Below are a list of the judicial review decisions relating to the 'duty to consult' with respect to the Muskrat Falls project.

Council of the Innu of Ekuanitshit v. Canada (Attorney General), 2013 FC 418 (CanLII)

The Court finds that the mitigating measures proposed by Nalcor and the JRP to minimize the negative impact on the Ekuanitshit's rights substantially satisfy the federal government's duty to consult and accommodate within its jurisdiction. The federal government's Response confirmed that these measures will be made an integral part of the project.
In conclusion, this application is dismissed because the Applicant was adequately consulted, mitigation measures addressed its concerns with respect to its usage of the territory in the Project area and, in any case, the scoping issue is statute barred. Finally, the Court also finds that judicial review of the consultation process is premature.

Council of the Innu of Ekuanitshit v. Canada (Attorney General), 2014 FCA 189

Governor in Council issued order on basis that energy, socioeconomic and environmental benefits of project outweighed adverse environmental effects. The responsible authorities decided to approve implementation of project if certain environmental mitigation measures were applied. The applicant Inuit Council unsuccessfully applied for judicial review of order and decision. The applicant then appealed. The appeal was dismissed because the Crown recognized its **duty to consult** from outset, and applicant actively participated in consultation process that included environmental assessment

Nunatsiavut v. Canada (Department of Fisheries and Oceans), 2015 FC 492

First Nation brought application for judicial review of decision to issue authorization — Application dismissed
Content of duty to consult in this case fell between medium and high end of spectrum, given potentially significant adverse environmental impact of project. The Court found that Canada adequately consulted and accommodated First Nation in accordance with terms of Agreement. First Nation's concerns were reasonably identified, considered and balanced with potential impact of authorization and competing societal concerns. Canada acknowledged and weighed adverse downstream impacts of methylmercury and decided to proceed, requiring company to undertake mitigation measures, environmental effects monitoring and adaptive management. The decision to issue authorization reasonable.

Nunatukavut Community Council Inc. v. Newfoundland & Labrador Hydro-Electric Corp., 2011 NLTD(G) 44

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.
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.

Nunatukavut Community Council Inc. v. Canada (Attorney General), 2015 FC 981

Applicant members of First Nation community council brought application for judicial review to challenge decision of Minister of Department of Fisheries and Oceans ("DFO") to issue authorization to NE. Application dismissed.
The Court found that the duty to consult was met and Minister's decision to issue authorization was reasonable. Process set out in 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 was not required so long as reasonable efforts have been made to consult and accommodate and if result was within range of possible, acceptable outcomes which were defensible in respect of facts and law, there would be no basis to intervene. Although the applicants were not satisfied with many of Canada's responses, the Minister's decision to issue authorization was ultimately reasonable.

*Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General**),*** 2012 FC 1520

NunatuKavut argued 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 the court had already found that the Panel fulfilled its section 16 mandate to consider, this argument was rejected.
The Court also rejected 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 the proceedings. The Panel's mandate was not as expansive as NunatuKavut posits. The mandate to invite information cannot be said to include a mandate to compel evidence. 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.

Federal Court Cour fédérale

Date: 20130423

Docket: T-778-12

Citation: 2013 FC 418

Ottawa, Ontario, April 23, 2013

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

CONSEIL DES INNUS DE EKUANITSHIT

Applicant

and

**LE PROCUREUR GÉNÉRAL DU CANADA,
EN SA QUALITÉ DE JURISCONSULTE DU
CONSEIL PRIVÉ DE SA MAJESTÉ
POUR LE CANADA
ET
L'HONORABLE KEITH ASHFIELD, EN SA
CAPACITÉ DE MINISTRE DES PÊCHES ET
DES OCÉANS CANADA
ET
L'HONORABLE DENIS LEBEL,
EN SA CAPACITÉ DE MINISTRE
DES TRANSPORTS CANADA
ET
L'HONORABLE JOE OLIVER,
EN SA CAPACITÉ DE MINISTRE DES
RESSOURCES NATURELLES CANADA
ET
NALCOR ENERGY
ET
NEWFOUNDLAND AND LABRADOR
HYDRO-ELECTRIC CORPORATION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review filed on April 16, 2012 pursuant to sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c-7 [FCA], by which the Applicant challenges the lawfulness of the Order in Council (C.P. 2012-285) taken by the Governor in Council ("the Order") approving the federal government's Response ("the Response") to the *Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador* ("the Report") and the related cause of action Decision dated March 16, 2012 ("the Decision") by the responsible authorities, Fisheries and Oceans Canada [DFO], Natural Resources Canada [NRCan] and Transport Canada [TC] (collectively "the RAs") pursuant to subsection 37(1) of the *Canadian Environmental Assessment Act*, SC 1992, c 37 [CEAA]. The Report was issued by a Joint Review Panel [JRP] as the culmination of its environmental assessment ("the EA") of the Lower Churchill Hydroelectric Generation Project ("the Project"). The Order was made by the Governor in Council on March 12, 2012 pursuant to subsection 37(1.1) of the CEAA.

[2] The Applicant is seeking, amongst other remedies:

1. a declaration that

a) the Governor in Council and RAs did not fulfill their duty to consult the Innus d'Ekuanitshit (the Ekuanitshit) on the elements of the Project liable to have a prejudicial effect on their traditional rights;

b) the Governor in Council and RAs did not seek to accommodate the Ekuanitshit in a spirit of reconciliation consistent with the honour of the Crown;

c) despite the requirements of paragraph 4(1)(a) of the *CEAA*, the Governor in Council and RAs did not possess sufficient information to assess the potential negative impact that the Project is liable to have on the current use of the land and resources for traditional purposes by the Ekuanitshit;

d) the Project proposed by Nalcor Energy ("Nalcor") is no longer the project proposed for evaluation under the *CEAA* due to subsequent changes in the implementation process;

e) the Project and the Labrador-Island Transmission Link Project (Transmission Link) constitute a single project under the *CEAA*; and

f) the Governor in Council and RAs did not have sufficient information in order to judge the economic benefits of the Project or whether there are other economically and technically feasible means of meeting energy requirements that are less environmentally harmful;

2. an order quashing the Order and the Decision;

3. an order returning the Report to the Governor in Council and RAs so that they may:

   a) fulfill their duty to consult and accommodate the Ekuanitshit pursuant to section 35 of *The Constitution Act, 1982* regarding the potential negative impacts of the Project on their traditional rights in a manner consistent with the honour of the Crown;

   b) ask that further information be supplied regarding the necessity and negative impacts of the Project;

   c) determine whether, in light of the supplementary information mentioned above, the Project's negative impacts are still justifiable in the circumstances;

4. a writ of prohibition preventing the ministers of the DFO and TC from:

   a) issuing permits under the *Fisheries Act*, RSC 1985, c F-14 and the *Navigable Waters Protection Act*, RSC 1985, c N-22; and

   b) taking any other irrevocable decision in their roles as RAs with regards to the Project 5) Costs, regardless of the result of the application.

[3] For the reasons that follow, the Court is dismissing this application.

II. Background

A. The parties

(i) The Applicant

[4] Le Conseil des Innus d'Ekuanitshit ("the Applicant") is a registered Indian band within the meaning of section 2 of the *Indian Act*, RSC 1985, c I-5.

[5] The Applicant participated throughout the EA process for the Project, and was awarded funding through the Canadian Environmental Assessment Agency's ("the Agency") Participant Funding Program to facilitate its participation in different phases of the EA.

(ii) The Respondents

[6] The Respondents are: (1) the Attorney general of Canada [AGC] named in lieu of the Governor in Council, whose approval of the Response is required pursuant to subsection 37(1.1) of the *CEAA*; (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; (the Government Respondents); (5) Nalcor; and (6) Newfoundland and Labrador Hydro-Electric Corporation.

[7] Fisheries and Oceans Canada [DFO] and Transport Canada [TC] identified themselves from the beginning as RAs with respect to the Project. DFO found that certain 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. Transport Canada 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 works under that Act.

[8] Natural Resources Canada became a responsible authority on August 19, 2011, when a decision was taken by the Government of Canada to provide financial assistance to Nalcor in the form of a loan guarantee for a part of the Project.

[9] 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 constituted to "engage in and carry out activities pertaining to the Province's energy resources, including hydro-electric generation". Nalcor is responsible for the implementation of the Province's energy policy, and is governed in that respect 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

[10] Nalcor's proposed Project consists of:

> "hydroelectric generating facilities at Gull Island and Muskrat Falls, and interconnecting transmission lines to the existing Labrador grid. The Project will be the subject of engineering design and marketing studies that will be conducted concurrently with the environmental assessment. As part of the environmental assessment, alternative means of carrying out the Project will be evaluated including its capacity, design, layout, and technology. The Project as currently planned is presented and, as with any project, will require optimization to reflect current market and business opportunities. Nevertheless, the Project will be very similar to previous concepts. Optimization will determine details such as the size and number of turbines within each powerhouse, and construction sequencing pending access to the south side of the river. Such changes and refinements will be relatively slight, and consistent with the normal process leading to final Project sanction. The Gull Island facility will consist of a generating station with a capacity of approximately 2,000 MW and include:
>
> - a dam 99 m high and 1,315m long; and
>
> - a reservoir 200 km^2 in area at an assumed full supply level of 125 m asl.
>
> The dam will be a central till-cored, rock-fill, zone embankment. The reservoir will be 225 km long, and the area of inundated land will 85 km^2 at full supply level. The powerhouse will contain four to six Francis turbines.
>
> The Muskrat Falls facility will consist of a generating station that will be approximately 800 MW in capacity and will include:
>
> - a concrete dam with two sections on the north and south abutments of the river;
>
> - a 107 km^2 reservoir at an assumed full supply level of 39 m asl.

> The north section of the dam will 32 m high and 180 m long, while the south section will be 29 m high and 370 m long. The north section will serve as a spillway in extreme precipitation events. The reservoir will be 60 km long and the area of inundated land will be 36 km^2 at full supply. The powerhouse will contain four to five propeller or Kaplan turbines, or a combination of both.
>
> The interconnecting transmission lines will consist of:
>
> - a 735 kV transmission line between Gull Island and Churchill Falls; and
>
> - two 230 kV transmission lines between Muskrat Falls and Gull Island.
>
> The 735 kV transmission line will be 203 km long and the 230 kV transmission lines will be 60kn long. Both lines will likely be lattice-type steel structures. The location of the transmission lines will be north of the Churchill River; the final route is the subject of a route selection study that will be included in the environmental assessment. The lines between Muskrat Falls and Gull Island may be on separate towers, or combined on double-circuit structures". (See Affidavit of Stephen Chapman, Exhibit SC-4, Federal Respondents Representations, Vol. 1, pages 270-271)

[11] The Project has a long history. Since 1978, three different versions of the Project have been contemplated. Two versions involved diversions of rivers and an agreement with Hydro Québec. As the negotiations failed with Hydro-Québec and it was determined that the diversion of rivers upstream of Churchill Falls was unfeasible, Nalcor focused on a project that did not entail the diversion of rivers. The version of the Project that was defined and registered by Nalcor for environmental assessment in November of 2006 is as described above; it does not rely on the diversion of rivers and is predicated on meeting identified needs within the Province and generating surplus energy to access export markets.

C. The CEAA Environmental Assessment Process

[12] It is important to describe the framework that applied to this EA under the CEAA. There are five stages involved. This application for judicial review was filed at the conclusion of the fourth stage.

[13] The Applicant submitted that correspondence related to phase V should be allowed in the record despite the fact that it was exchanged after the application. The Court decided that it should not be accepted in the record because phase V is still ongoing and, more importantly, the record should be confined to what was before the decision maker at the time the application was filed.

[14] The Project was registered in November 2006 and the RAs determined that the CEAA applied to the Project in February 2007.

[15] In June 2007, the Minister of the Environment referred the assessment to a review panel. Since the Province of Newfoundland and Labrador had also concluded that public hearings would be required under provincial legislation, the two Governments agreed to set up a JRP in January 2009.

[16] It is important to note that the CEAA provides for three types of environmental assessments: screening, comprehensive study and panel review. A panel review calls for a more comprehensive assessment and extended involvement by participants. The assessment

was conducted by the JRP after the "Agreement for the Establishment of a Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project" was concluded in January 2009. The federal Minister of the Environment, together with the provincial Ministers of Environment and Conservation and the Minister of Intergovernmental Affairs, appointed the five member panel responsible for the panel review.

[17] In order to better comprehend the scope and degree of involvement required under the EA, the Court believes that reproducing substantive extracts from the JRP Agreement that defined the Terms of Reference for the Panel's EA will facilitate the comprehension of the issues raised by this application. The JRP Agreement specified that:

> "2.0 Establishment of the Panel
>
> 2.1 A process is hereby established for the creation of a Panel, pursuant to sections 40, 41 and 42 of the CEAA and section 73 of the EPA and, for the purposes of the review of the Project/Undertaking.
>
> 3.0 Constitution of the Panel
>
> 3.1 The Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador shall jointly establish the Panel.
>
> 3.2 The Panel shall consist of five members.
>
> 4.0 Conduct of the Environmental Assessment by the Panel
>
> 4.1 The Panel shall have all the powers and duties of a panel set out in section 35 of the CEAA and sections 64 and 65 of the EPA and applicable regulations.

4.2 The Panel shall conduct the EA in a manner that discharges the requirements set out in the CEAA, the EPA and in the Terms of Reference for the Panel set out in Schedule 1.

6.0 Record of environmental Assessment and Panel Report

6.1 A Project File containing all records produced, collected or submitted with respect to the EA of the Project/Undertaking shall be maintained by the Agency from the appointment of the Panel until the report of the Panel is submitted to the Ministers. The Public Registry shall be operated in a manner to ensure convenient public access to the records for the purposes of compliance with section 55 of the CEAA and the practices of the Department.

6.2 On completion of the EA of the Project/Undertaking, the Panel shall prepare a report and submit it to the Ministers who will make it public.

6.3 The report will address the factors required to be considered under section 16 of the CEAA and section 65 of the EPA, will set out the rationale, conclusions and recommendations of the Panel relating to the EA of the Project/Undertaking, including any mitigation measures and follow-up program, and include a summary of issues raised by Aboriginal groups, governments and other interested parties. [Emphasis added]

6.4 The Parties agree to coordinate, to the extent possible, the timing and announcements of decisions on the Project/Undertaking.

6.5 Once the report is submitted to the Minister of the Environment, responsibility for the maintenance of the Public Registry in accordance with section 55 of the CEAA will be transferred to Fisheries and Oceans Canada as responsible authority.

8.0 Participant Funding

8.1 The Agency will administer a participant funding program to facilitate the participation of Aboriginal

groups and the public in the EA of the Project/Undertaking. [Emphasis added]

Part I – Scope of the Project/Undertaking

The Proponent proposes a project/undertaking consisting of hydroelectric generating facilities at Gull Island and Muskrat Falls, and interconnecting transmission lines to the existing Labrador grid.

The Project/Undertaking includes the following components as described by the Proponent. The specific dimensions/characteristics of the proposal are subject to change as a result of the findings of the environmental assessment.

The Gull Island facility consisting of a generating station with a capacity of approximately 2,000 MW that includes:

- A dam 99 m high and 1,315 m long; and
- A 215 km^2 reservoir in area at an assumed full supply level of 125 m above sea level (asl).

The dam is to be a concrete faced, rock fill dam. The reservoir is to be 230 km long, and the area of inundated land is to be in the order of 85 km^2 at full supply level. The powerhouse is to contain five Francis turbines.

The Muskrat Falls facility consisting of a generating station with a capacity of approximately 800 MW that includes:

- A concrete dam with two sections on the north and south banks of the river; and
- A 100 km^2 reservoir in area at an assumed full supply level of 39 m asl.
-

The north and south dams will be constructed or roller compacted concrete. The north section dam is to be in the order of 32 m high and 432 m long, while the south section is to be in the order of 29 m high and 125 m long. The reservoir is to be 60 km long and the area of inundated land is to be in the order of 41 km^2 at full supply level.

The powerhouse is to contain four propeller or Kaplan turbines, or a combination of both.

Interconnecting transmission lines consisting of:

- A 735 kV transmission line between Gull Island and Churchill Falls; and
- Two 230 kV transmission lines between Muskrat Falls and Gull Island.

The 735 kV transmission line is to be 203 km long and the 230 kV transmission lines are to be 60 km long. Both lines will be lattice-type steel structures. The location of the transmission lines is to be north of the Churchill River; the final route is the subject of a route selection study that will be combined on double-circuit structures.

Part II – Scope of the Environmental Assessment

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;
4. Alternative means of carrying out the Project/Undertaking that are technically and economically feasible and the environmental effects of any such alternative means;
5. Alternatives to the Project/Undertaking;
6. Extent to which biological diversity is affected by the Project/Undertaking;
7. Description of the present environment which may reasonably be expected to be affected, directly or indirectly, by the Project/Undertaking, including adequate baseline characterisation;
8. Description of the likely future condition of the environment within the expected life span of the Project/Undertaking if the Project/Undertaking was not approved;
9. Environmental Effects of the Project/Undertaking, including the Environmental Effects of Malfunctions, accidents or unplanned events that may occur in connection with 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;
12. Mitigation measures that are technically and economically feasible and that would mitigate any significant adverse Environmental Effects of the Project/Undertaking, including the interaction of these measures with existing management plans;
13. Proposals for environmental compliance monitoring;
14. Measures to enhance any beneficial Environmental Effects;
15. Need for and requirements of any follow-up program in respect of the Project/Undertaking;
16. Capacity of renewable resources that are likely to be significantly affected by the Project/Undertaking to meet the needs of the present and those of the future;
17. Extent of application of the precautionary principle to the Project/Undertaking;
18. Comments received from Aboriginal persons or groups, the public and interested parties by the Panel during the EA;
19. Factors related to climate change including greenhouse gas emissions;
20. Proposed public information program.

To assist in the analysis and consideration of these issues, in addition to the Secretariat established by Canada and Newfoundland and Labrador to support the Panel, the Panel may retain, within its approved budget, independent expertise to provide information on and help interpret technical and scientific issues and matters related to traditional knowledge and community knowledge.

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 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 section 35 of the Constitution Act, 1982;
- the scope, nature or meaning of the Labrador Inuit Land Claims Agreement. [Emphasis added]

Part III – Steps in the Environmental Assessment Process

The main steps in the EA by the Panel will be as follows:

1. Site Visit;
2. Public Information Centres;
3. Submission of the EIS;
4. Review of the EIS;
5. Comments provided to the Proponent;
6. EIS Sufficiency;
7. Scheduling of Public Hearings;
8. Location of Public Hearings;
9. Conduct of Public Hearings;
10. Length of Public Hearings;
11. Delivery of Panel Report."

[18] The final Environment Impact Statement [EIS Guidelines] were released by the Governments on July 15, 2008 after considering input provided by Aboriginal groups, including the Applicant, and other stakeholders between December 19, 2007 and February

27, 2008 on the scope of the Project and other issues (see Exhibit A-98 to Bennett Affidavit, Nalcor Representations [NR], Vol. 1 and Chapman Affidavit at paras 71 and 99, Federal Respondents Representations, Vol.1).

[19] The EIS Guidelines is a 10,800 page document that addresses the need, alternatives and cumulative effects of the Project.

[20] The EIS issues of concern were determined through: (a) the EIS Guidelines; (b) stakeholder and public consultation; (c) local and existing knowledge of potential environmental effects of projects (including hydro-electric projects); (d) Nalcor's submissions describing the existing environment; and (e) analysis of the Nalcor study team, comprised of 15 environmental consulting firms.

