was not that the framers of the provincial Order in Council hoped that the Commissioner would be able to conduct a substitute police investigation, but because this Court concluded that in fact that is what the Order in Council directed the Commissioner to undertake. Extrinsic evidence was admitted to support the finding of ultra vires but such evidence corroborated what was already evident in the text of the Order in Council. The simple answer to the appellant's argument in this case is that if the Commissioner did attempt to undertake a substitute police investigation as in *Starr* he would be acting ultra vires the authority conferred by the s. 100 Resolution. Even if some members of the City Council were motivated to vote for the Resolution by an erroneous view of what it accomplishes, this motive cannot turn an intra vires resolution into an ultra vires resolution.

50 The decision in *Starr* cannot be taken as a licence to attack the jurisdiction of every judicial inquiry that may

incidentally, in the course of discharging its mandate, uncover misconduct potentially subject to criminal sanction. In the present case, while the OPP investigation was ongoing at the time of the first City Council Resolution, it had terminated 16 months prior to passage of the second Sarnia Council Resolution of January 9, 1995. Even if passage of the second Resolution is thought to be tainted with the circumstances alleged to have surrounded the first Resolution (notwithstanding the intermediate election of a new City Council), the fact remains that the second Resolution is not directed to specific allegations of criminal misconduct by named individuals.

51 It must be remembered that in *Starr* the police criminal investigation was ongoing during the Houlden inquiry itself. A senior official in the office of the Ontario Premier had resigned after admitting improper receipt of personal benefits at no cost, including the famous refrigerator. The Houlden inquiry had regular police officers assigned to its investigation staff. Efforts had to be made to prevent the work of the "inquiry police" from tainting the work of the "police police" who were investigating concurrently the possibility of charges under the Criminal Code. Both investigations were working under substantially identical terms of reference, namely s. 121 of the Criminal Code, R.S.C., 1985, c. C-46, as may be seen by comparing s. 121 with the Houlden Commission terms of reference.

Criminal Code, s. 121

Every one . . . who . . . pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family . . .

Houlden Commission terms of reference, para. 2

. . . a benefit, advantage or reward of any kind was conferred upon an elected or unelected public official or upon any member of the family

In the result, the "police police" and the "inquiry police" were covering the same ground under substantially the same terms of reference at the same time. The difference was that the "police police" had to work within the constraints of the criminal law, whereas the "inquiry police" did not. The Houlden Commission Order in Council was thus quashed on the basis that it was directed to exclusive federal jurisdiction over criminal law and procedure and was therefore ultra vires the legislative authority of the province. The narrowness of its finding is evident from the judgment of Lamer J., as he then was, at p. 1402:

The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel Criminal Code provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a prima facie case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the Code. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry governed by Part XVIII of the Code, into allegations of specific criminal acts by *Starr* and Tridel Corporation Inc.

Further, the general constitutional rule that permits provincial inquiries that are in "pith and substance" directed to provincial matters (in this case local government) to proceed despite possible "incidental" effects on the federal criminal law power was affirmed by Lamer J. at p. 1409:

There is no doubt that a number of cases have held that inquiries whose predominant role it is to elucidate facts and not conduct a criminal trial are validly constituted even though there may be some overlap between the subject-matter of the inquiry and criminal activity. Indeed, it is clear that the fact that a witness before a commission may subsequently be a defendant in a criminal trial does not render the commission ultra vires the province. But in no case before this Court has there ever been a provincial inquiry that combines the virtual replication of an existing Criminal Code offence with the naming of private individuals while ongoing police investigations exist in respect of those same individuals.

52 The exceptional nature of *Starr*, and the exceptional set of facts that compelled this Court's decision, was emphasized in the *Blood Inquiry* case, *supra*. In that case as stated, the *Krever Inquiry*, established under the federal Inquiries Act, was held to be within its jurisdiction to make findings of misconduct, even misconduct carrying

potential civil or criminal liability, provided such findings were properly relevant to the broader purpose of the inquiry, as set out in its terms of reference. In delivering the reasons of this Court, Cory J. distinguished Starr and Re Nelles and Grange (1984), 46 O.R. (2d) 210 (C.A.), at para. 47:

Clearly, those two inquiries were unique. They dealt with specific incidents and specific individuals, during the course of criminal investigations.

The Blood Inquiry case picked up and endorsed the earlier line of cases in this Court giving broad scope to provincial inquiries, including Attorney General of Quebec and Keable v. Attorney General of Canada, [1979] 1 S.C.R. 218; O'Hara v. British Columbia, [1987] 2 S.C.R. 591; and Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97. The Westray case is particularly interesting in comparison to the facts of this case because at the time the mine managers were called to testify before the Commission they were in fact simultaneously facing charges under the provincial Occupational Health and Safety Act. The affirmation of the correctness of those decisions by a unanimous Court in the Blood Inquiry case renders the division of powers ground of appeal untenable in the present case as well.