(See Exhibits H, I, JJ, NN to Bennett Affidavit (NR, Vol 1, pages 421, 453 and 1737)

[21] The Applicant received plain language summaries of the EIS, translated into French and the Québec dialect of Innu-aimun ("Innu-aimun").

(See Exhibit A-398 to Bennett Affidavit (NR, Vol. 1)

[22] Between March 9, 2009 and April 15, 2011, the JRP conducted its information gathering process. They began by inviting the public and government agencies to comment on the adequacy of the EIS. The Applicant was among the 52 parties who presented detailed submissions (see document entitled Legal Comments on the Adequacy of the

Environmental Impact Statement of the Lower Churchill Hydroelectric Project dated June 22, 2009 (Applicant's Record, Exhibit 12, page 996, NR, Vol. 3, page 490).

(See Exhibit J to Bennett Affidavit (NR, Vol. 1, page 462)

[23] These submissions led the JRP to issue Information Requests ["IRs"] to Nalcor. Between May 1, 2009 and March 21, 2010, the JRP sent 166 IRs in five separate rounds. The process was meant to enable the JRP and the public to: (a) scrutinize the EIS; (b) make additional requests for information; and (c) comment on Nalcor's IR responses.

(See Exhibits A-251- A-432, K, L, pages 498 and 513 to Bennett Affidavit (NR, Vol. 1 and 3)

[24] Nalcor implemented a planning framework for the Project called the "Gateway Process". The process entails six sequential phases between opportunity evaluation and decommissioning. In essence, at each of the six phases, there is a decision gate with respect to the development or not of the asset. Either the activity is stopped pending additional information or it can move to the next sequential phase or it is abandoned.

[25] Further to an announcement by Premier Williams on October 25, 2010, regarding a possible change in the sequencing of the Project, Nalcor was asked to provide additional information with respect to the change in the sequencing and the corresponding potential impact and environmental effects. Responses IR#JRP.165 and IR#JRP.166 filed in January 2011 contain a total of 160 pages. The main conclusion was to the effect that there are no material changes to the predicted environmental effects resulting from re-sequencing the

Project phases (see Exhibit A-549 to Bennett Affidavit (NR, Vol 11, page 2756). These responses make no reference to the Applicant or to any other Quebec based innus.

[26] The application for the Transmission Link was filed on January 29, 2009 and revised on September 15, 2009. It called for the construction and operation of an approximately 1,100 km long transmission line and associated infrastructure within Labrador and the Island of Newfoundland and finally favoured the Gros Morne and the selection of the Long Range Mountains crossing as the proposed transmission corridor (see Applicant's Record, V. Duro Affidavit, Exhibit 10, Vol. 3, Page 804).

[27] The record reveals that Nalcor filed over 5,000 pages of additional documentation for consideration by the JRP and stakeholders by way of IR responses. Thirteen of the IRs touched upon the Applicant's specific concerns with respect to: (a) Aboriginal consultation; (b) caribou, including the Red Wine Mountain and Lac Joseph herds; (c) monitoring and follow-up; and (d) waterfowl survey methodology.

(See Exhibits A-251, A-432, A-588, K, L, KK, LL to Bennett Affidavit (NR, Vol 1, 3 and 8)

[28] On two occasions, the JRP invited the public to comment on Nalcor's IR responses. The Applicant filed detailed submissions on both occasions.

(See Exhibits K, M, N to Bennett Affidavit (NR, Vol. 3, pages 498 and 544 and Exhibits 13, 17 to Duro Affidavit (Applicant's Record, Vol. 4 and 5)

[29] On January 14, 2011, the JRP determined that the EIS (including the additional information submitted by Nalcor) was sufficient to proceed to the Hearing.

(See Exhibit A-544 to Bennett Affidavit (NR, Vol. 1)

[30] On January 14, 2011, participants were informed that the Hearing would begin on March 3, 2011. The Final Public Hearing Procedures were released on February 16, 2011, after consideration of extensive input from the public, including the Applicant.

[31] The Hearing was conducted over 30 days between March 3 and April 15, 2011, in six different communities and in the Province of Quebec. There were general, community and topic-specific hearing sessions.

(See Exhibit A-1385 to Bennett Affidavit (NR, Vol. 12)

[32] The Applicant, through its representatives, made oral submissions during the community Hearing session in Sept-Îles, Quebec, on April 7, 2011, during which a video and materials were presented to the JRP. Simultaneous translation was provided (French and Innu-aimun).

(See Exhibits A-1220, A-1244, A-1280, A-1284 to Bennett Affidavit (NR, Vol. 1 and Exhibits 20-25, 28, 43 to Duro Affidavit (Applicants Record, Vol. 5, 6 and 9)

[33] After the conclusion of 30 days of hearings, the JRP declared the record closed.

The Report

[34] The 355 page JRP Report was released to the Governments and the public on August 23 and 25, 2011, respectively.

(See Applicant's Record, Affidavit V. Duro, Exhibit 3, Vol. 1, page 221)

[35] As required by CEAA and the TOR, the Report contains: (a) a description of the EA process, including public hearings; (b) the rationale, conclusions and recommendations regarding the nature and significance of the potential environmental effects ; (c) recommendations concerning, amongst others, the mitigation measures relating to the environmental management of the Project, caribou, monitoring and follow-up programs; (d) a summary of issues identified and comments and recommendations received from Aboriginal persons/groups; and (e) a summary of the issues raised and comments and recommendations received from the public, Governments and interested parties.

The Decision and Response of the Federal Government

[36] Pursuant to the CEAA and the EPA, the Governments jointly issued their responses and the decisions on March 15, 2012.

(See Exhibits R, S and T to Bennett Affidavit, NR, Vol. 3 and V. Duro Affidavit, Applicant's Record, Exhibits 1 and 3, Vol. I, pages 170 and 218)

[37] The Response describes the Federal involvement in the Generation Project, the EA process, and the key considerations contained in the JRP Report. It also sets out the conclusions of the Federal Government and the reasons for its conclusion that the significant adverse environmental effects of the Generation Project are justified by its benefits; it also describes the decisions required of TC and DFO under their respective Acts and the *CEAA* and responds to each recommendation of the JRP.

(See Exhibit R to Bennett Affidavit (NR, Vol. 1 and 3, Applicant's Record, V. Duro Affidavit, Exhibit 1, Vol.1, page 170)

[38] The Decision determined that the implementation of mitigation measures is required for the Project to address, *inter alia*: (a) birds, fish and mammals and/or their habitat (the caribou); (b) current Aboriginal use of land and resources for traditional purposes; (c) socio-economic impacts; and (d) physical and/or cultural heritage. The Decision also required the implementation of a follow-up program to verify the accuracy of the EA and to determine the effectiveness of any measures taken to mitigate adverse environmental effects of the Project for the period extending from October 1, 2012 to October 1, 2037.

(See Exhibit S to Bennett Affidavit, NR. Vol. 3, and V. Duro Affidavit, Exhibit 2, Vol. 1, page 218)

III. Relevant legislation

[39] The applicable sections of the *Canadian Environmental Assessment Act*, SC 1992, c 37 and of *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c 11, are appended to this decision.

IV. The issues

[40] The Court has framed the issues raised by this application as follows:

1. ***Is the Applicant's challenge of the Project scoping decision statute barred? If not was it scoped in accordance with section 15 of the CEAA?***
2. ***Did the Government Respondents properly consider section 16 factors of the CEAA prior to issuing their Decision and Response pursuant to s 37 of the CEAA?***
3. ***Was the Applicant properly consulted and accommodated in relation to the Project?***

V. Standard of review and analysis of the first issue:

1. ***Is the Applicant's challenge of the Project scoping decision statute barred? If not was it scoped in accordance with section 15 of the CEAA?***

A. Standard of review

[41] Determining the scope of a project under section 15 of the *CEAA* is a discretionary exercise to be reviewed on the standard of reasonableness (see *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)* [*Prairie Acid Rain Coalition*], 2004 FC 1265 at para 42; *Inverhuron & District Ratepayers Ass. v Canada (Minister of The Environment)* [*Inverhuron*], 2001 FCA 203; *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)* [*Bow Valley*], 2001 CanLII 22029 (FCA), [2001] 2 FC 461) at para 55; *Pembina Institute for Appropriate Development v Canada (Minister of Fisheries and Oceans)*, 2005 FC 1123).

B. Analysis

[42] The Applicant challenges, albeit indirectly, the Minister of the Environment's [the Minister] scoping decision, made pursuant to paragraph 15 (1)(*b*), to conduct separate EAs for the Project and the Transmission Link. The Applicant argues that this amounted to "project splitting". Citing subsections 15(1) and 15(3) of the *CEAA*, the Applicant argues that the Minister unreasonably refused to exercise his discretion to enlarge the scope of the Project's EA by not including the Transmission Link. The Applicant submits that the Transmission Link is a related construction that was likely to be carried out in relation to the Project and is now an essential element.

[43] According to the Applicant, an inevitable result of this failure to "scope in" the Transmission Link is that the true negative effects of the actual Project remain unknown.

This, in turn, renders the responsible authorities' determination (pursuant to paragraph 37(1)(*a*) of the *CEAA*) that the significant adverse environmental effects of the Project could be justified in the circumstances, unreasonable.

[44] The Respondents counter that the judicial review of the Minister's scoping decision is statute barred by subsection 18.1(2) of the *FCA* and that the Applicant is attempting to indirectly challenge the decision via its arguments based on paragraph 37(1)(*a*) of the *CEAA* and that in any case, the decision to maintain the scope of the Project as proposed by Nalcor was reasonable.

[45] A scoping decision made under section 15 of the *CEAA* is unquestionably a decision made by a "federal board, commission or other tribunal" within the meaning of subsection 18.1 (2) of the *FCA* (see *Prairie Acid Rain Coalition*, *Inverhuron* and *Bow Valley*, above). As such, the Applicant had to commence its application for judicial review within 30 days after the time the decision was first communicated. The Court may, however, in its discretion, grant an extension of time to commence an application (see subsection 18.1 (2) *FCA*).

[46] As a preliminary issue, the Court finds it is necessary to address the pertinence of the decision in *Tzeachten First Nation v Canada (Attorney General)*, 2007 FC 1131 [*Tzeachten 1*], to the case at hand. Applying the reasoning found in *Krause v Canada*, [1999] FCJ No 179, Justice Lemieux found that "no extension of time is required […] when the object of the litigation is to obtain relief in a case where the duty to consult and

accommodate reserve and aboriginal interests is engaged" (*Tzeachten 1*, above, at para 27). The limit to file in subsection 18.1(2) *FCA* does not apply in such cases.

[47] However, the decision in *Tzeachten 1* is distinguishable from the present case because it dealt with the aboriginal group's right to have the Crown's consultation process judicially reviewed despite failure to file within the prescribed delay. Such is not the case in the present instance because if the Court declaring judicial review of the scoping decisions statute barred will not impact the judicial review of the consultation process provided to the Applicant. Subsection 18.1 (2) continues to apply.

[48] The Project scoping decision was made by the Minister and communicated to the Applicant on January 8, 2009. It is important to note that the Applicant had been aware of the Project's scope since December 2007 when the EIS Guidelines were released. As for the decision to conduct separate EAs for the Generation Project and the Transmission Link, Nalcor advised the Applicant of the scope in February 2009 and the decision was taken in November 2009. Furthermore, the decision was re-confirmed and communicated to the Applicant on multiple occasions afterwards, with the last relevant communication occurring on January 31, 2011. This last confirmation was made in response to a letter sent by the Applicant on December 16, 2010, conveying its concerns about the scoping decisions to the Agency, the Province and the JRP. Despite its concern, the Applicant only commenced its application for judicial review on April 16, 2012.

[49] In *Harold Leighton et al v Her Majesty in Right of Canada*, 2007 FC 553 at paras 33 and 34, Justice Lemieux summarized the principles that should guide a decision to grant an extension of time to commence a judicial review:

> [33] To grant or refuse a request for an extension of time to launch a judicial review application is a matter of discretion which must be exercised on proper principles. Those principles are well known with the Federal Court of Appeal's decision in *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, being the seminal case.
>
> [34] From *Grewal*, above, and other decisions of the Federal Court of Appeal, the task at hand is as follows:
>
> • A number of considerations or factors must be taken into account in the exercise of the discretion;
>
> • These factors include: (1) a continuing intention to bring the application, (2) any prejudice to the parties opposite, (3) a reasonable explanation for the delay, (4) whether the application has merit i.e., discloses an arguable case (hereinafter the four-prong test) and (5) all other relevant factors particular to the case [emphasis mine], see *James Richardson International Ltd. v. Canada* [2006] FCA 180 at paragraphs 33 to 35;
>
> • As explained in *Jakutavicius v. Canada (Attorney General)* [2004] FCA 289, these factors or consideration are not rules that fetter the discretionary power of the Court. Once the relevant consideration or factors are selected, sufficient weight must be given to each of those factors or considerations;
>
> • The weight to be given to each of the factors or considerations will vary with the circumstance of each case (*Stanfield v. Canada*, 2005 FCA 107 (CanLII), 2005 FCA 107);
>
> • The underlying consideration in an application to extend time is to ensure that justice is done between the parties. The usual consideration in the standard four-prong test of continuing intention, an arguable case, a reasonable explanation for the delay and prejudice to another party is a means of ensuring the fulfillment of the underlying

> consideration of ensuring that justice is done between the parties. An extension of time can be granted even if one of the standard criteria is not satisfied (*Minister of Human Resources Development v. Hogervrost*, 2007 FCA 41; and
>
> • The factors in the test are not conjunctive (*Grewal*, above, at pages 11 and 13).

[50] While the Court acknowledges that the Applicant has an arguable case, it will not grant an extension in the present case for the following reasons. Firstly, the indirect challenge comes two years after the Transmission Link scoping decision was communicated to the Applicant and the Applicant has failed to request such an extension. Secondly, the Court is convinced that any delay attributable to a review of the scoping decision will result in a serious financial prejudice to the opposing parties (Nalcor and the Government Respondents) and to the public in general.

[51] The Applicant has not petitioned this Court for an extension of time to challenge the scoping decisions, nor has it offered any reasonable explanation for the two years that have passed before bringing its application forward on this issue. This is not surprising given that the Applicant is challenging the decisions indirectly through subsection 37(1) of the *CEAA*. The Court underlines the fact that the Applicant was represented by able counsel throughout the relevant time frame and should have challenged the scoping decisions at the first opportunity before even participating in the two EA processes that were based on them.

[52] Because the Applicant neglected to challenge the Minister's scoping decisions, the EA processes moved forward. Studies were conducted, meetings were held and serious investments were made by the proponents to move the Project along. As the Respondents

explain: "To change the scope of the two projects at this time would require at least one new EA process, the preparation of a new EIS, reconvening a JRP, scheduling new public hearings, and re-engaging hundreds of stakeholders, all at great cost, inconvenience and delay".

- ***Was the Minister's decision not to expand the scope of the Project proposed by Nalcor reasonable?***

[53] Regardless of whether the Applicant's scoping challenge is statute barred or not, this Court finds that the Minister's decision to maintain the scope of the Project as proposed by Nalcor to be reasonable.

[54] Under section 15 of the *CEAA*, the RAs ((under 15(1) (*a*)) or Minister (under 15(1) (*b*)) have the discretion to determine what elements of a proposed undertaking will make up a project for the purpose of an EA. In *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 at para 39 [*MiningWatch*], the Supreme Court of Canada set limits to this discretion by deciding that "[…] the minimum scope is the project as proposed by the proponent, and the RA or Minister has the discretion to enlarge the scope when required by the facts and circumstances of the project". Subsections 15(2) and (3) are examples of situations where the RA or Minister may increase the scope of the project beyond the description proposed by the proponent. "In sum, while the presumed scope of the project to be assessed is the project as proposed by the proponent, under s. 15(2) or (3), the RA or Minister may enlarge the scope in the appropriate circumstances" (*MiningWatch*,

above, at para 39). The Minister may also enlarge the scope of projects pursuant to 15(1) where the conditions of 15(2) and (3) are not met.

[55] One of the harms that subsections 15(2) and 15(3) seek to prevent is referred to as "project splitting". The Supreme Court explained that "project splitting" occurs when a proponent "[…] represent[s] part of a project as the whole, or propos[es] several parts of a project as independent projects in order to circumvent additional assessment obligations […]". The Court then provided an example of how project splitting could be used to "circumvent additional assessment obligations":

> Where the RA or Minister decides to combine projects or to enlarge the scope under s. 15(2) or (3), it is conceivable that the project as proposed by the proponent might have only required a screening. However, when the RA or Minister considers all matters in relation to the project as proposed, the resulting scope places the project in the [Comprehensive Study List]. Where this occurs, the project would be subject to a comprehensive study (*MiningWatch* at para 40).

[56] In other words, project splitting can be used as a means to avoid a more rigorous EA. In the case at bar, the Applicant argues that Nalcor is engaging in a form of project splitting. By having the Project and Transmission Link undergo separate EAs, Nalcor, according to the Applicant, is hiding the Project's true environmental footprint and can therefore justify more readily its adverse environmental effects. The Applicant also underlines that the negative impacts of the Project and the Transmission Link are considered separately, yet the government's response considered their positive impacts cumulatively.

[57] In order to guide the RAs or Minister in determining whether to expand the scope of a project beyond that advanced by a proponent, the Agency released an Operational Policy Statement [OPS] in February 2010, entitled *Establishing the Project Scope and Assessment Type under the Canadian Environmental Assessment Act*. The OPS suggests that when two projects can be considered "connected actions", they should generally be scoped together. Two projects are connected actions when (1) one project is automatically triggered by another; (2) one project cannot proceed without the other; or (3) both are part of a larger whole and have no independent utility if considered separately.

[58] The Applicant argues that paragraph 15(3)(*b*) required the Minister "tout au long de l'évaluation de se pencher sur la question de savoir s'il y a d'autres opérations susceptibles "d'être réalisées en liaison avec l'ouvrage" […] dont le promoteur propose la construction" (Applicant's Record, Vol. 2, page 3663, at para 158). This interpretation of subsection 15(3) is at odds with the jurisprudence on the issue of scoping. In *Friends of the West Country Assn. v Canada (Minister of Fisheries and Oceans),* 1999 CanLII 9379 (FCA), [2000] 2 FC 263 at para 14 [*Sunpine*], the Court of Appeal explained that "the words in subsection 15(3) do not have the effect of rescoping a project to something wider than what was determined under subsection 15(1)". That is to say, subsection 15(3) is only relevant when the RA or Minister initially scopes the project under subsection 15(1). Once the project is scoped, subsection 15(3) no longer imposes any obligation on the Minister to expand it. In the Court's opinion, the real question to ask in this instance is whether subsection 15(3) required the Minister to include the Transmission Link when he initially

scoped the Project. The Court finds that he did not have such an obligation for the following reasons.

[59] The Transmission Link was not a "construction, operation, modification, decommissioning, abandonment or other undertaking in relation to" the Project (subsection 15(3) of the *CEAA*). The jurisprudence has interpreted these undertakings as works "that pertain to the life cycle of the physical work itself or that are subsidiary or ancillary to the physical work that is the focus of the project as scoped" (*Sunpine*, above, at para 20). The Court of Appeal in *Sunpine* offered some examples of the type of undertakings contemplated in subsection 15(3):

> [F]or example, something as major as a coffer dam required to hold back water where the construction of a bridge required work on a river bed, or of a lesser order, such as the construction of temporary living quarters for construction workers (*Sunpine*, at para 20).

[60] The Court agrees with the Respondents that the Transmission Link was not initially a subsidiary or ancillary undertaking that is part of the life cycle of the Project. The Transmission Link will not be erected in order to fix, maintain or decommission the Muskrat Falls dam.

[61] The two pertinent subsections are therefore 15(1) and (2).

[62] Subsection 15 (2) clearly states that the RA or Minister can expand the scope of a project to include one or more other projects when they are "so closely related that they can be considered to form a single project". Subsection 15(2) clearly contemplates a situation

where a proponent attempts to register closely related projects for separate EAs at or around the same time. As the Respondents pointed out to this Court, at the time when the Project was registered for its EA:

> "Nalcor was working to determine transmission options […] [and] had not yet determined: (a) which market it would pursue (an overland route through Québec to export markets, routes from Labrador to the Island and through to export markets in the Maritimes and/or United States, or industrial development in Labrador); or (the preferred option for meeting domestic Island needs" (NR, page 3355, para 95).

[63] While the Transmission Link project existed as one of several options that was included in the Energy Plan, no decision had been taken when the Project was registered.

[64] The Applicant suggests that the Transmission Link was really a "*fait accompli*" and that Nalcor was engaging in project splitting. The evidence in the record, more specifically the sequence of events, does not support the allegation that Nalcor was attempting to split the Project in two. Hence, when the decision was taken by the Minister he properly applied section 15(1) of the *CEAA* by scoping the Project as proposed by Nalcor. The Transmission Link was not automatically triggered by the Project. As the Respondents submit, "[t]he Generation project was technically and economically feasible on its own for the purpose of delivering electricity and interconnecting to the existing Labrador grid" (NR, page 3357, para 100). The initial option contemplated developing Gull Island first for export using the Quebec corridor. Furthermore, the harm that the Applicant is concerned with (i.e. that the full environmental effects of the Project not being considered cumulatively with the Transmission Link) is addressed by paragraph 16(1)(*a*) of the *CEAA* which requires an EA to include "the environmental effects of the project […] and any cumulative effects that are

likely to result from the project in combination with other projects […] that have or will be carried out".

[65] It is important to note that Nalcor registered the Transmission Link for a separate EA in January 2009 (two years after the Project was registered). The Transmission Link was initially tracked as a screening but was later upgraded to a comprehensive review after the release of the *MiningWatch* decision. The two projects were maintained as separate EAs, however. Those decisions were communicated to the public on April 14th, 2010. Was the decision to maintain separate EAs for the Project and the Transmission Link reasonable?

[66] Although it is clear that, in April 2010, the two projects were so closely related (to the point where the Transmission Link could not proceed without the Project) that the RAs might have considered joining them, the Court finds that the decision to keep two separate EAs was reasonable for the following reasons. First, given that the Transmission Link project had been upgraded to a comprehensive study, the harm that subsection 15(2) seeks to prevent (i.e. a less rigorous EA for one of the projects) was no longer an issue. In addition, paragraph 16(1)(*a*) ensured that there was no risk that the two projects' environmental impacts would be considered independently. In fact, the combined negative effects of the projects will be considered twice (once in the Project EA and a second time in the Transmission Link EA).

[67] Second, it should be noted that, the Project's EA was already well underway when the Transmission Link was registered as indicated by Nalcor:

> "the JRP Agreement was signed; the EIS Guidelines had been issued; Nalcor had filed its 11,000 page EIS and responded to 165 IRs. […] Restarting the Generation Project EA to include both projects would have been highly prejudicial to all parties: (a) causing considerable delay and confusion among stakeholders; (b) requiring Nalcor to restart the EIS and component studies (which had taken years to prepare), including, re-review by all stakeholders; and (c)_requiring Nalcor to adjust the construction schedules for both of the projects (NR, page 3358, para 106).

[68] In short, the Court accepts the Respondents' argument that there was no harm in maintaining separate EAs, whereas joining them would have wasted a substantial amount of work and cost a significant amount of money. The main consideration under the CEAA is that the environmental impact of the Project and the Transmission Link are considered in a careful and precautionary manner and that there is meaningful public participation throughout the environmental assessment process. The Applicant has not convinced this Court that it was unreasonable not to proceed to a single EA for the Project and Transmission Link. It is not clear that starting anew with a single EA in April 2010 (i.e. when the Transmission Link was upgraded to a comprehensive study) would have significantly increased the quality of the assessment of the environmental impacts of these projects. Hence, our conclusion that the decision to maintain the Project and the Transmission Link EAs separate is reasonable given the circumstances.

VI. Standard of review and analysis of the second issue:

2) Did the Government Respondents properly consider section 16 factors of the CEAA prior to issuing their Decision and Response pursuant to s 37 of the CEAA?

A. Standard of review

1. Section 16 of the *CEAA*

[69] In *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302 at para 37 [*Pembina*], Justice Tremblay-Lamer summarized the jurisprudence regarding the standard of review to be applied to decisions taken under section 16 of the *CEAA*:

> All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] F.C. 263, [1999] F.C.J. No. 1515 (QL), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2001 CanLII 22029 (FCA), [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (QL), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley*, cited above, at para. 55; *Inverhuron*, cited above, at paras. 39-40).

[70] The issue in the present case is whether the JRP could, despite a lack of certain information, validly conclude that the Project's impact on the Applicant's use of the land for

traditional purposes would be negative but not significant after mitigating matters are implemented. This is clearly a question dealing with "weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect". The standard of review on such a question is reasonableness (see *Pembina*, cited above, at para 37).

[71] It is also worth noting that much more recently, in *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520 [*Grand Riverkeeper*], Justice Near re-assessed the standard of review applicable to the same question in light of the four factors described in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*], namely (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). He also concluded that the standard of review on such questions is reasonableness (see *Grand Riverkeeper*, above, at para 40).

2. Subsections 37(1) and 37(1.1)

[72] Decisions taken by responsible authorities upon receipt of an EA report are reviewable on a standard of reasonableness (see *Inverhuron* above, at para 32). In *Bow Valley*, above, at para 78, Justice Linden described the level of deference owed to these decisions as follows:

> The Court must ensure that the steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations as to scope of the project, the extent of the screening and the assessment of the cumulative

> effects in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.

[73] A high level of deference for decisions under section 37 was also suggested in *Pembina*, above:

> The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval (*Pembina*, above, at para 74).

[74] The Government Respondents agree with the findings in *Bow Valley* that decisions made by the Governor in Council [GIC] pursuant to subsection 37(1.1) are only reviewable in cases where the statutory process for the EA was not followed or otherwise acted outside the boundaries of the statute. They submit that such an understanding of the scope of review is consistent with the Supreme Court of Canada's decision in *Thorne's Hardware Ltd et al. v The Queen et al.*, [1983] 1 SCR 106, and argue that the motives behind the GIC's approval of the federal government's Response are beyond the Court's reach.

[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, page 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.

B. Analysis

- **Section 16 challenge to the sufficiency of information before the Government Respondents in drafting the JRP and making the decisions under subsections 37(1) and 37(1.1).**

[77] The Applicant argues that the Government Respondents violated section 16 of the *CEAA* by failing to properly consider the negative impacts of the Project on the Applicant's current use of the land for traditional purposes. It also claims that the JRP was unable to properly consider the negative impacts on the Applicant because it lacked certain information on the extent and location of their current land use of the land. As noted above, the Applicant blames Nalcor and the Government Respondents for the paucity of information before the JRP.

[78] Given the lack of information as to the negative impacts of the Project on the Applicant and other Quebec aboriginal groups, the Applicant submits that the decisions taken pursuant to subsections 37(1.1) and 37(1) of the *CEAA* were unreasonable. The Governor in Council and Responsible Ministers could not reasonably conclude that the negative environmental effects of the Project were justifiable in the circumstances without a complete and thorough understanding of the severity of those environmental effects.

[79] While counsel for the Government Respondents acknowledge that the JRP did not have a full picture of the current land use by Quebec Aboriginal groups (including the Applicant) in the Project area, they submit that it possessed sufficient information to fulfill its mandate under section 16 of the *CEAA*. Based on the information before it, the JRP noted that current use in the Project area appeared to be "seasonal, sporadic and of short duration." It also noted that many of the areas reported to be used by Quebec Aboriginal groups were outside the Project area and would not be affected. The JRP's conclusion on the issue went as follows:

> 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 are current uses in the Project area, the Panel concludes that the Project's impact on Quebec Aboriginal 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 (see page 3148, NR, Vol. 12).

[80] Counsel for the Government Respondents concludes that the JRP properly considered the impact that the Project would have on the current use of the land by Quebec Aboriginal Groups and more importantly by the Applicant, as required by section 16 of *CEAA*. They submit that the Governor in Council and Responsible Ministers had sufficient information on this aspect of environmental effects to take a reasonable decision pursuant to subsections 37(1.1) and 37(1) of *CEAA*.

[81] Nalcor, for its part, denies that the information available to the JRP was insufficient and argues that "[t]he reasonableness of the information considered during the EA pursuant to section 16 must be evaluated in light of the reasonableness of the EA process, which provided the Applicant with ample opportunities to provide relevant information" (NR, page 3364). They submit that this argument must also fail if the federal government is found to have met its duty to consult. Finally, they remind the Court that the JRP in question was found to have met its obligations under section 16 in a recent judgment rendered by Justice Near (see *Grand Riverkeeper*, above, at para 71).

[82] The Court concludes that there is no reason to intervene in the present instance for the following reasons. Firstly, there is no evidence before this Court that the statutory process called for by the *CEAA* was breached. On the contrary, the *CEAA* was closely followed and adhered to at every stage of the process.

[83] Secondly, as the Applicant points out, the primary purpose of the *CEAA* is to ensure that projects are considered carefully before they are sanctioned by federal authorities so that they do not cause significant adverse effects (para 4(1)(*a*) of the *CEAA*). The preamble to the *CEAA* also clearly states that : "[….] the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality." This goal is subject to the caveat that projects creating significant adverse environmental effects may still be approved if they are deemed to be justifiable in light of other considerations (subsection 37(1) of the *CEAA*). Consideration of the factors listed in section 16 ensures that the responsible authorities will have a good appreciation for the potential/likely adverse environmental effects of a project.

[84] The Court finds that on this subject, the JRP possessed sufficient information to properly assess the likelihood of significant adverse impacts of the Project on the Applicant's (and other Quebec Aboriginal groups') current use of the land for traditional purposes. While some details on the extent and location of usage could have been supplemented, the JRP had sufficient documentation and information before it, namely, testimony from members of Quebec aboriginal groups and historical documents, to validly

conclude that usage in the Project area is "seasonal, sporadic and of a short duration". A close review of the documentation filed by Nalcor with the JRP reveals that the studies conducted by Hydro-Québec as part of the La Romaine Project together with the Comtois study and the presentation made by the Applicant in Sept Îles adequately describes the Applicant's ties to the caribou that roam on part of the Project's footprint. The Court is also satisfied that reasonable efforts were made by the JRP to acquire a more complete picture of the Project's impact on the Applicant. The Court fails to see how further details would have significantly modified the JRP's ultimate conclusion in this instance.

[85] The JRP carefully considered the issues, noted that certain information was lacking but still felt confident that the Project's negative impacts on Quebec Aboriginal land use in the Project area would be small after the proposed mitigating measures were put into place, particularly as they pertain to the caribou. Its conclusion "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, cited above, at para 47). This finding also means that the GIC and RAs possessed sufficient information on the topic to make their decisions pursuant to subsections 37(1.1.) and 37(1) of the *CEAA*.

- **Benefits of the Transmission Link**

[86] The Applicant contends that the federal government's response to the JRP report unreasonably considered the benefits of the Transmission Link in concluding that the Project's negative consequences could be justified in the circumstances. In its Response, the

federal government lists the "replacement of non-renewable generation plants that produce significant green house, and air pollutants" among the benefits of the Project. The Applicant submits that the only generation plant the Government could be referring to is the Holyrood generation plant located on the Island of Newfoundland. They further argue that Holyrood could not be replaced without the Transmission Link. The Applicant therefore argues that it is unreasonable to consider the benefits of the Transmission Link while ignoring its negative impacts. Since the two projects were scoped separately, the Applicant contends that they should not be considered together because the Transmission Link is still undergoing its EA and has yet to be approved. They posit that including the benefits of the Transmission Link was, therefore, premature.

[87] According to the Applicant, the fact that the Response considers the benefits of the Transmission Link is also evidence that the Project has been substantially modified. The Applicant argues that the "true project" that is being approved and intended on being built is not the one described in the Report but rather that of the Muskrat Falls dam with the Transmission Link. The Gull Island dam has, according to the Applicant, either been abandoned or indefinitely postponed. This situation creates a significant problem according to the Applicant because it entails an indefinite approval for Gull Island. The dam would hang over the land like "the sword of Damocles". It is further submitted that the George River caribou herd is currently experiencing an alarming decline in numbers and that the construction of Gull Island at a later date, without further assessment, could be potentially disastrous for the herd.

[88] Nalcor and the Government Respondents both reply that there is nothing in the *CEAA* which prevents the government from considering the benefits of related or unrelated projects. On the contrary, both argue that it would be unreasonable to consider a project in isolation and ignore any benefits accruing from other projects. In addition, Nalcor argues that "while the Response considers the Transmission Link, it does not focus on it exclusively" (NR, page 3366). The economic analysis conducted by NRCan (a study the federal government relied on) "considers the economic viability of the Generation Project as a whole, as well as an assumption that only one or the other component might proceed […] [and concluded that] any of these scenarios could be economically viable" (NR, page 3366).

[89] Nalcor equally insists that it still intends to move forward with Gull Island but that it must clear its gateway process before moving any further. The fact that there is currently no determined start date for the Gull Island dam does not mean that it will not be built. Nalcor considers that the only significant change that has occurred relates to the sequencing of the construction of the two dams. What is more, according to Nalcor the impact of switching the order of construction was already considered in detail during the EA. It referred the Court to IR JRP 165. Nalcor also points to section 24 of the *CEAA* to substantiate its position that there is no indefinite approval of Gull Island. That section, according to Nalcor, is designed to prevent the precise harm that the Applicant is concerned about. If the construction of Gull Island does not proceed within a reasonable timeframe, section 24 of the *CEAA* will apply and require that a new EA be conducted.

[90] The Court accepts the Respondents' argument on this issue. In addition to the points they raised above, the Court adds the following. Under paragraph 16(1)(*a*) of the *CEAA*, a JRP must take into account the cumulative environmental effects of prior and future projects. Given that the negative impacts of a future project must be taken into account in an EA, the Court considers that the positive impacts can also be weighed in just as well. Section 16 does not preclude such an exercise.

[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. 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.

- **Economic Feasibility and Alternatives**

[92] The Applicant argues that the GIC and Responsible Ministers unreasonably ignored the JRP's conclusions and recommendations regarding the adequacy of the

economic studies produced by Nalcor and the need to examine alternatives. The JRP concluded in section 4.2 as follows:

> The Panel concludes that Nalcor's analysis that showed Muskrat Falls to be the best and least cost way to meet domestic demand requirements is inadequate and an independent of economic, energy and broad-based environmental considerations of alternatives is required.

[93] In its Response, the federal government noted that it had two economic analyses (one by NRCan and another by Manitoba Hydro International [MHI]), which "concluded by supporting Nalcor's assertions that the Project represents the least cost option for meeting anticipated electricity demand" (NR, Vol. 3, page 0601). The Applicant contends that these studies could not corroborate each other because the analysis conducted by NRCan evaluated the Project as originally proposed (Gull Island followed by Muskrat) whereas MHI and Nalcor's looked at Muskrat Falls together with the Transmission Link.

[94] The Court cannot find a reviewable error on this issue. The JRP fulfilled its purpose under para 4(1)(*a*) of the *CEAA* by alerting the responsible authorities to its conclusion that Nalcor's economic analysis was inadequate. The federal government disagreed with the JRP on the basis that another analysis corroborated Nalcor's. The federal government's decision on this issue had, therefore, a reasonable factual basis. 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*, 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).

[95] The evidence before the Court indicates that the federal government was properly informed on 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.

VII. Standard of review and analysis of the third issue:

3) Was the Applicant properly consulted and accommodated in relation to the Project?

A. Standard of Review

[96] In *Dunsmuir*, above, at para 62, the Supreme Court of Canada indicated that the first step in determining the appropriate standard of review is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". If the case law has, then the inquiry ends there and the established standard of review should be followed.

[97] The standard of review to be applied in cases 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" was first discussed in *Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 60 [*Haida*]. Applying the principles established by *Haida*, the consensus in the case law is 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 against the content of the duty" (*Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at para 91 [*Ka'a'Gee*]). This is a mixed question of fact and law to be reviewed on the standard of reasonableness.

[98] It is clear from the facts of this case that the federal government understood its duty to consult the Applicant on the Project. Ultimately, the question to be answered on this issue is whether the federal government satisfied the Crown's duty to consult and accommodate the Applicant in the present case. The standard of review is reasonableness. The question is then: Did the Crown make reasonable efforts to satisfy the duty to inform and consult incumbent upon them? (See *Haida*, above, at para 62).

B. Analysis

- ***What was the scope of the Crown's duty to consult and accommodate?***

[99] In order to decide whether the Crown fulfilled its duty to consult, the Court needs to determine the scope or content of that duty. The Supreme Court, in *Haida*, above, found that the scope of the duty to consult it "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" (*Haida*, above, at para 39).

[100] At the low end of the spectrum, that is to say, where there is little evidence supporting the existence of a right, the importance of the right to the Aboriginal peoples small, and the potential impact of the proposed action on that right limited, the duty may only be "to give notice, disclose information and discuss any issues raised in response to the notice" (*Haida* at para 43). When the opposite is true, that is when "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" (*Haida* at para 44) then deep consultation may be required. Deep consultation may involve "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). Even in cases where the duty to consult is at the lower end of the spectrum, the duty requires that aboriginal peoples' concerns be taken seriously and, where possible, mitigation measures implemented (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 64 [*Mikisew*]).

[101] Regardless of where the Crown's duty to consult lies on this spectrum, "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" (*Haida* at para 45). A key requirement in honourable consultation is responsiveness (*Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 25 [*Taku River*]).

[102] The case law has also clearly established that consultation is not a "one way street" and there exists an obligation for both parties to actively engage in the process. As Justice Finch explained in *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161 [*Halfway River*]:

> 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 et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

Preliminary assessment of the strength of the claim

[103] The Applicant has filed a number of documents testifying to the Ekuanitshit's traditional use of the land in and around the Project area for hunting small and large game, particularly caribou. Such documents include: 1) A 1983 study by Robert Comtois,

Occupations et utilisation du territoire par les Montagnais de Mingan conducted in support of the Ekuanitshit's claims in the federal government's comprehensive land claims process (the "Conseil Attikamek Montagnais [CAM] negotiations); 2) an archeological study by Hydro-Québec (Applicant's Record, Vol. X, page 3181); 3) historical and archeological reports produced by Nalcor (Applicant's Record, Vol. X, pages 3113, 3121 and 3122).

[104] The federal government has never questioned the strength of the Ekuanitshit's claim and, as the Applicant points out, already accepted it for the purpose of negotiating a treaty in 1979 (the CAM negotiations). While Nalcor initially claimed that the information they possessed did not provide any evidence of the Applicant's historical or contemporary use of the land in the Project area, they later submitted a number of documents testifying to it. Those documents include: 1) the CAM; (2) 11 Aboriginal consultation updates filed by Nalcor with the JRP; and (3) Nalcor's responses to information requests number JRP.2 and 1S/2S. In light of the uncontradicted evidence adduced, the Court concludes that the Applicant has a strong *prima facie* case for land use rights in the Project area.