4. Is the Resolution Unlawful in That It Requires an Investigation by Sarnia into the Affairs of Clearwater?

53 The appellants submit that the new municipal body of Sarnia created by operation of the Sarnia-Lambton Act, 1989 could not lawfully undertake an inquiry into the affairs of the predecessor municipality. In this regard the appellants rely on Hydro Electric Commission of Mississauga v. City of Mississauga (1975), 13 O.R. (2d) 511 (Div. Ct.). The appellants submit that the Sarnia-Lambton Act, 1989, read as a whole, provides for the creation of a new body from two separate municipalities, both of which were dissolved upon the amalgamation. It is argued that the language of the Act creates a discontinuity between the former municipalities, now dissolved, and a new and separate entity, and that s. 100 does not allow the new City of Sarnia to investigate the officers, servants and contractors of a defunct municipality or to inquire into the conduct of that other municipality's public business.

54 This issue turns upon the intent of the Ontario legislation, and in particular s. 9 of the Sarnia-Lambton Act, 1989, which provides as follows:

9. Except as otherwise provided in this Act, the assets and liabilities of the former municipalities and their local boards become assets and liabilities of the City or a local board thereof without compensation, and the City and its local boards stand in the place of the former municipalities and their local boards. [Emphasis added.]

The appellants argue that if the concluding words had included "for all purposes" the underlined phrase "might well have broadened the ambit of the section beyond the subject of 'assets and liabilities'" (Appellants' Factum, at para. 36). I think the interpretation of s. 9 advanced by the appellants is too narrow, but in any event the fact is that the springboard for the s. 100 Resolution in this case is precisely Sarnia's inheritance of the assets and liabilities from Clearwater. The conditions attached to these assets, as we have seen, require the new City of Sarnia to take planning action and to assume municipal services before interest or principal becomes payable. These conditions, and their provenance, constitute "live issues" for the consideration of the new City of Sarnia. Thus, even on the appellants' interpretation, s. 9 of the Sarnia-Lambton Act, 1989, which puts the new City of Sarnia "in the place of the former" municipality for purposes relevant to assets and liabilities, brings Sarnia within s. 100. It is unnecessary to consider the broader view of s. 9 contended for by the respondent.

5. Did the Commissioner Breach the Requirements of Natural Justice and Irrevocably Lose Jurisdiction by the Procedure He Adopted at the Inquiry Pre-Hearing?

55 The appellants submit that the Commissioner erred in failing to share the advice from Commission counsel with interested parties and in failing to hear submissions from the appellants' counsel before deciding the procedure he

would follow. The appellants submit that when the Commissioner denied them a hearing, he was not acting impartially and thus undermined public confidence in the integrity of the Commission process.

56 In my view this submission, as well, fails on the facts. The appellants were not denied a hearing and the Commissioner's conduct disclosed no bias. It is true that at the opening of the "pre-hearing" on March 6, 1995 the Commissioner stated that he would proceed notwithstanding the filing of the judicial review application. However, at the time he made this statement, neither the Commissioner nor Commission counsel had received any application from the appellants for an adjournment. When counsel for the appellants came to address the Commissioner, it seems that they felt their tactical position would be stronger if they treated the Commissioner's opening announcement as irrevocable. This strategy was carried to the point that counsel who at that time acted for Consortium, after making submissions that cover two and a half pages of transcript, concluded by saying:

So I thought out of courtesy, sir, I should let you know what we would have said to you. [Emphasis added.]

After saying what they would have said, but making it clear that they were not actually saying it, appellants' counsel sat down and did not participate further. The Commissioner's statement of the procedure he proposed to follow consisted largely of generalities seemingly addressed to the non-lawyers in the hearing room. In the absence of any notification that an adjournment would be sought, the Commissioner cannot be faulted for outlining his proposal to proceed with the inquiry in an expeditious way, nor can he be faulted for declining to consider a possible adjournment in circumstances where the appellants themselves refused, in apparent umbrage, or for tactical reasons, to make submissions in support of that relief. There is no basis to attribute lack of impartiality to the Commissioner. In the particular circumstances of the pre-hearing, he was entitled to outline how he proposed to proceed without disclosing the advice he received from Commission counsel. His rulings will stand or fall on their own merits, irrespective of what advice he received. His decision to proceed and the proposed arrangements for the hearing were decisions properly made within the ambit of his procedural discretion, and thus this ground too must be rejected.

Disposition

57 The appeal is therefore dismissed with costs.

Appeal dismissed with costs.