The seriousness of the potentially harmful effect

[105] The Court recognizes that caribou are at the very heart of Ekuanitshit culture. The Applicant is particularly concerned about the future of the caribou living in and around the Project area. During the JRP hearings, Chief Piétacho explained the respect that members of the Innu nation have for the caribou and how important they were to the nation's survival. For historical reasons, including the creation of the Mingan reserve and the imposition of the

Indian Residential School system, there was a break with the Applicant's caribou hunting tradition in Labrador. During the JRP hearings, Chief Piétacho explained that the Ekuanitshit are now returning to Labrador to hunt caribou and perpetuating their traditional ties to the caribou.

[106] Regarding the potential adverse effects of the Project on the caribou, the JRP report paints a nuanced picture. Due to a number of factors, the Red Wine Mountains herd is already a species at risk and it is unclear whether the herd, with or without the Project, can be saved. Nevertheless, the JRP concluded that "in light of the current state of the herd and the cumulative effects on its recovery, the Project would cause a significant adverse environmental effect on the Red Wine Mountain caribou herd" (NR, Vol. 12, page 3096).

[107] While the Ekuanitshit no longer depend on the caribou for their survival and have only recently resumed hunting them in the Project area the animal's cultural significance should not be underestimated. Furthermore, the Court considers that in this case, reconciliation demanded that the federal government consult and take measures within its legislative powers to ensure that this traditional activity be maintained. This duty becomes even more evident as the Court acknowledges the fact that the federal government is partially to blame for the Applicant's break with tradition (cf. the residential schooling system). Given that the Applicant presents a strong *prima facie* case for its claim and that the potential for adverse effects on a culturally significant right is high, this Court finds that the Applicant was entitled to more than minimum consultation. The Applicant's concerns

needed to have been seriously addressed and mitigating measures needed to have been included in the Project.

- **Preliminary issues**

Is judicial review premature?

[108] The Government Respondents argue that the Applicant filed its application for judicial review before the federal government's consultation period came to an end. Consultation did not come to end with the GIC's Order in Council. According to the Federal Consultation Framework, the process is now in Phase V: Regulatory permitting. Consultation is to continue up until TC and DFO issue permits allowing Nalcor to pose acts that will obstruct navigable waterways or destroy fish habitat.

[109] The Government Respondents rely on Justice Barnes' decision in *Gitxaala v Canada (Transport, Infrastructure and Communities)* 2012 FC 1336 at para 54 [*Gitxaala*] where he found that an application for judicial review based on a claim that Crown consultation was inadequate is premature if "the effective end-point in the process of consultation has not been reached" .In that same paragraph he also noted that the Supreme Court of Canada in *Haida* ,above, explained that "there are a variety of remedies available for a failure to consult not the least of which is the opportunity at later stages in the process to engage in meaningful dialogue and, where necessary, to accommodate First Nations

concerns". Justice Barnes' conclusion was that the First Nations groups could be heard again if "the process proves to be deficient or perfunctory" (*Gitxaala*, above, at para 54).

[110] The Applicant argues that consultation and accommodation must not only be evaluated when final permits are issued but also when ""strategic, higher level decisions" that may have an impact on Aboriginal claims and rights" are taken (*Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 [2010] 2 SCR 650 at para 44 [*Carrier Sekani*]). The decisions taken pursuant to subsections 37(1) and 37(1.1) are not only "higher level decisions" but their effect is to release the Project from the EA process and will, in turn, have a substantial influence on the permit granting decisions.

[111] The Government Respondents reply that *Carrier Sekani*, above, refers to decisions that trigger or engage the duty to consult, not the duty to evaluate the consultation process (*Carrier Sekani*, above, at para 43). In this case, the consultation process began long before the decisions under review were made. The consultation process is still ongoing and should not be judged until it is over.

[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.

Constitutive elements of the Crown's consultation

[113] The Applicant claims that the federal government's consultation consisted of one letter sent to the Applicant on September 9th, 2009, requesting comments on the JRP report. The Government Respondents allege that this is an inaccurate caricaturization of the federal government's consultation in this case. The federal government emphasized in their Consultation Framework that the second and third phases of Crown consultation would take place within the context of the JRP's EA process. The Government Respondents remind the Court that it is now a well accepted practice that Crown consultation can take place through the CEAA's EA process (see *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 at para 45; *Taku River*, above, at paras 2 and 22; and *Gitxaala*, above, at para 50). The Court is satisfied that the consultations conducted by the JRP during the EA constituted federal government consultation.

Consultation

[114] The Applicant's participation in the Project EA began early on in the process, at the planning stage. The Canadian Environmental Assessment Agency (the "Agency") and the Provincial Department of Environment and Conservation (the "NLDEC") invited the Applicant to comment on their draft Environmental Impact Statement Guidelines ("Draft Guidelines"). The Applicant responded by submitting comments on what information it felt Nalcor should include in its EIS in order to assist the Joint Review Panel [JRP] in carrying out the EA. The Applicant was also invited to comment on the draft JRP Agreement and to nominate JRP members.

[115] The Applicant acknowledged that it was actively involved in the EA process. To fund that participation, the Agency granted the Applicant the full amount it initially requested through its participant funding program (an initial $55, 850.25 and an additional $11, 105.00 upon further request later on in the process). Through this funding, the Applicant was able to present written submissions regarding Nalcor's EIS which subsequently informed the JRP's IR process. The IRs elicited a number of responses from Nalcor on issues that concerned the Applicant, including: (a) the Red Wine Mountain and Lac Joseph caribou herds; (b) monitoring and follow-up; (c) waterfowl survey methodology and; (d) Aboriginal consultation.. The Applicant made further comments on the adequacy of Nalcor's responses which, in turn, led the JRP to make additional IRs. Altogether the IRs resulted in 250 pages of further information.

(See Exhibits A-251, U,V,W to Bennett Affidavit, pages 113, 681, 693 and 1061, NR, Vol. 1, 3, 4 and 5)

[116] The Applicant also presented his oral submissions at the JRP community Hearing session which took place, at its request, in Sept-Îles on April 7, 2011. Chief Piétacho and 4 other community elders testified on the Ekuanitshit's use of the land to be affected by the Project. The Applicants also played a video of other elders describing the Ekuanitshit's traditional voyages from Mingan to as far as "Tshishe-shastshit" in Labrador. Simultaneous translation of the proceedings was provided. The Court had the benefit of viewing part of the video that was presented and finds it admissible in the record as evidence of the representations made by the Applicant.

[117] In response to the Applicant's concerns regarding the nefarious effects of the Project on their use of the land, Nalcor introduced a number of mitigating measures. For example, with regards to the caribou, Nalcor proposed to:

> "-consider the timing of construction and other activities and restricting access when caribou are in the area;
> -reduce wildlife mortality by posting speed limits and implementing a no harassment/no harvesting policy;
> -arrange work schedules to minimize travel in designated areas during calving and post-calving periods;
> -remove trees from the riparian zone surrounding the reservoirs;
> - monitor both the Red Wine Mountain and George River herds to ensure that predictions of Project effects are accurate including evaluating effects of habitat loss and alteration, increased access and changes in predator-prey dynamics;
> - design monitoring and follow-up programs to allow for the identification of cumulative effects by referencing applicable management plans and consulting with regulators;

> - monitor daily and seasonal road and river crossings by caribou and traffic access;
> - provide support for telemetry work to monitor caribou population numbers, calf survival, and movement and distribution patters;
> - monitor the Red Wine Mountain caribou herd through ongoing participation with the Labrador Woodland Caribou Recovery Team, including support of satellite GPS monitoring and other work directly related to the effects of the Project; and
> -monitor the George River caribou herd through the participation with the George River Caribou Herd Co-Management Team" (NR, Vol. 12, page 3093).

[118] The Court notes the conclusion reached by the JRP with respect to the Applicant's claims. Pages 185-186 of the JRP Report read:

> 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 are current uses in the Project area, the panel concludes that the Project's impact on Quebec Aboriginal 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 (NR, page3148).

[119] Based on the foregoing, it is clear that the Applicant's concerns were taken seriously and that several mitigating measures were introduced into the Project in response.

[120] The Applicant, however, maintains that the Crown failed to meet its duty to consult in two major respects. First, the Crown did not adequately inform the Ekuanitshit on both their contemporary use of the land in the Project zone and on the negative impact that the

Project would have on their rights. Second, the Crown failed to sufficiently accommodate the Applicant on the predicted negative impacts of the Project on their rights.

Failure to inform

[121] The JRP concluded that while the Project's negative impact on the Applicant's land use would not be significant, uncertainties remained as to the location and extent of the Applicant's current use of the land in the Project area. The JRP noted that such information might become available during the course of further consultation with the federal government. The Applicant stresses that this never happened.

[122] While the Respondents maintain that the information provided during the EA process was sufficient to satisfy the federal government's duty to consult, they note that Nalcor and the Applicant made numerous attempts to negotiate a Community Consultation Agreement [CCA]. The CCA was intended to provide the Applicant the capacity to present information on their current land use in the Project area. The parties were unable to come to an agreement for several reasons including:

Methodology

[123] The Applicant believed that a similar approach to that taken by Hydro-Québec in the La Romaine project should have been adopted. This method would have involved the hiring of an "expert to carry out a study on the Innus of Ekuanitshit [and] his or her work

would be supported by community liaison officers paid by the proponent and would be supervised by a Nalcor-Ekuanitshit joint committee" (NR, page 1402). Nalcor considered the approach the Applicant put forward but ultimately opted for an approach where the community would hire a Nalcor funded consultation officer who would work "in close cooperation with Nalcor personnel to collect data, disseminate information and prepare reports" (NR, page 1408).

Duration

[124] Nalcor believed "that the activities described in the draft agreement [could] be implemented over a four month period" whereas the Applicant found this estimate to be "unrealistic and impractical" (NR, page 1408).

Cost and scope

[125] Nalcor estimated a budget of approximately $87,500 for the activities described in their draft consultation agreement. Again, the Applicant believed this estimate to be unrealistic. The Applicant maintained its position throughout negotiations that the type of study required was one similar to that performed for the La Romaine project. The Hydro-Québec environmental impact study included multiple studies for which the estimated cost was $600,000. Nalcor considers that given the data available from the Comtois study and those conducted by Hydro-Québec for La Romaine, a study of similar magnitude was not

required to uncover the scope and location of the Applicant's current use of the land in the Project area for traditional purposes.

[126] It is clear in the jurisprudence that the duty to consult does not imply a duty to agree (*Haida*, above, at para 42). What is required is a "commitment […] to a meaningful process of consultation" (*Haida*, above, at para 42). When the Court applies these principles to the CCA negotiations, it finds that Nalcor was committed to provide the Applicant with a meaningful opportunity to update existing information regarding their current use of the land in the Project area.

[127] For one, the Court does not agree with the Applicant that a study similar in scope and kind to that performed for the La Romaine project was required in this case. A fair amount of information already existed on the Applicant's use of the land in the Project area (i.e. Comtois study and those of Hydro-Québec for La Romaine). Indeed, that information, in addition to the testimonies made during the JRP hearing in Sept-Îles on April 7th, was sufficient enough for the JRP to conclude that the Project would not have a significant impact on the Applicant's current land use. The Court agrees that the methodology proposed by Nalcor was reasonable in this instance. The Applicant referred the Court to the results of a study conducted by another Quebec based Innu group, the Pakua Shipi, who accepted the $87,500 Nalcor offer and terms of reference. The Applicant argued that it rightly rejected Nalcor's proposal since the result of the study were inconclusive and lacked scientific rigor.

[128] The Applicant also claims that the consultation process was deficient in that Innu Nation received preferential treatment which is contrary to the principle established in *Hlalt First Nation v British Columbia (Environment)*, 2011 BCSC 945

[129] The Court finds that it was incumbent on the Applicant, having decided that the funding and amount of time offered were insufficient, to present a counter offer that demonstrated that it was truly engaged in the process. As the Court reviewed the correspondence exchanged in the negotiations, it indicates that the Applicant denounced the successive offers made by Nalcor but remained on its position that an in-depth study similar to La Romaine was required. Given the difference in terms of impact on the rights of the Applicant between the Project (two dams in Labrador) and La Romaine (4 dams in close proximity to their reserve), the Court is of the opinion that the Applicant's position "frustrate[d] the consultation process […] by imposing unreasonable conditions" (*Halfway River*, above, at para 161).

[130] Phase IV of the federal government's Consultation Framework covers the period after the release of the JRP report up until the Decision and Response. In conformity with the Framework, the Agency sent the Applicant a letter on September 9th, 2011 soliciting comments on the JRP report within a delay of 45 days. The Applicant responded within the delay with a 22 page submission requesting that the federal government refrain from authorizing the Project before:

> "1) avant qu'une étude sérieuse ne soit complétée sur l'utilisation historique et contemporaine par les Innus de Ekuanitshit du territoire visé par le projet, y compris les effets négatifs potentiels du projet;

> 2) plus, précisément, sans qu'une étude complète sur les effets potentiels sur la harde de caribous du Lac Joseph ne soit produite et avant qu'un programme de suivi exhaustif de la harde de caribous des monts Red Wine ne soit mis sur pied, au sujet desquels les Innus de Ekuanitshit devraient être consultés (Applicant's Record, Vol. VII, pages 2088-2089, 2101-2102)".

[131] The Crown did not reply to the Applicant's request and four months later the Project was released from the EA process. The Court agrees with the Applicant that the federal government should have responded to that letter. As noted above, responsiveness is a key requirement of honourable consultation (*Taku River*, above, at para 25).This misstep, however, does not mean that the consultation process, as a whole, should be deemed inadequate. As Justice Barnes noted in *Gitxaala*, above, the consultation process must be reasonable, not perfect.

[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 report and confirmed in the Decision (see NR: vol. 3, p. 638). Nalcor chose to focus on the Red Wine herd in its EIS (i.e. to use it as its "key indicator") because it was the species most at risk. The mitigating measures introduced to prevent serious harm to the Red Wine caribous can also be applied to the Lac Joseph herd (see NR, Vol. 8, page 1914).

[133] The Court believes it should underline that subsection 37(2) of the *CEAA* requires a responsible authority to adopt a course of action under paragraph 37(1)(*a*) to "ensure that

any mitigation measures referred to in that paragraph in respect of the project are implemented". Should the federal government fail to do so, the Applicant may have that decision not to implement the mitigation measures recommended judicially reviewed.

Insufficient accommodation

[134] The Applicant submits that the Crown has failed to establish why the Applicant should not be accommodated to the same extent as, for example, the Innu nation. The Applicant points to the Impact and benefits agreements [IBA] that Nalcor signed with Innu Nation in 2008 called "Tshash Petapen" which not only includes employment opportunities but commercial participation and even royalties.

[135] The Court finds that the mitigating measures proposed by Nalcor and the JRP to minimize the negative impact on the Ekuanitshit's rights substantially satisfy the federal government's duty to consult and accommodate within its jurisdiction. The federal government's Response confirmed that these measures will be made an integral part of the project. [Emphasis added]

[136] While the traditional rights of the Applicant in question are culturally significant, the impact the Project will have on them cannot be compared to the impact it will have on Innu Nation. One obvious difference is that the Project will be located on or in closer proximity to the land where the Innu Nation lives and to which it claimed title. The Project will inevitably affect more than one significant aspect of their lives.

[137] In conclusion, this application is dismissed because the Applicant was adequately consulted, mitigation measures addressed its concerns with respect to its usage of the territory in the Project area and, in any case, the scoping issue is statute barred. Finally, the Court also finds that judicial review of the consultation process is premature.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. In view of the general importance of some of the issues raised by this application the Court orders that the Respondents jointly pay 25% of Applicant's costs.

"André F.J. Scott"
Judge

ANNEX

***Canadian Environmental Assessment Act,* SC 1992, c 37**

Definitions

2. (1) In this Act,

…

"environmental effect" means, in respect of a project,

(*a*) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the Species at Risk Act,

(*b*) any effect of any change referred to in paragraph (a) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes by aboriginal persons, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or

(*c*) any change to the project that may be caused by the environment,

whether any such change or effect occurs within or outside Canada;

***Loi canadienne sur l'évaluation environnementale*, LC 1992, c 37**

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

[…]

« effets environnementaux »

"environmental effect"

« effets environnementaux » Que ce soit au Canada ou à l'étranger, les changements que la réalisation d'un projet risque de causer à l'environnement — notamment à une espèce sauvage inscrite, à son habitat essentiel ou à la résidence des individus de cette espèce, au sens du paragraphe 2(1) de la Loi sur les espèces en péril — les répercussions de ces changements soit en matière sanitaire et socioéconomique, soit sur l'usage courant de terres et de ressources à des fins traditionnelles par les autochtones, soit sur une construction, un emplacement ou une chose d'importance en matière historique, archéologique, paléontologique ou architecturale, ainsi que les changements susceptibles d'être apportés au projet du fait de l'environnement.

Purposes

4. (1) The purposes of this Act are

(*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;

(*b*) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(*b*.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(*b*.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(*b*.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(*c*) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

Objet

4. (1) La présente loi a pour objet :

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) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

b.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale;

b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets;

b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale;

c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites;

(*d*) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.

Duties of the Government of Canada

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

Mission du gouvernement du Canada

(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence.

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.

Same assessment for related projects

(2) For the purposes of conducting an environmental assessment in respect of two or more projects,

(*a*) the responsible authority, or

(*b*) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so

Pluralité de projets

(2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.

closely related that they can be considered to form a single project.

All proposed undertakings to be considered

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

(*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,

likely to be carried out in relation to that physical work.

Factors to be considered

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:

(*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;

(*b*) the significance of the effects referred to in paragraph (*a*);

Projet lié à un ouvrage

(3) Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération — construction, exploitation, modification, désaffectation, fermeture ou autre — constituant un projet lié à un ouvrage :

a) l'opération est proposée par le promoteur;

b) l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.

Éléments à examiner

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) 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) 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;

(*d*) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(*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 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.

c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;

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 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.

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.

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.

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 (*d*) shall be determined

(*a*) by the responsible authority; 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.

Factors not included

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

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

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)*a*), *b*) et *d*) et (2)*b*), c) et *d*) incombe :

a) à l'autorité responsable;

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

Situations de crise nationale

(4) L'évaluation environnementale d'un projet n'a pas à porter sur les effets environnementaux que sa réalisation peut entraîner en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*.

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,

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.

exercer ses attributions afin de permettre la mise en œuvre 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.

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

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.

Governor in Council referred to in paragraph (*a*).

Federal authority

(1.2) Where a response to a report is required under paragraph (1.1)(*a*) and there is, in addition to a responsible authority, a federal authority referred to in paragraph 5(2)(*b*) in relation to the project, that federal authority may act as a responsible authority for the purposes of that response. This subsection applies in the case of a federal authority within the meaning of paragraph (*b*) of the definition "federal authority" in subsection 2(1) if the Minister through whom the authority is accountable to Parliament agrees.

Application du paragraphe 5(2)

(1.2) Lorsqu'une autorité responsable a l'obligation, en vertu du paragraphe (1.1), de donner suite au rapport qui y est visé, toute autorité fédérale dont le rôle à l'égard du projet est prévu à l'alinéa 5(2)*b*) peut prendre part à l'exécution de cette obligation comme si elle était une autorité responsable. S'agissant d'une autorité fédérale visée à l'alinéa *b*) de la définition de « autorité fédérale », au paragraphe 2(1), elle peut s'acquitter de cette obligation avec l'agrément du ministre par l'intermédiaire duquel elle rend compte de ses activités au Parlement.

Approval of Governor in Council

(1.3) Where a project is referred back to a responsible authority under subsection 23(1) and the Minister issues an environmental assessment decision statement to the effect that the project is likely to cause significant adverse environmental effects, no course of action may be taken by the responsible authority under subsection (1) without the approval of the Governor in Council.

Agrément du gouverneur en conseil

(1.3) L'autorité responsable à laquelle le projet est renvoyé au titre du paragraphe 23(1) ne prend la décision visée au paragraphe (1) qu'avec l'agrément du gouverneur en conseil si le projet est, selon la déclaration du ministre, susceptible d'entraîner des effets environnementaux négatifs importants.

Responsible authority to ensure implementation of mitigation measures

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(*a*), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made there under or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are

Précision

(2) L'autorité responsable qui prend la décision visée à l'alinéa (1)*a*) veille, malgré toute autre loi fédérale, lors de l'exercice des attributions qui lui sont conférées sous le régime de cette loi ou de ses règlements ou selon les autres modalités qu'elle estime indiquées, à l'application des mesures d'atténuation visées à cet alinéa.

implemented.

Mitigation measures — extent of authority

(2.1) Mitigation measures that may be taken into account under subsection (1) by a responsible authority are not limited to measures within the legislative authority of Parliament and include

(*a*) any mitigation measures whose implementation the responsible authority can ensure; and

(*b*) any other mitigation measures that it is satisfied will be implemented by another person or body.

Mesures d'atténuation — étendue des pouvoirs

(2.1) Les mesures d'atténuation que l'autorité responsable peut prendre en compte dans le cadre du paragraphe (1) ne se limitent pas à celles qui relèvent de la compétence législative du Parlement; elles comprennent :

a) les mesures d'atténuation dont elle peut assurer l'application;

b) toute autre mesure d'atténuation dont elle est convaincue qu'elle sera appliquée par une autre personne ou un autre organisme.

Responsible authority to ensure implementation of mitigation measures

(2.2) When a responsible authority takes a course of action referred to in paragraph (1)(*a*), it shall, with respect to any mitigation measures it has taken into account and that are described in paragraph (2.1)(a), ensure their implementation in any manner that it considers necessary and, in doing so, it is not limited to its duties or powers under any other Act of Parliament.

Application des mesures d'atténuation

(2.2) Si elle prend une décision dans le cadre de l'alinéa (1)*a*), l'autorité responsable veille à l'application des mesures d'atténuation qu'elle a prises en compte et qui sont visées à l'alinéa (1.1)a) de la façon qu'elle estime nécessaire, même si aucune autre loi fédérale ne lui confère de tels pouvoirs d'application.

Assistance of other federal authority

(2.3) A federal authority shall provide any assistance requested by a responsible authority in ensuring the implementation of a mitigation measure on which the federal authority and the responsible authority have agreed.

Appui à l'autorité responsable

(2.3) Il incombe à l'autorité fédérale qui convient avec l'autorité responsable de mesures d'atténuation d'appuyer celle-ci, sur demande, dans l'application de ces mesures.

Prohibition: proceeding with project

(3) Where the responsible authority takes a course of action referred to in paragraph (1)(*b*) in relation to a project, the responsible authority shall publish a notice of that course of action in the Registry and, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made under it shall be exercised or performed that would permit that project to be carried out in whole or in part.

Interdiction de mise en œuvre

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)*b*) à l'égard d'un projet est tenue de publier un avis de cette décision dans le registre, et aucune attribution conférée sous le régime de toute autre loi fédérale ou de ses règlements ne peut être exercée de façon à permettre la mise en œuvre, en tout ou en partie, du projet.

Time for decision

(4) A responsible authority shall not take any course of action under subsection (1) before the 30th day after the report submitted by a mediator or a review panel or a summary of it has been included on the Internet site in accordance with paragraph 55.1(2)(p).

Délai relatif à la prise de la décision

(4) L'autorité responsable ne peut prendre une décision dans le cadre du paragraphe (1) avant le trentième jour suivant le versement du rapport du médiateur ou de la commission, ou un résumé du rapport, au site Internet conformément à l'alinéa 55.1(2)p).

***The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11**

35. (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.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed

***Loi constitutionnelle de 1982*, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11**

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.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au

equally to male and female persons.

paragraphe (1) sont garantis également aux personnes des deux sexes.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-778-12
STYLE OF CAUSE:	CONSEIL DES INNUS DE EKUANITSHIT and LE PROCUREUR GÉNÉRAL DU CANADA ET AL
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	January 22, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	April 23, 2013

APPEARANCES:

David Schulze Nick Dodd Nathan Richards	FOR THE APPLICANT
Bernard Letarte Vincent Veilleux	FOR THE RESPONDENT LE PROCUREUR GÉNÉRAL DU CANADA
Maureen Killoran Thomas Gelbman	FOR THE RESPONDENT NALCOR ENERGY

SOLICITORS OF RECORD:

DIONNE SCHULZE S.E.N.C. Montreal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT LE PROCUREUR GÉNÉRAL DU CANADA
Osler, Hoskin & Harcourt LLP Montreal, Quebec	FOR THE RESPONDENT NALCOR ENERGY

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140822

Docket: A-196-13

Citation: 2014 FCA 189

CORAM: **GAUTHIER J.A.**
MAINVILLE J.A.
BOIVIN J.A.

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

Heard at Montréal, Quebec, on June 9, 2014.

Judgment delivered at Ottawa, Ontario, on August 22, 2014.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140822

Docket: A-196-13

Citation: 2014 FCA 189

CORAM: **GAUTHIER J.A.**
MAINVILLE J.A.
BOIVIN J.A.

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

REASONS FOR JUDGMENT

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 km^2 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 km^2.

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	Autorité responsable
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	**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

panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

d'étude approfondie, prend l'une des décisions suivantes :

(*a*) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

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 œuvre totale ou partielle du projet :

(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.

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 œuvre du projet en tout ou en partie.

Approval of Governor in Council	Agrément du Gouverneur en Conseil
(1.1) Where a report is submitted by a mediator or review panel,	**(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.
(*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*).	

[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	Détermination de la portée du projet
15.(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be	**15.(1)** L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une

determined by	commission, le ministre, après consultation de l'autorité responsable, détermine la portée du projet à l'égard duquel l'évaluation environnementale doit être effectuée.
(*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.	

[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 decried 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	Utilisation d'une évaluation antérieure
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	**24.(1)** Si un promoteur se propose de mettre en œuvre, 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*) the project did not proceed after the assessment was completed,	*a*) le projet n'a pas été mis en œuvre après l'achèvement de l'évaluation;
…	[…]
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	Ajustements nécessaires
(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.	(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 that 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 acceptation 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 caribous 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.

"Richard Boivin"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-196-13
STYLE OF CAUSE:	COUNCIL OF THE INNU OF EKUANITSHIT v. 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
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 9, 2014
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	AUGUST 22, 2014

APPEARANCES:

David Schulze Nicholas Dodd	FOR THE APPELLANT COUNCIL OF THE INNU OF EKUANITSHIT
Bernard Letarte Vincent Veilleux	FOR THE RESPONDENTS 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
Maureen Killoran Jean-François Forget	FOR THE RESPONDENT NALCOR ENERGY

SOLICITORS OF RECORD:

Dionne Schulze, s.e.n.c. Montréal (Quebec)	FOR THE APPELLANT COUNCIL OF THE INNU OF EKUANITSHIT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENTS THE ATTORNEY GENERAL OF 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
Osler Hoskin & Hartcourt Calgary (Alberta)	FOR THE RESPONDENT NALCOR ENERGY

Federal Court Cour fédérale

Date: 20150417

Docket: T-1347-13

Citation: 2015 FC 492

Ottawa, Ontario, April 17, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NUNATSIAVUT GOVERNMENT

Applicant

and

ATTORNEY GENERAL OF CANADA (DEPARTMENT OF FISHERIES AND OCEANS)

Respondent

and

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION

Second Respondent

and

NALCOR ENERGY

Third Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c-7 ("*Federal Courts Act*"), by which the Applicant challenges the decision of the Minister of Fisheries and Oceans 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*"), it permits impacts to fish and fish habitat arising from the construction of the Muskrat Falls hydroelectric generation facility proposed by Nalcor for the lower Churchill River as part of the Lower Churchill Hydroelectric Generation Project in Labrador.

[2] The Applicant claims that it was not properly consulted and that concerns of Labrador Inuit were not fully and fairly considered or adequately accommodated by Canada, as represented by the Department of Fisheries and Oceans ("DFO"), in the decision to issue the Authorization.

I. The Project

[3] Nalcor proposed to develop two hydroelectric generation facilities on the lower Churchill River in central Labrador with a combined capacity of 3,047 megawatts ("MW"). The project would consist of two dams located at Muskrat Falls (824 MW) and at Gull Island (2,250 MW), two reservoirs, and transmission lines connecting Muskrat Falls, Gull Island and the existing Churchill Falls hydroelectric facility. Additional facilities would include access roads, temporary bridges, construction camps, borrow pits and quarry sites, diversion facilities and spoil areas ("Project") (as described in the *Report of the Joint Review Panel: Lower Churchill Hydroelectric Generation Project* dated August 2011("JRP Report")).

[4] Given the nature of the Applicant's claim, it is necessary to set out, in some detail, the factual background of this matter, its legislative backdrop and the relevant provisions of the *Labrador Inuit Land Claims Agreement*, between The Inuit of Labrador, Her Majesty The Queen in Right of Newfoundland and Labrador, and Her Majesty The Queen in Right of Canada, 22 January 2005 ("Agreement"), which was given force of law pursuant to the *Labrador Inuit Land Claims Agreement Act*, SNL 2004, c L-3.1 and the *Labrador Inuit Land Claims Agreement Act*, SC 2005, c 27.

II. Factual Background

[5] On November 30, 2006 Nalcor submitted a project registration and description document for the Project with the Newfoundland and Labrador Department of Environment and Conservation ("NL DEC") and the Canadian Environmental Assessment 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*"). The Agency was responsible for coordinating federal Aboriginal consultation during the environmental assessment of the Project, and for acting as the Crown Consultation Coordinator as described in the *Consultation Framework* described below.

[6] Transport Canada ("TC") and DFO determined that an environmental assessment was required because, to proceed, the Project would require approval 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 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*. TC and DFO each identified themselves as a "responsible authority" ("RA") as defined in the *CEAA*, being a federal authority that is required to ensure that an environmental assessment ("EA") is conducted (*CEAA*, ss 2(1), 11(1)). Health Canada identified itself as being in possession of specialist or expert information or knowledge necessary to conduct the EA, as did Environment Canada ("EC"), Natural Resources Canada ("NRC"), and Aboriginal Affairs and Northern Development Canada (then Indian and Northern Affairs Canada).

[7] In response to a December 4, 2006 opinion request from NL DEC, DFO advised Newfoundland and Labrador (the "Province") on January 12, 2007 that, amongst other things: an Environmental Impact Statement ("EIS") was recommended in order to address the potential impacts on fish and fish habitat; the potential for bioaccumulation of mercury should be assessed in all fish species; a discussion of potential downstream effects should be provided; Nalcor should consider and discuss methods to reduce the release of mercury into the reservoir, thereby reducing mercury uptake and accumulation; and, the effects of changes to fish and fish habitat downstream of Muskrat Falls and/or Lake Melville should be discussed.

[8] On February 9, 2007 a Notice of Commencement of an Environmental Assessment for the Project was posted on the Agency Registry, which initiated an EA of the Project under the *CEAA*. Because DFO was of the opinion that the Project was likely to cause significant adverse environmental impacts, the federal Minister of Environment ultimately determined that a joint Canada-Newfoundland and Labrador EA, to be conducted by an independent review panel pursuant to ss 25(a) and 29 of the *CEAA*, being the most stringent of the EA review options under that legislative regime, was appropriate.

[9] Prior to making that determination, the Minister of Environment, as represented by the Minister of Lands and Natural Resources, wrote to the Applicant on May 30, 2007, advising of his intent to refer the proposed Project to a joint Canada-Newfoundland and Labrador review panel, referred to as the Joint Review Panel ("JRP" or "Panel") for the EA and advising that the Agency had been asked to contact the Applicant to discuss the next steps in the process.

[10] On August 8, 2007 DFO and TC wrote to the Applicant concerning the Project and, as required by s 11.2.8 of the Agreement, provided the Project registration document. The letter explained that DFO had determined that the proposed damming and formation of the reservoirs would likely cause a harmful alteration, disruption or destruction of fish habitat and, therefore, that authorizations under the *Fisheries Act* would be required. Further, that TC had determined that the *NWPA* approvals would likely be required because a dam was a named work under Part I of the *NWPA*, those regulatory requirements being triggers for an EA pursuant to s 5(1)(d) of the *CEAA*. The letter also advised that DFO and TC were arranging consultations with Aboriginal groups to hear and understand their views about how they might be affected by the granting of the authorizations and approvals to construct and operate the Project, and invited participation.

[11] Prior to this, DFO had met with representatives of the Applicant and other Aboriginal groups in Goose Bay, Labrador on October 19 and 20, 2006 to discuss DFO's role with respect to the EA and to identify their early positions and perspectives about the Project. At that time the Applicant had noted, amongst other things, that it should be consulted as, while the Project was not on Labrador Inuit Lands ("LIL") or in the Labrador Inuit Settlement Area ("LISA"), which terms are defined in the Agreement, it could affect the zone where the Applicant has harvesting rights pursuant to ss 12.13.10 and 12.13.13 and Schedule 12-E of the Agreement. The Applicant further noted that consultation should be in accordance with the Agreement.

[12] In March 2007 the Province provided DFO with draft Environmental Impact Statement Guidelines ("EIS Guidelines") for comment. The preface of the draft EIS Guidelines stated that they were intended to assist the proponent with the preparation of the EIS, the purpose of which

was to identify the important environmental impacts associated with the undertaking, to identify appropriate mitigation and produce a statement of residual effects for evaluation by the Minister of Environment and Conservation. With respect to the EIS to be prepared by Nalcor, the EIS Guidelines stated that, "The contents of the EIS will be used by the Minister of Environment and Conservation, in consultation with Cabinet, to determine the acceptability of the proposed project based on anticipated impacts, proposed mitigation, and severity of unmitigable residual impacts from the proposed undertaking". DFO reviewed the draft and made comments including that the study area boundary should include areas downstream of Muskrat Falls (Upper Lake Melville) where biological effects may be expected to occur.

[13] DFO and the Agency met with the Applicant in Goose Bay on September 18, 2007 at which time the need for input by the Applicant into the EIS was noted and a copy of the draft EIS Guidelines was provided. The draft EIS Guidelines were made available to the public for review on December 19, 2007. More than fifty interested parties responded. The Applicant provided comments on February 22, 2008, referencing the potential application of consultation provisions as found in the Agreement and seeking, amongst other things, an expanded study area for the EIS.

[14] On June 6, 2008 the Assistant Deputy Minister for the NL DEC responded to the Applicant's comments on the draft EIS Guidelines, noting that they had been reviewed by both governments and that the Province was responding with the consent of the Agency. It noted that the draft EIS Guidelines had been significantly modified to include consideration of the interests and knowledge of Aboriginal groups and communities, the Applicant in particular. Further, that

s 7.0, Consultation with Aboriginal Groups and Communities, had been completely revised and that a list of the Aboriginal groups and communities to be consulted by Nalcor when preparing the EIS, including the Applicant, was now included. A table responding to the Applicant's comments, on a point by point basis, was attached to the letter, which also stated that should further explanation be required, the Applicant, upon request, would be provided with a meeting with both governments in an effort to resolve any outstanding concerns with the draft EIS Guidelines. Absent such a request, the Province and Canada would proceed to finalize the EIS Guidelines.

[15] The finalized EIS Guidelines were issued by Canada and the Province in July 2008. Ultimately, the EIS Guidelines did not stipulate specific geographic boundaries for the EIS, but required Nalcor to provide rationale for delineating the study area boundaries as it did (EIS Guidelines, s 4.4.2). They also required that in its EIS, Nalcor assess whether the Project may reasonably be expected to have adverse environmental effects on the LISA (EIS Guidelines, s 4.2.5).

[16] The EIS Guidelines described the EA as a process for identifying a 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 measures (EIS Guidelines, s 2.1). 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 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.
>
> To assist in ensuring that the EIS provides the necessary information to address issues of potential concern to these groups, the Proponent shall consult with each group for the purpose 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.

[17] Prior to this, in February 2008 the Government of Canada had released *the Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult* ("*Interim Consultation Guidelines*"). The evidence of DFO was that these *Interim Consultation Guidelines* established that consultation by Canada with Aboriginal groups was to be conducted by way of a "whole of government approach" and should be integrated with the EA process to the extent possible. Further, that to the best of DFO's ability, the Project consultations were conducted with reference to the *Interim Consultation Guidelines* throughout the Project until the issuance of the *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* in March 2011 (Affidavit of Ray

Finn, Regional Director of Ecosystems Management, Newfoundland and Labrador Region, DFO dated 22 October 2013 ("Finn Affidavit"), paras 35-36).

[18] On May 1, 2008 the Province wrote to the Applicant, with the consent of the Agency, advising that both levels of government wished to work with the Applicant to ensure that their respective obligations under the Agreement were met. In that regard, they had reviewed the Agreement with respect to obligations concerning "undertakings", as defined in the Agreement, and identified ss 11.2.2, 11.2.8, 11.2.9 and 11.5.11 as key items for consideration. The Province and the Agency proposed and attached a draft process ("Draft Consultation Process") as a means to achieve those obligations. This proposal divided the EA process into its constituent parts and indicated how the Applicant would be consulted at each stage of the process.

[19] On August 13, 2010 Canada issued the *Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project* ("*Consultation Framework*"). The Agency sent the *Consultation Framework* to the Applicant on August 20, 2010. It states that it sets out additional detail as to how the federal government would rely on the JRP process, to the extent possible, to assist in fulfilling its legal duty to consult Aboriginal groups with respect to the proposed Project. It identifies the Agency as being responsible for coordinating federal Aboriginal consultation during the EA and that the Agency would also fulfill the role of Crown Consultation Coordinator. As such, the Agency would ensure that the activities described in the *Consultation Framework* were carried out and that Aboriginal groups were well informed. On September 7, 2010 the Agency met with representatives of the Applicant. The minutes of the meeting indicate that they were asked if they had any comments on the *Consultation Framework*.

The response was that it was fine as it was fairly generic and contained nothing unexpected, however, that 45 days to prepare for the hearings was too short and it should be 90 days. At this meeting, the Applicant also expressed its view that the Project area as described by Nalcor was inadequate as it did not include Lake Melville.

[20] The *Consultation Framework* appears to follow the same general process as the May 2008 Draft Consultation Process, but with further detail. It divides the consultation into the following five phases, which are adopted below for convenience:

- Phase 1: Initial engagement and consultation on the draft JRP Agreement, the appointment of the JRP members and the EIS Guidelines;
- Phase 2: JRP process leading to hearings;
- Phase 3: Hearings and preparation of the JRP Environmental Assessment Report (JRP Report);
- Phase 4: Consultation on the JRP Report; and
- Phase 5: Regulatory permitting.

The evidence of DFO is that the Agency led the consultation in Phases 1-4, whereas DFO did so in Phase 5 (Affidavit of Stephen Chapman, Associate Director, Regional Operations, with the Agency, dated 22 October 2013 ("Chapman Affidavit"), paras 130, 132).

Phase 1: Initial Engagement and Consultation on the Draft JRP Agreement, the Appointment of the JRP Members and the EIS Guidelines

[21] Phase 1 included initial engagement and the preparation of the EIS Guidelines, the related consultation for which is described above. It also included consultation on the draft JRP agreement ("JRP Agreement"), draft JRP terms of reference ("TOR"), and Panel selection.

[22] On May 7, 2008 the Province, with the consent of the Agency and in accordance with Draft Consultation Process, provided the Applicant with the draft JRP Agreement and the draft TOR in advance of making these publicly available for comment on June 6, 2008. The Applicant was invited to provide comments and was 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 Applicant could also request a meeting with the Province and the Agency in an effort to resolve any concerns with the draft JRP Agreement and TOR. The Applicant did not provide any comments on these documents.

[23] The JRP Agreement and TOR were finalized and released in January 2009. Subsequently, these were amended to extend the comment period for the EIS by 30 days for three Aboriginal groups, including the Applicant, and to provide for translation of certain JRP documents into Aboriginal languages, including Inuktitut.

[24] The JRP Agreement required the Panel to conduct the EA in a manner that discharged the requirements of the *CEAA*, *NL EPA* and TOR. 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 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 recommendations of the JRP relating to the EA, including any mitigation measures and follow-up program, and include a summary of issues raised by Aboriginal groups, the public, governments and other interested parties (JRP Agreement, ss 4.2, 4.3 and 6.3).

[25] The TOR set out the scope of the EA and the steps in the EA process. With respect to the scope, it 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 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.

[26] By letter of May 13, 2008 the Province invited the Applicant to propose three nominees for consideration for appointment to the JRP. The Applicant proposed one nominee, Dr. Keith Chaulk, who was subsequently appointed as one of the five JRP members.

Phase 2: JRP Process Leading to Hearings

[27] Phase 2 concerned the JRP process leading up to the public hearings, including consultation on the EIS and additional information requests ("IR"). The Applicant was one of eleven groups who received participant funding pursuant to s 58(1.1) of the *CEAA*. It received $23,471 for participation in Phase 2.

[28] On February 17, 2009 Nalcor submitted its EIS to the JRP. The EIS, together with its component studies, comprised over 10,000 pages and incorporated a number of baseline studies and other information. The JRP then initiated a 75-day public consultation process on the EIS. The public consultation process was subsequently extended by 30 days as some Aboriginal groups had not received notification of their participant funding until after the public review period had commenced.

[29] On June 19, 2009 the Applicant provided a detailed response to the JRP in respect of the EIS. This included its view that the study area of the EIS should be expanded, that the EIS contained no support for the statement that there was no reasonable possibility the Project would have an adverse environmental effect in the LISA, and, that the follow up program should include Lake Melville with focus on water temperature, salinity, primary production and methylmercury levels in fish and marine mammals.

[30] Based on the comments received and the JRP's own questions, 166 IRs regarding the EIS were sent to Nalcor in five rounds by the JRP. Nalcor responded to each IR, submitting

approximately 5000 pages of additional documentation. The JRP invited the public, Aboriginal groups and governments to review the additional information received from Nalcor and to provide comments.

[31] On December 18, 2009 the Applicant submitted its comments to the JRP with respect to the additional information submitted by Nalcor. Nalcor responded to the submissions on February 16, 2010.

[32] On February 15, 2010 the JRP wrote to the Applicant advising that the information provided to date by Nalcor was insufficient and that additional information was required before it could conclude on the sufficiency of the EIS for the purpose of proceeding to public hearings. It advised that it had sent additional IRs to Nalcor, and encouraged the Applicant to participate and to provide information regarding traditional land and resource use to Nalcor. It also invited the Applicant to provide to the JRP information related to the nature and scope of Aboriginal rights or title in the Project area and any potential adverse impacts or potential infringement of the Project on those rights or title, all as set out in the TOR. The JRP repeated this request on December 3, 2010.

[33] During this time there were also various communications between the Applicant, the Agency and the JRP. On January 14, 2011, the JRP determined that the EIS along with the information submitted in response to the IRs contained sufficient information to allow it to proceed to the public hearings phase of the EA.

[34] On February 16, 2011 the Agency and DFO met with the Applicant to provide information on the hearings process and the process for consultation on the JRP Report. At this time the Applicant also discussed issues of concern to it, including downstream impacts. DFO advised of its position that there was not enough evidence in the EIS to back up Nalcor's conclusion that there would be no downstream effects in Lake Melville and that DFO, Health Canada and other federal departments would make a joint presentation on mercury concerns during the relevant public hearing.

[35] On February 21, 2011 DFO provided to the JRP a summary of its views on the EIS and related recommendations. DFO supported removal of all vegetation in the reservoir footprints and three meters above the full supply level prior to impoundment to lessen the extent of mercury release, but did not make a recommendation to that effect. Further, because it was possible that mercury bioaccumulation as a result of the Project may be observed at a greater magnitude, for longer periods and further downstream than predicted by Nalcor, DFO recommended that Nalcor be required to develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream following reservoir creation. The frequency and timing of sampling supporting a clear assessment of the magnitude and timing of changes and informed determinations as to risks to human health and implementation of fisheries management measures. Further, DFO recommended that more baseline data be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

Phase 3: Hearings and Preparation of the JRP Report

[36] Phase 3 included the public hearings and the preparation of the JRP Report. The JRP held 30 days of hearings in nine locations in Newfoundland and Labrador and in Quebec between March 3 and April 15, 2011. The Applicant made written submissions and participated in the public hearings, raising concerns about environmental, social, cultural and health effects of the Project, emphasizing the downstream effects, including methylmercury. In its written submissions the Applicant proposed recommendations and mitigation measures, including an accord between the Applicant and Nalcor concerning baseline establishment and monitoring of effects and compliance as a condition of approval, as well as clearing of all wood and brush within reservoir boundaries. DFO participated in the hearings, as did other parties.

[37] The JRP Report was issued on August 25, 2011. It is a comprehensive, 355 page document 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. In Chapter 17, the Panel's Concluding Comments, 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 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. It also identified a range of potential Project benefits, as well as crucial additional information required before the Project should proceed in the areas of long-term financial returns, energy

alternatives to serve island needs, and reducing 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.

[38] Chapter 6, Aquatic Environment, is particularly relevant to the issues raised by the Applicant in this application. There the JRP described the views of Nalcor and the participants on a number of issues including the fate of mercury and downstream effects. It 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 bioaccumulation of mercury, would be seen in Goose Bay or Lake Melville; and follow-up monitoring. Related to this are findings in Chapters 4, 8, 9, 10 and 13.

[39] The JRP was not convinced that all effects beyond the mouth of the river would be "non-measurable" as defined by Nalcor. It stated that while effects in Lake Melville were more difficult to predict on the basis of existing information, this emphasized the need for a precautionary approach, particularly because no feasible adaptive management measures had been identified to reverse either long-term adverse ecological changes or mercury contamination of renewable resources.

[40] The JRP concluded that, based on the information before it, it was unable to make a significance determination with respect to the risk of long term alteration of ecological characteristics in the estuarine environment. There was a risk that mercury could bioaccumulate in fish and seals in Goose Bay, and possibly in Lake Melville populations as well, but this would probably not represent a risk to the health of these species. While the implications on health and land use were addressed elsewhere in the JRP Report, Recommendation 6.7 addressed the need to take a precautionary approach to reduce uncertainty regarding both the potential ecological and mercury effects downstream. As described in more detail later in these reasons, Recommendation 6.7 suggested that prior to impoundment, Nalcor be required to carry out a comprehensive assessment of downstream effects, including baseline mercury data collection and revised modelling to predict the fate of mercury in the downstream environment.

[41] The significance of the potential for downstream mercury effects on Aboriginal and non-Aboriginal land and resource use, and on human health and communities was discussed by the JRP in Chapters 8, 9, and 13.

Phase 4: Consultation on the JRP Report

[42] Phase 4 concerned consultation on the JRP Report and recommendations. The Applicant was provided with funding in the amount of $21,000 by the Agency's participant funding program to support its engagement at this stage.

[43] On August 31, 2011 the Applicant wrote to the Premier of the Province generally endorsing the JRP Report and highlighting key issues, including potential bioaccumulation of

mercury downstream and the importance of fishing and seal hunting to Inuit, and requesting a meeting. A second request followed which was responded to on November 8, 2011. In its response, the Province referenced the September 16, 2011 meeting that the Applicant had with the Agency, DFO, EC, and NL DEC, described below.

[44] On September 9, 2011 the Agency wrote to the Applicant advising that consultation on the JRP Report and its conclusions and recommendations would be conducted to fulfill any applicable duty to consult that each government may owe to any Aboriginal government or group. The letter requested that, prior to the governments taking any decision or course of action which would enable the Project to proceed, the Applicant prepare and submit its views on the JRP Report to the two governments within 45 days of the public release of the oral translation in Inuktitut of the JRP Report's Executive Summary. The letter stated that this consultation would seek to establish the Applicant's views on whether all concerns about potential impacts of the Project on Labrador Inuit's rights under the Agreement had been characterized accurately and on the manner and extent to which any recommended mitigation measures might serve to accommodate those concerns. Further, to determine whether there remained any outstanding issues. Full and fair consideration would be given to such views and, where requested, the governments would meet with the Applicant to discuss its views on the JRP Report. The Agency advised that this consultation would inform reports to the federal and provincial Cabinets concerning the consultation process with the Aboriginal groups.

[45] On September 16, 2011 representatives of the Agency, DFO, EC and NL DEC met with representatives of the Applicant in Goose Bay to discuss consultation on the JRP Report. With

respect to the process of consultation, the Agency's meeting notes indicate that in response to the Applicant's question of which government would respond to the JRP Report and to the responses of the Aboriginal groups, the Agency advised that the responses from Cabinets would very likely be general and a rationale may not always be given. However, that the departments would provide a rationale to the Aboriginal groups to the best of their ability as soon as possible after the Cabinets' responses. If the Applicant advised which recommendations were most important to it, the Agency and departments could focus on those in developing rationale. With respect to monitoring of downstream effects, the Applicant put forward its views, including that a comprehensive holistic approach to arctic science in Lake Melville should be funded, Inuit led and carried out utilizing ArcticNet, and, that specific wording for consumption advisories should be developed. The August 30, 2013 Affidavit of Tom Sheldon, the Applicant's Director of Environment ("Sheldon Affidavit"), indicates that he also emphasized the need for implementation of Recommendation 6.7 and agreed with the JRP's recommendation for full clearing of the Muskrat Falls reservoir as well as the need for an agreement between Nalcor and the Labrador Inuit regarding further mitigation given the JRP's conclusions and report (Sheldon Affidavit, para 32).

[46] On November 11, 2011 the Applicant submitted the *Nunatsiavut Government Response to Panel Report*. This acknowledged that the Applicant had spent considerable time participating in the EA process in order to assert its views that the Project would have potential negative effects on Labrador Inuit and their rights and title, environment, culture and way of life. This participation had included approximately 30 separate submissions to the JRP and the Applicant

stated that it was pleased that the JRP had found many of its concerns to be valid and that it agreed with many of the JRP's recommendations.

[47] The submissions recited the JRP's findings with respect to downstream effects; referenced a recent study on the human health effects of prenatal and childhood exposure to environmental contaminants, such as methylmercury, on the health and development of Inuit children in northern Quebec that was released subsequent to the Panel hearings; included a table setting out its response to each JRP Recommendation; and, set out three major recommendations that the Applicant submitted would help to mitigate impacts on Inuit and Inuit rights and to allow Inuit to constructively contribute to the Project process going forward. These are summarized as follows:

i. **Inuit representation on management structure**

This asserted a fundamental right to participate as a part of a high level management mechanism for the proposed Project which would consist of the Nunatsiavut Government, the Innu Nation, the Province and Canada;

ii. **Inuit rights, Inuit research – baseline studies and monitoring**

This asserted a right of Inuit to conduct and lead baseline research and monitoring into a broad suite of potential impacts that the Project would have on Inuit and Inuit rights. It also asserted a moral and legal obligation on Nalcor, Canada and the Province to fund this, and requested a minimum of $200,000 per year for a program specifically designed to establish baseline conditions directly related to Inuit rights. The Applicant asserted a need for a large scale, comprehensive understanding of the downstream environment and how changes would impact Inuit (biophysical, cultural, socioeconomic and health impacts). It asserted that research should be led by Inuit, who would collaborate with Nalcor and governments, and who would utilize ArcticNet for this purpose; and

iii. **Compensation related to impacts on Inuit and Inuit rights as a result of the Project**

This asserted that framework language should be included as a condition of permits associated with the development of the Project to ensure that Inuit have a mechanism for compensation if any listed impact, including losses related to harvesting and cultural practices and unplanned events, should arise.

[48] On December 21, 2011 the Applicant wrote to the Premier of the Province (Canada was copied on the letter) requesting a meeting between senior political levels of the Province, Nalcor and the Nunatsiavut Government prior to the announcement of the Province's response to the JRP Report. The Premier responded the following day, and a meeting was held on January 9, 2012. The meeting was attended by representatives of the Applicant and the Province.

[49] By letter of January 16, 2012 to the Minister of Natural Resources for the Province (cc'd to the Ministers for DFO, EC and others), the Applicant set out four core mitigative measures proposed during that meeting. These included the three major recommendations in the Applicant's response to the JRP Report (summarized above), as well as Inuit priority for jobs, training and business opportunities associated with the Project, second only to Innu.

[50] On January 24, 2012 the Agency prepared an internal report entitled *Lower Churchill Hydroelectric 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 information was derived from presentations the Aboriginal groups made to the JRP and from comments made by the groups directly to federal government department officials.

[51] On January 30, 2012 Ray Finn, DFO's Regional Director of Ecosystems Management, Newfoundland and Labrador Region, prepared a memorandum for DFO's Regional Director General for Newfoundland and Labrador ("DFO Regional Director General") which provided an update on the EA for the Project and on consultations to that point with Aboriginal groups. Amongst other things, the background section of the memorandum noted that DFO had participated in Aboriginal consultation on the JRP Report, led by the Agency, during the review and development of Canada's response. Further, that the Innu Nation and Nunatsiavut Government "are generally supportive of the project", while the Nunatsiavut and Innu groups of Quebec believed they were not adequately considered during the JRP process. Under the "Analysis / DFO Comment" section, it is noted that Canada's response was currently being completed for submission to Cabinet on February 8, 2012 and that DFO would participate in the review and finalization of the *Aboriginal Consultation Report* to ensure Aboriginal concerns had been addressed, where appropriate, prior to Canada making its decision.

[52] 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"), which responded to the JRP Report and its recommendations, was approved by the Governor General, on the recommendation of the Minister of Fisheries and Oceans, pursuant to s 37(1.1)(a) of the *CEAA*, by Order-in-Council dated March 12, 2012. It was published on the Agency Registry on March 15, 2012. The Province's response was issued on the same day.

[53] Canada's Response states that it was prepared by the RAs (DFO, TC and NRC) pursuant to s 37(1.1) of the *CEAA*, in consultation with other federal agencies. It states that in preparing the response, the RAs reviewed the JRP Report, as well as 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.

[54] 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, the commitments that had been made by the federal government in relation to the recommendations provided in the JRP Report, and the commitments made by Nalcor in its EIS and during the JRP hearings. Canada would require certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as require additional studies on downstream effects. This would be done through inclusion of the 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.

[55] Further, Canada's Response stated that the potential social, economic and environmental benefits for the Province, communities and Aboriginal groups, as well as benefits beyond the Province, were also considered, as was an economic analysis of the Project that was conducted by Canada.

[56] Canada determined that the expected significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects of the Project 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)

[57] As to the Course of Action Decision, Canada's Response noted that s 37(1.1)(c) of the *CEAA* indicates that the RAs' course of action shall be in conformity with the approval of the Governor-in-Council, and that, pursuant to s 37(1), if the Project is likely to cause significant adverse environmental effects that can be justified in the circumstances, the RAs may exercise any power or duty that would permit the Project to be carried out, in whole or in part. As such:

> […] Fisheries and Oceans Canada and Transport Canada may issue any subsection 35(2) and s. 32 *Fisheries Act* authorizations and any Part 1, Section 5 of the *Navigable Waters Protection Act* approvals associated with the Project, respectively…
>
> Under, [sic] subsection 37(2.2) of the *Canadian Environmental Assessment Act*, a Responsible Authority is required to ensure the implementation of mitigation measures for an approved Project. Similarly, under subsection 38(2) of the *Canadian Environmental Assessment Act*, the Responsible Authorities will ensure the implementation of follow-up programs that determine the accuracy of the conclusions of the environmental assessment and the effectiveness of the mitigation measures.
>
> (Canada's Response, pp 8-9)

[58] Canada's Response then addressed each of the JRP Recommendations that were directed to the federal government.

[59] As to Recommendation 6.7, Canada's Response stated that the Government of Canada agreed with the intent of that recommendation and noted that it was directed to Fisheries and Oceans Canada. It went on to say that, as a condition of a s 35(2) authorization under the *Fisheries Act*, and prior to impoundment, DFO would require Nalcor to collect additional baseline data on bioaccumulation of methylmercury in fish and on fish habitat downstream of Muskrat Falls. DFO would also require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methylmercury in fish (including seals) within the reservoirs and downstream, including the Goose Bay/Lake Melville area, and to 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.

[60] On March 16, 2012, in conformity with the Governor-in-Council's approval of Canada's Response, the three RAs issued their course of action decision pursuant to s 37(1) of the *CEAA* ("Course of Action Decision"). The Course of Action Decision stated that the RAs may exercise any power or perform any duty or function with respect to the Project because, after taking into consideration the JRP Report and the implementation of appropriate mitigation measures, the RAs were of the opinion that the Project is likely to cause significant adverse environmental effects that can be justified in the circumstances. 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

[61] Phase 5 of the consultation process concerned regulatory permitting leading to the issuance of the Authorization.

[62] By letter of April 23, 2012 the Agency advised the Applicant that responsibility for leading and coordinating Crown consultation for the federal government was being transferred from the Agency to DFO for the Phase 5 consultations.

[63] On July 9, 2012 DFO wrote to the Applicant 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 ss 32 and 35(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 the proposed process within 14 days.

[64] The proposed *Regulatory Phase Protocol* stated that it followed the *Consultation Framework*, and involved a five step process within Phase 5. First, upon receipt of the Fish Habitat Compensation Plan ("FHC Plan") or the Environmental Effects Monitoring Program

("EEM Plan"), both conditions of the *Fisheries Act* Authorization, or a Request for Work Approval per the *NWPA*, the departments would provide those documents and relevant supporting information to the Applicant, who would then have 30 days to review it. Regulatory approvals would not be issued prior to the end of that timeframe and consideration of any comments received. Second, 10 days prior to the end of the timeframe to submit comments, a reminder would be sent to the Applicant. Third, if no comments had been received when the timeframe ended, the Applicant would be notified that the approval or authorization would be considered and, if appropriate, approved. If comments were received, then within 30 days of receipt, the departments would give them full and fair consideration and would respond to them in writing. Fourth, the departments would incorporate changes as appropriate. And fifth, within 14 days of issuance of the *Fisheries Act* authorization and the *NWPA* approval they would be sent to the Applicant.

[65] On July 24, 2012 the Applicant provided comments on the draft *Regulatory Phase Protocol*. The Applicant took the position that, in order to align the *Regulatory Phase Protocol* with the Agreement and the meaning of "Consult" therein: the *Fisheries Act* authorization and the *NWPA* approval should not be issued prior to Project sanction by both levels of government; the timeframe for the Applicant to prepare its comments should be increased to 90 days and, upon request, the Applicant should be permitted the opportunity and funding to present its views in person to DFO; where the Applicant provided comments, DFO should not provide a response to those comments in less than 15 days, in order to ensure adequate time for full and fair consideration; and, the *Fisheries Act* authorization and the *NWPA* approval should be sent to the Applicant on the date of issuance.

[66] A revised and final *Regulatory Phase Protocol* adopted a 45 day time frame for the Applicant to submit comments and confirmed that regulatory approvals would not be issued prior to the end of that timeframe and consideration of comments received. The revised protocol added that within 10 days of receipt, the Applicant could request a meeting with the RA to discuss the application/document, to be held within the 45 day review period. Finally, the amended protocol stated that copies of the *Fisheries Act* authorization and the *NWPA* approval would be provided to the Applicant within 5 days of issuance. DFO sent the finalized *Regulatory Phase Protocol* to the Applicant on February 21, 2013.

[67] Nalcor provided a draft FHC Plan to the Applicant on December 21, 2012 and invited the Applicant to a public information session, which would provide a technical briefing on the FHC Plan and EEM Plan, held on January 16, 2013. Nalcor also met with the Applicant on January 23, 2013 to present details of the FHC Plan and EEM Plan, at which time the Applicant raised a number of concerns.

[68] 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 addressing the outstanding EA issues were to be sent to Aboriginal groups prior to sending the finalized *Regulatory Phase Protocol*.

[69] On February 12, 2013, the Applicant met with the Minister of Fisheries and Oceans to discuss its concerns about the Project. The Applicant provided a power point that restated its concerns about downstream effects, the JRP's findings and that Nalcor was not conducting a comprehensive assessment of downstream effects as recommended by the JRP which, in its view, put Inuit health and well-being at risk because Nalcor's approach was reactive rather than proactive.

[70] It also stated that preliminary data gathered by research being conducted on behalf of the Applicant suggested that total mercury from the Churchill River extends into Lake Melville and the LISA and sought, as a condition of the s 35(2) *Fisheries Act* authorization, that Nalcor be required to provide the Applicant with annual funding of $200,000- $500,000 for its research and monitoring of the overall effects on the downstream environment. Further, that meaningful engagement of the Applicant as a government, not a stakeholder, was required.

[71] A February 21, 2013 memorandum for the Deputy Minister of DFO summarized the status of Aboriginal consultations for Phase 5. It anticipated that DFO would complete the consultations by mid-May and should be in a position to issue a *Fisheries Act* authorization by June 2013.

[72] On February 28, 2013, DFO wrote to the Applicant advising that it was preparing to issue a *Fisheries Act* authorization and provided the draft FHC Plan and EEM Plan, as received from Nalcor, and sought comments on the two plans within 45 days as per the *Regulatory Phase Protocol*. The Applicant did not provide comments on the FHC Plan, but on several occasions

expressed concerns regarding inadequacies in the EEM Plan with respect to baseline data, as described below.

[73] On March 22, 2013 the Applicant met with DFO to discuss the EEM Plan. Amongst other things, the Applicant suggested that the current draft EEM Plan was too basic, and that a much more comprehensive scientific investigation of the Lake Melville ecosystem as a whole was necessary to understand current baseline conditions and to answer future questions as to Project effects. The Applicant gave examples of additional parameters to be studied. DFO responded that it would require Nalcor to implement an EEM Plan to satisfy the *CEAA* monitoring requirements and to verify specific predictions, but not to undertake foundational environmental research (Finn Affidavit, para 83). The Applicant also sought accommodation by way of a requirement by DFO that Nalcor, as a condition of the Authorization, provide funding to the Applicant to complete a comprehensive mercury study to inform the Human Health Risk Assessment, as well as a thorough Lake Melville ecosystem study, so that the Applicant could ensure appropriate baseline study was conducted.

[74] On April 15, 2013 the Applicant wrote to DFO providing comments on the draft EEM Plan. The Applicant stated that the EEM Plan was not of sufficient form and detail to allow it to prepare its views or to determine if it would be an effective monitoring tool both adjacent to and within the LISA, and that it had not been provided with any additional documentation or detail since expressing this view to Nalcor on January 25, 2013 and to DFO on March 22, 2013. The Applicant stated that the Phase 5 consultation did not meet the definition of "Consult" as found in the Agreement. The Applicant referred to Recommendation 6.7 and stated that a

comprehensive assessment of downstream effects into Lake Melville had still not been completed nor was one planned.

[75] The Applicant stated that the EEM Plan was premised on the assumption by Nalcor that a monitoring program can be in place for a system, Lake Melville, that is not well understood. The Applicant asserted that the basic science of monitoring required that the system being monitored be well understood prior to a monitoring program being established. After a baseline understanding of the Lake Melville system was acquired, an EEM Plan of sufficient form and detail could then be developed. Nalcor's refusal to conduct a holistic downstream effects analysis, as recommended by the JRP, resulted in an EEM Plan that did not have sufficient baseline understanding, form and detail to allow the Applicant to prepare its views. By not requiring Nalcor to carry out a comprehensive downstream effects assessment, DFO was not respecting the constitutionally protected rights of the Applicant, including that of consultation. The Applicant stated that it was leading the only comprehensive downstream effects assessment, as per Recommendation 6.7, and that this assessment included mercury, oceanography, climate, sea ice, human health risk assessment and socioeconomic components. Based on results to date, it was known that the Churchill River is a substantial source of total mercury to Lake Melville and that the mercury influence from the river can be detected at least 150 km from the river mouth. The Applicant also again requested that DFO require Nalcor, as a condition of the Authorization, to provide funding to the Applicant for the completion of its comprehensive downstream effects assessment.

[76] On May 30, 2013 DFO responded to the Applicant's comments on the EEM Plan. DFO stated that it was of the view that the plan contained sufficient detail to allow the Applicant to prepare its views and comment on it. And, based on comments that it had received, DFO would require Nalcor to add to the EEM Plan some additional details on the protocols for sampling and analysis of fish and seals for methylmercury currently set out in baseline monitoring reports. As to Recommendation 6.7, Canada's Response stated that Nalcor would be required to collect additional baseline data on methylmercury bioaccumulation in fish and on fish habitat downstream of Muskrat Falls prior to impoundment. This information was collected by Nalcor in 2011 and 2012, including in Lake Melville, and would continue to be collected prior to impoundment. DFO stated that it wished to clarify that the primary objective of an EEM or follow-up program is to verify specific predictions made by a proponent during an EA, especially where there may be uncertainty about the severity or extent of a possible impact. EEM programs are not designed or implemented to study environments or changes in them overall. The Nalcor EEM Plan with respect to fish and fish habitat addressed those predictions for which DFO considered monitoring to be required for verification, including in relation to methylmercury bioaccumulation in fish. As to the Applicant's view that DFO was not respecting the Applicant's consultation rights, DFO stated that it was consulting with the Applicant in accordance with the *Regulatory Phase Protocol* which was developed in consideration of and consistent with the Agreement. Finally, as to the Applicant's funding request, DFO stated that it typically sets out monitoring and reporting requirements that a proponent must meet in a s 35 *Fisheries Act* authorization, but does not specify who a proponent is to engage to carry this out. DFO would require Nalcor to make raw data and results of the EEM Plan available to interested

parties, and encouraged the Applicant to discuss the sharing of monitoring results and possible collaboration in monitoring directly with Nalcor.

[77] Following various communications between Nalcor and DFO, Nalcor submitted its revised, final EEM Plan and FHC Plan 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.

[78] On June 28, 2013 DFO, on behalf of Canada, responded to the Applicant's November 11, 2011 and July 24, 2012 letters, addressing the concerns raised therein on a point by point basis. It stated that these concerns were taken into account when the federal government responded to the JRP Report, as indicated in Canada's Response. With respect to the Applicant's concerns regarding significant adverse effects should consumption advisories or other impacts arise, and the Applicant's requests for participation on a high level management structure and for framework language for compensation as a condition of any permits, DFO stated that a high level management structure was not contemplated for the Project, but that DFO and TC would be consulting with the Applicant in the context of their regulatory functions and that DFO had consulted with the Applicant on the EEM Plan and FHC Plan it was requiring as conditions of *Fisheries Act* Authorization. Further, that it was requiring Nalcor to collect data on methylmercury in fish and seals as part of the EEM Plan which would be forwarded to Health Canada for subsequent advice on consumption levels, and that Nalcor was responsible for relaying that information to the Applicant and posting any consumption advisories. Finally, that the requested framework language would not be included as a condition of the authorizations or approval as it would not be enforceable as a condition under the *Fisheries Act* or the *NWPA*.

[79] As to the Applicant's concerns regarding monitoring and assessment of environmental effects and the Applicant's suggestion that it be funded to develop and implement a program specifically designed to establish baseline conditions directly related to Inuit rights, DFO advised that as a condition of any s 35(2) authorization under the *Fisheries Act*, and prior to impoundment, DFO was requiring Nalcor to collect additional baseline data both in the Muskrat Falls reservoir and downstream of Muskrat Falls into Goose Bay/Lake Melville, including data on fish and fish habitat utilization as well as mercury levels in both fish and seals. DFO would require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methylmercury in fish (including seals) in those areas after creation of the Muskrat Falls reservoir. Additionally, DFO would require Nalcor to 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. The monitoring requirements of any *Fisheries Act* authorization are the responsibility of Nalcor, and those associated with the bioaccumulation of mercury would be outlined in the EEM Plan which was sent to the Applicant for review and input prior to finalizing. The letter also apologized for the late response but noted that consultation on the regulatory approvals had occurred since the Applicant's letters.

[80] The Applicant's concerns were reiterated in a letter to the Minister of Fisheries and Oceans on July 2, 2013. The Applicant stated that throughout the EA and post-EA process, Nalcor had not provided meaningful baseline measurements or conducted sufficient research to characterize the downstream environment that would be impacted by the Project, particularly in Lake Melville.

[81] Further, that Canada's Response to Recommendation 6.7 was an extreme simplification of its intent. The response eliminated the need to understand the downstream environment at a holistic level and the ability to model or predict downstream impacts prior to flooding. This simplification was reflected in the EEM Plan, which required the collection of baseline methylmercury data only in fish and seals, such that downstream impacts related to mercury would only be detected once concentrations have increased in country foods that Inuit consume and depend on for their health. The Applicant asserted that accurate prediction is critical to permit preventative mitigation measures. Absent an accurate understanding of the pathways and fate of mercury, the only mitigation measure available would be consumption advisories, which would constitute a threat to Inuit food security and health and would violate Inuit rights. The Applicant stated that it considered any increase in mercury concentrations downstream to be a significant impact, irrespective of harvesting advisories which should be a mitigation measure of last resort only, and one for which compensation must be available.

[82] The Applicant further stated that although the JRP found that the uncertainty as to whether consumption advisories would be required beyond the mouth of the Churchill River needed to be resolved before reservoir filling proceeds, DFO was not requiring Nalcor to conduct any meaningful work related to this. The Applicant stated that more certainty in predictions regarding downstream impacts was needed, and that this required an understanding of the entire Lake Melville system and mercury behaviour within that system related to Muskrat Falls. Further, that the preliminary data of research being conducted by the Applicant validated the Applicant's concerns. The Applicant took the position that DFO should change the conditions of

its Authorization and the EEM Plan to account for this preliminary research and to accommodate the Applicant's concerns.

[83] The Applicant stated that DFO's complete disregard of Inuit concerns throughout the entire EA process, including the May 30, 2013 response, indicated that neither good faith consultation nor accommodation had taken place. The letter listed three items of concern and requested Ministerial intervention in the decisions being made by DFO. These are summarized as follows:

- the need for a comprehensive baseline report on mercury in water, sediments and biota that also identifies all possible pathways for mercury throughout the food web downstream from the Project, including throughout Lake Melville to provide basic foundational knowledge of the environment which is essential for the prediction of downstream impacts as a result of flooding, as well as for the formulation of a meaningful EEM Plan and consultation respecting that plan;

- while the total elimination of increased mercury and methylmercury concentrations downstream may be impossible, the primary and only mitigation measure that could reduce the risk or concentrations of mercury prior to flooding is full clearing of the reservoir area, including trees and the top layer of organic matter. A first step towards accommodation would be to require this; and

- consumption advisories are not an acceptable approach to mitigation, as Inuit rights and well-being cannot be put at potential risk for economic benefits. Any potential increase in mercury or methylmercury concentrations downstream would be a direct violation of Inuit human, treaty, and individual rights.

[84] 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. It is this Authorization that the Applicant has sought to have judicially reviewed.

[85] The Authorization is eleven pages in length and lists a number of Conditions of Authorization. A few of the particularly relevant conditions are summarized as follows:

- Condition 1.1 states that if, in DFO's opinion, the authorized impacts to fish and fish habitat are greater than previously assessed, 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 such further 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.

- Condition 1.4 requires Nalcor to undertake the Project in accordance with the EIS, the Project Wide Environmental Protection Plan and the FHC Plan.

- 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 bioaccumulation 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, as well as a requirement to record and report peak levels and subsequent decline to background levels (Condition 6.3). There are also a number of reporting mechanisms as well, including annual reports and comprehensive EEM Plan reports every 5th year starting in 2023.

[86] By letter of July 9, 2013 DFO advised the Applicant that the Authorization had been issued, and provided it with a copy.

[87] Subsequently, by letter of July 12, 2013 to the Applicant, the Minister of Fisheries and Oceans addressed several issues, including that at the February 12, 2013 meeting the Applicant had presented information concerning its interest in a downstream research and monitoring program. The Minister stated that, as set out in Canada's Response, DFO would require Nalcor to carry out a comprehensive multi-year program to monitor and report on mercury levels downstream of the Project both before and after reservoir creation. Although the Authorization had already been issued, the Minister stated that Nalcor had developed an EEM Plan which was

being reviewed by DFO and, once approved, would become a condition of the s 35 *Fisheries Act* Authorization. The Minister also referenced the February 28, 2013 letter from his officials encouraging the Applicant's participation in the review of the EEM Plan, and again encouraged the Applicant to engage with DFO on the finalization of the requirements that DFO would impose on Nalcor by way of the Authorization. The Minister also noted that DFO had no role in Nalcor's decision as to who it engaged to carry out the monitoring required by the Authorization.

[88] On August 27, 2013 the Minister wrote to the Applicant responding to its July 2, 2013 letter. The letter noted that the JRP had considered predictions concerning methylmercury bioaccumulation that may arise as a result of the Project and the need for consumption advisories. Further, that Canada agreed with the intent of the JRP's Recommendations in relation to downstream effects. And, pursuant to Canada's Response, DFO was requiring Nalcor to collect additional baseline data on methylmercury bioaccumulation in fish and on fish habitat downstream of Muskrat Falls prior to impoundment and to conduct a comprehensive long term program to monitor bioaccumulation of methylmercury in fish (including seals) downstream of Muskrat Falls and into Lake Melville. That EEM monitoring would follow up on predictions that the bioaccumulation of methylmercury at distances downstream of the reservoir, and particularly in Lake Melville, would not have significant adverse effects. Follow-up monitoring of this type was required and implemented to verify specific predictions, rather than to provide basic foundational knowledge of the environment.

[89] The Minister also noted that DFO had consulted with the Applicant in the process of reviewing the EEM Plan and preparing conditions of the Authorization, and had considered

comments and advice received from the Applicant, which led to some additions to the monitoring plans. DFO also carried out rigorous reviews of the monitoring plans. As to the suggestion that the removal of trees and organic matter from the reservoir would be an appropriate mitigation measure, Canada's Response agreed with the intent of the JRP Recommendations on that issue, but did not commit to undertaking a pilot study or to other recommended actions in that regard. The Minister noted that requirements related to clear cutting of vegetation falls under provincial legislation. The Minister stated that she was confident that the monitoring was adequate to verify predictions about downstream aquatic effects and that it would allow Canada to continue to make decisions that consider and protect the interests of the Applicant.

III. Issues

[90] The Applicant submits that the issue is:

1. Whether its rights under s 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*] and under the Agreement have been respected and, in particular, whether its rights to consultation and accommodation were met. Resolving this issue involves assessing:

    a. whether the consultation process was correctly carried out and met the standards dictated by the Agreement and by the *Constitution Act, 1982*; and

    b. whether its views were given full and fair consideration and accommodation in good faith prior to DFO issuing the Authorization.

[91] Canada submits the issues in the form of statements, being that:

1. The content of the duty to consult is defined by the Agreement; and
2. Canada's consultation efforts were reasonable.

[92] Nalcor submits that the issues are:

1. What is the standard of review of the Authorization?
2. Did DFO fulfill the Crown's duty to consult with and, if necessary, accommodate the Applicant in respect of the Authorization?

[93] In my view, the issues can be restated as follows:

1. What is the standard of review?
2. What is the content of the duty to consult and accommodate, more specifically:
   a. Does the Agreement exhaustively define the Crown's duty to consult?
   b. What was the scope and extent of the duty to consult and of any duty to accommodate in this case?
3. Did Canada satisfy its duty to consult and accommodate?

Issue 1: What is the Standard of Review?

Applicant's Position

[94] The Applicant submits that Canada's decision to issue the Authorization is subject to review on the standard of correctness. The duty to consult in this matter arises under the common law and in the specific context of the Agreement, which is a modern treaty for the purposes of s 35(1) of the *Constitution Act, 1982*. The Supreme Court of Canada has identified the appropriate standard of review for assessing whether consultation has occurred in the context of a modern treaty (*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Little Salmon*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]).

[95] The requirements of the duty to consult are determined on the standard of correctness. Only if there was adequate consultation does the question of whether the decision to issue the Authorization was reasonable arise.

Canada's Position

[96] Canada agrees that the question of the content of the duty to consult is reviewable on the correctness standard (*Innu of Ekuanitshit v Canada (Attorney General)*, 2013 FC 418 at para 97 [*Ekuanitshit FC*]; *Little Salmon* at para 48) but submits that 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 37-39, leave to appeal to SCC refused, [2014] SCCA No 62 [*Cold Lake*]).

Nalcor's Position

[97] Nalcor submits that insofar as the Applicant is attacking the decision-making of the Minister under the *Fisheries Act*, the standard of review is reasonableness, and deference is owed absent a decision made in bad faith or on the basis of irrelevant considerations (*Malcolm v Canada (Minister of Fisheries and Oceans)*, 2013 FC 363 at para 57; *Vancouver Island Peace Society v Canada*, [1992] 3 FC 42 (TD) at paras 7, 12; *Alberta Wilderness Assn v Express Pipelines Ltd*, 137 DLR (4th) 177 (FCA) at para 10; *Alberta Wilderness Assn v Cardinal River Coals Ltd*, [1999] 3 FC 425 (TD) at paras 24-26).

[98] As to the adequacy of consultation and accommodation, Nalcor submits that the extent of the duty is reviewable on a standard of correctness since the legal requirements are expressly set out in the Agreement (*Haida* at para 61; Agreement, s 11.6.2). However, where the extent of these requirements depends on findings of fact, the standard is one of reasonableness (*Haida* at paras 61, 63; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 [*Ka'a'Gee Tu #2*] at paras 91, 121; Agreement, s 1.1.1). Finally, whether the consultation process was adequately carried out requires deference since it involves determinations of fact and applications of the law to the facts (*Cold Lake* at para 39; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 40 [*Taku River*]; *Ka'a'Gee Tu #2* at paras 91, 121).

Analysis

[99] 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 at para 62 [*Dunsmuir*]; *Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 38, leave to appeal to SCC refused [2014] SCCA No 466 [*Ekuanitshit FCA*]).

[100] 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, 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 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.

[101] 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 (*Katlodeeche* at paras 126-127; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at paras 92-93 [*Ka'a'Gee Tu #1*]).

[102] As stated by Justice de Montigny in *Ka'a'Gee Tu #2*:

> [89] …A reviewing court owes very little deference to the decision-maker when determining whether the duty to consult is triggered or delineating the scope and extent of the duty in regard to legal and constitutional limits. On the other hand, the question as to whether the Crown discharged its duty to consult and accommodate will be reviewable on the standard of reasonableness.
>
> (Also see *Katlodeeche* at paras 126-127).

[103] In *Little Salmon* the Supreme Court addressed the standard of review as follows:

> [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, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [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]

[104] In discussing the analysis of the adequacy of consultation, 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.

[105] In *Ekuanitshit FC*, affirmed 2014 FCA 189, leave to appeal to SCC refused [2014] SCCA No 466, which also concerned the subject Project, this Court 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 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. On the other hand, 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 (*Ekuanitshit FC* at para 98).

[106] The Federal Court of Appeal upheld Justice Scott's decision. It noted that its role in an appeal from a judicial review decision is to first determine whether the applications judge identified the appropriate standard of review, and then to determine whether it was applied correctly. As to the issue of the duty to consult, the Federal Court of Appeal stated:

> [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.

[note: the above reference by the Federal Court of Appeal to paragraph 77 of *Little Salmon* was likely intended to be to paragraph 72]

[107] Although the Federal Court of Appeal refers to paragraph 48 of *Little Salmon*, which could be understood to suggest that the correctness standard applies when assessing whether the Crown's efforts were adequate to meet its duty to consult, it did not state that Justice Scott erred in identifying the standard of review in that regard as one of reasonableness. Its following analysis was primarily concerned with whether, on the facts of the case, the consultation process carried out to that point by Canada was adequate and proportionate both to the strength of the Innu claim and to the seriousness of the adverse impacts the contemplated government action would have on the claimed right. The Court of Appeal found that Justice Scott did not err in finding that the Innu had been adequately consulted prior to the Order of the Governor-in-Council being issued.

[108] 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.

[109] The Alberta Court of Appeal in *Cold Lake*, leave to the SCC denied, also referred to *Little Salmon* and interpreted it as follows:

> [36] Parks submits that the reviewing judge erred in applying the correctness standard to the question of the adequacy of the consultation process and that both the consultation process and decision should be reviewed for reasonableness.
>
> [37] We agree. In *Haida*, the court held that the existence and extent of the duty to consult or accommodate (including the assessment of the seriousness of the claim and the extent of adverse impact) are questions of law, subject to review on a standard of correctness: at para 61. However, where these questions are infused with questions of fact or mixed fact and law, some deference to the initial adjudicator may be appropriate. With respect to the consultation process itself, "[w]hat is required is not perfection, but reasonableness": at para 62. Chief Justice McLachlin said:
>
> > 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 (at para 63).

[38] This court followed this approach in *Tsuu T'ina*, stating that the questions of whether there is a duty to consult and the assessment of the scope of the duty are reviewed on a standard of correctness, with deference owed to any underlying findings of fact, while the consultation process is reviewed on a standard of reasonableness: paras 27-29. There has been the suggestion in recent case law that the Supreme Court in *Beckman* may have altered the standard of review for assessing the consultation process to correctness. The British Columbia Court of Appeal applied the correctness standard in reviewing the consultation process in *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472, [2013] 1 WWR 791. It agreed with the trial judge's analysis that deference may be appropriate on findings of fact where there is a neutral tribunal assessing the consultation process. However, where the initial decision maker is a representative of the Crown and a party to the dispute, less deference is warranted. We note that this distinction has not been articulated by the Supreme Court and many other courts have concluded that the adequacy of the consultation process involves issues of mixed fact and law reviewable on a reasonableness standard: see *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379, 354 DLR (4th) 696, *Long Plain First Nation v Canada (Attorney General)*, 2012 FC 1474 at para 65, [2013] 1 CNLR 184; *Dene Tha' First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 at paras 103-08, *West Moberly First Nations v British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247, 333 DLR (4th) 31.

[39] In our view, the duty to consult is described in very general terms and there is significant flexibility in how the duty is met. The Crown has discretion as to how it structures the consultation process. As noted by Garson JA (dissenting in the result) in *West Moberly First* Nations, the consultation process requires compromise, and compromise is a "difficult, if not impossible, thing to assess on a correctness standard": at para 197. The assessment of the adequacy of consultation process will necessarily involve factual determinations and applications of the law to facts. This necessarily attracts some appellate deference.

[40] Accordingly, we conclude that the standard of review applicable to both the issue of the adequacy of the consultation process and the final decision to end consultation and proceed with the project are to be reviewed on a standard of reasonableness.

[110] In *West Moberly First Nations v British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247, leave to appeal to SCC refused, [2011] SCCA No 399 [*West Moberly*], as referenced above in *Cold Lake*, the judgment of Chief Justice Finch, as he then was (separate reasons for judgment by Justices Hinkson and Garson) did not directly address the standard of review in relation to the scope of the duty to consult but did note that the question was whether the consultation process was reasonable (para 141). He also stated that "A consultation that proceeds on a misunderstanding of the Treaty, or a mischaracterization of the rights that the Treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable" (para 151). Justice Hinkson, in concurring reasons, accepted that the appropriate standard of review in consultation cases for the Crown's assessment of the extent of its duty to consult is correctness, and that the appropriate standard of review for assessing the process adopted for a particular consultation and the results of that process is that of reasonableness (para 174). In dissenting reasons, Justice Garson addressed the standard of review and, in particular, paragraphs 48 of *Little Salmon* and 61–63 of *Haida*. She was of the view that *Little Salmon*'s adoption of a higher standard was attributable to the fact that the case concerned the construction of a modern, comprehensive treaty and distinguished it on that basis. She then stated:

> [196] Thus, I would apply a reasonableness standard to the question of the adequacy of the consultation where the historical treaty does not provide the degree of specificity necessary to ascertain the "correct" process.
>
> [197] As was held in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 74, "[c]onsultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests". Compromise is a difficult, if not impossible, thing to assess on a correctness standard.

> [198] In summary, the Crown's determination of the scope and extent of its duty to consult must be assessed on a correctness standard. But the third *Taku* question, as to the adequacy of the consultation and the outcome of the process, must be assessed on a reasonableness standard as those questions are either questions of fact or mixed fact and law. The consultation process must also meet the administrative law standards of procedural fairness.

[111] Whether *Little Salmon* altered the standard of review was also addressed *in Dene Tha' First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977. There Justice Grauer of the British Columbia Supreme Court recited paragraphs 61-63 of *Haida*, noting that therein the Supreme Court had explained that the standard to be applied to consultation decisions is bifurcated. He then noted that this approach was followed by Justice Neilson of the British Columbia Supreme Court (as she then was) in *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras 15-16.

[112] He next referred to *West Moberly*, noting that it too involved Treaty 8 rights, and the three separate judgments of the members of the British Columbia Court of Appeal concerning the standard of review. At this stage Justice Grauer stated the following:

> [104] I pause, respectfully, to add my own comments to those of Garson J.A. concerning the conundrum posed by Justice Binnie's choice of words in the *Beckman* decision when he stated that "a decision maker who proceeds on the basis of inadequate consultation errs in law". At first glance, this seems inconsistent with previous statements by the Supreme Court in cases such as *Haida Nation* and *Taku River*.
>
> [105] I have already reviewed how, as discussed in *Haida Nation*, the standard of review of the question of scope and extent of duty can move from correctness towards reasonableness depending on the extent to which the decision inextricably combined questions of fact and law. In Beckman, it seems to me, as in the judgment of Finch C.J.B.C. in *West Moberly First Nations*, we have a hint that the real question comes down to the adequacy of the consultation

process which will itself, to an extent, determine the correctness of the scope. In other words, if the process did not accomplish a reasonable result, then it was probably carried out pursuant to an incorrect assessment of its proper scope.

[106] One of the distinguishing features of this case is that, from at least the Crown's perspective, the consultation process is fluid and ongoing. From the perspective of the DTFN, however, that cannot cure the fact that it started out on the wrong foot because of a scope assessment that was wrong in law, judged on the correctness standard.

[107] It is, however, clear to me from the evidence that the Crown's determination of the extent and scope of its duty to consult was inextricably bound up with its assessment of the underlying question of the direct and potential impact of the 21 tenure sales on the DTFN's treaty rights in the Key Response Area. This question turns on factual analyses, as indicated in the competing impact/disturbance reports. Thus, as suggested above, the issue of the scope and extent of the duty to consult in this case is intertwined with the issue of the adequacy of the consultation.

[108] Whether a duty to consult and, if indicated, to accommodate existed is clearly a question of law, and was never in doubt in this case. Not only did the Crown acknowledge the existence of such a duty throughout, but the Crown had also entered into a Consultation Agreement with the DTFN aimed at covering the very sort of situation that arose. But when it comes to the Crown's assessment of the scope and extent of that duty, I conclude that in the circumstances of this case, the "correctness" of the Crown's assessment depends upon the "reasonableness" of that assessment's underpinning. We have a question of mixed law and fact so the standard, in effect, becomes one of reasonableness as noted in the passage from *Haida Nation* quoted above.

[113] 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).

[114] 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.

[115] 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*.

[116] For example, a modern treaty by its terms may specify all, or certain aspects of, the consultation required, including participation in an identified environmental assessment process. Should the Crown fail to comply with those consultation requirements by not participating then it would have breached its duty to consult and, necessarily, would also have failed to identify and implement an adequate process of consultation in that regard. To proceed on that basis would be an error of law. However, if the Crown correctly identified the prevailing legal parameters, then the adequacy of the consultation process would be reviewed on the reasonableness standard.

[117] As noted in *Cold Lake*, quoting Justice Garson in *West Moberly*, "the consultation process requires compromise, and compromise is a "difficult, if not impossible, thing to assess on a correctness standard"" (para 39).

[118] I would also note that subsequent decisions of this Court and of the British Columbia Court of Appeal have held that the standard of review for the adequacy of consultation and accommodation is reasonableness (*Adam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1185 at paras 65-66, 87 [*Adam*]; *Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority*, 2015 BCSC 16 at para 229).

[119] 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).

[120] 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 (paras 90-92).

Issue 2: What was the Content of the Duty to Consult and Accommodate, More Specifically:

A. Does the Agreement Exhaustively Define the Crown's Duty to Consult?

B. What was the Scope and Extent of the Duty to Consult and of any Duty to Accommodate in this Case?

A. Does the Agreement Exhaustively Define the Crown's Duty to Consult?

Applicant's Submissions

[121] The Applicant submits that the consultation obligations under the Agreement do not exhaustively define Canada's duty to consult. Rather, Canada has an additional duty to consult based on the honour of the Crown, pursuant to s 35 of the *Constitution Act, 1982*. Thus, Canada's treaty obligations are to be interpreted consistently with the honour of the Crown (*Little Salmon* at paras 61-62). Both the honour of the Crown and Chapter 11 of the Agreement require the Crown to act in a manner that accomplishes the intended purposes of the Agreement (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 73 [*Manitoba Metis*]). When the effects and impacts on rights are significant, deeper consultation is required and accommodation may be required (*Haida* at para 47).

Canada's Submissions

[122] Canada submits that the source and content of the duty in this case is delineated by the Agreement, as negotiated and agreed between the parties (*Little Salmon* at para 67). By its terms, the Agreement requires the Respondent to consult prior to issuing the Authorization (s 11.6.2), and "consult" is defined in s 1.1.1. Canada submits that a similar definition applied in *Little Salmon* and that there the Supreme Court of Canada found that the duty to consult was at the low end of the spectrum (*Little Salmon* at paras 57, 74, 79).

Nalcor's Submissions

[123] Nalcor submits that since a process of consultation has been incorporated into the Agreement, the Crown's consultation obligations with respect to the Project are governed by Chapters 1 and 11 of the Agreement and that there is no additional duty to consult based on the honour of the Crown or otherwise. Contrary to the Applicant's reading of *Little Salmon*, the Supreme Court of Canada did not find an "additional duty" there; it merely identified the source of the duty. Further, unlike in *Little Salmon*, there is no need to identify the source of the duty here as the Agreement expressly states this (*Little Salmon* at paras 54, 58-67, 72-75). Finally, there is no need to invoke the honour of the Crown as an interpretive tool, as the parties expressly agreed that consultation was required prior to a federal decision to issue an authorization, and the definition of "consult" in the Agreement contains sufficient flexibility to allow for consultation in various circumstances (Agreement, s 11.6.2; *Little Salmon* at para 67).

Analysis

[124] In this matter, there is no dispute that the Crown had a duty to consult the Applicant with respect to the Project. There is also no dispute that the Agreement is a modern comprehensive land claims agreement which is a treaty as contemplated by s 35(3) of the *Constitution Act, 1982* (*Little Salmon* at para 62).

[125] In terms of general principles, the jurisprudence has established that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown which is always at stake when dealing with Aboriginal peoples (*Haida* at para 16). The honour of the Crown also infuses treaty making and treaty interpretation (*Haida* at para 19; *Ka'a'Gee Tu #2* at para 94) and requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*Manitoba Metis* at para 73). Even though consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealings with Aboriginal peoples (*Little Salmon* at para 61). However, the duty that flows from the honour of the Crown varies with the situation in which it is engaged, and what constitutes honourable conduct will vary with the circumstances (*Manitoba Metis* at paras 73-74). And, although the concept of the duty to consult is a valuable adjunct to the honour of the Crown, it plays a supporting role and should not be viewed independently from its purpose (*Little Salmon* at para 44).

[126] The duty to consult in the context of a modern land claim treaty was addressed by the Supreme Court of Canada in *Little Salmon*. There the Yukon territorial government approved a

grant of 65 hectares of surrendered land to a resident. The plot formed part of the applicant's traditional territory, to which the applicant's members had an express treaty right to hunt and fish for subsistence. The treaty contemplated that the government could take up surrendered land from time to time for other purposes, including agriculture.

[127] The applicants contended that in considering the grant, the government had proceeded without proper consultation and without proper regard to their concerns. Conversely, the territorial government took the position that no consultation was required as the treaty was a complete code. While the treaty referred to consultation in over 60 different places, a land grant application was not one of them. The territorial government therefore contended that, where not specifically included in the treaty, the duty to consult was excluded.

[128] The Supreme Court of Canada was unanimous in the result that the Crown had met its duty to consult, but was split on the source of that duty. Justice Binnie, writing for the majority, did not accept the territorial government's argument that the treaty was a "complete code" and that the absence of a treaty obligation to consult before granting land meant that such an obligation was excluded by negative inference (paras 52, 55, 59-62). Rather, he was of the view that the duty to consult is derived from the honour of the Crown, which applies independently of the treaty (para 52). Further, he held that, given the procedural gap in the treaty, the First Nation was correct "in calling in aid the duty of consultation in putting together an appropriate procedural framework" (para 38).

[129] As to the territorial government's position that the procedural gap in the case of land grants precluded consultation as an implied term of the treaty, Justice Binnie stated:

> [61] I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

[130] Thus, Justice Binnie found that, because there was a procedural gap in the treaty as its provisions did not govern the process for agricultural grants at that time, consultation was necessary to uphold the honour of the Crown. The duty to consult was, therefore, imposed as a matter of law (para 62). However, he also found that the First Nation went too far in seeking to impose on the territorial government the substantive right of accommodation in addition to the procedural protection of consultation, as nothing in the treaty or surrounding circumstances gave rise to a requirement of accommodation in that case (paras 14-15, 82).

[131] Also of note in *Little Salmon* is the approach taken by the majority to modern treaties. Justice Binnie noted that, unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well resourced and sophisticated parties (para 9). Further:

> [12] The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760-61 Treaty at issue in *R. v. Marshall*, [1999] 3 S.C.R. 456, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, [1996] 1 S.C.R. 771, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. The historical treaties were typically expressed in lofty terms of high generality

> and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step — albeit a very important step — in the long journey of reconciliation (para. 69).

[132] In addition to finding that modern treaties are intended to create some precision around property and governance rights and obligations, while still to be interpreted and applied in a manner that upholds the honour of the Crown, Justice Binnie restated at several junctures that the consultation can be shaped by the agreement of the parties, as set out in paragraph 61 of that decision, and the significance of this:

> [46] …And the content of meaningful consultation "appropriate to the circumstances" will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.
>
> […]
>
> [54] The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the

> relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork*: Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.
>
> […]
>
> [67] When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.
>
> […]
>
> [69] However, as stated, the duty to consult is not a "collateral agreement or condition". The LSCFN Treaty is the "entire agreement", but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

[133] In concurring reasons, Justice Deschamps (writing for herself and Justice Lebel) agreed that the appeal and cross appeal should be dismissed but for different reasons than those of the majority. She found that there was no gap in the treaty and that, because of this, there was no need to resort to a duty outside the treaty. She also disagreed with the majority that the common law constitutional duty to consult applies in every case, even where there is no gap. Instead, it was her view that the common law constitutional duty to consult applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty (para 94, also see paras 118, 203-204).

[134] In my view, *Little Salmon* stands for the proposition that when a modern day land claim treaty is in place, the starting point for any analysis of the duty to consult will always be the text of the agreement. Where its terms address the duty to consult in a given situation, then the scope of that duty will primarily, if not exclusively, be shaped by those terms. If the agreement is silent on the duty to consult in that situation, or there is a procedural gap, then pursuant to the honour of the Crown, a duty to consult will still arise at law. Further, even if the terms of the agreement speak to the duty to consult, because it is also imposed as a matter of law in every case, it is part of the essential legal framework within which the treaty is to be interpreted and performed.

[135] I also take this to mean that, if necessary, the honour of the Crown and adjunct duty to consult may be used as interpretive tools when considering consultation provisions found in a modern treaty. As such, I do not understand that there is an additional or parallel duty owed in such circumstances.

[136] My understanding is also consistent with that of Dwight G. Newman, who has stated that both the majority and the concurring judgments in *Little Salmon* appear "attentive to text as a dominant feature in modern treaty interpretation". Further, that:

> Although for the majority the duty to consult can continue to operate as a parameter outside the treaty if there are areas in which the treaty leaves differences of interpretation, [paras 62, 69] the text of a detailed treaty will nonetheless take priority in defining when the duty to consult applies.
>
> […]
>
> [A]ll the judges have come to agreement that modern treaties are to be approached in a manner suited to their detailed negotiated text, that approaching them with deep attention to text is the primary

> means of interpreting them to achieve their purposes, and that failing to approach them in this way undermines processes of reconciliation underway in various ongoing negotiations. Modern treaty interpretation is fundamentally different from the approaches the Court has taken to historical treaty interpretation.
>
> (Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011), 54 SCLR (2d) 475 at 481-483).

[137] In my view this interpretation is also in keeping with and is supported by the Quebec Court of Appeal's decision in *Makivik v Quebec*, 2014 QCCA 1455 [*Makivik*], in which the Court of Appeal respected the terms of the treaty as the primary source of the duty to consult, but interpreted the treaty in accordance with constitutional duties and the honour of the Crown. Specifically, it found that the Minister's constitutional duty to consult with an open mind applied to any consultation prescribed by the treaty, such that his failure to comply with an outlined process, based on his belief that it would not change the ultimate result, was not purely a procedural irregularity but was a breach of the honour of the Crown through a failure to consult with an open mind, and therefore a breach of the provisions of the treaty. In effect, the Court of Appeal focused on the contractual certainty principles from *Little Salmon* while recognizing that the general common law constitutional principles concerning the duty to consult are the underlying and, therefore, can be the interpretive framework of the duty prescribed by the treaty.

[138] In summary, as stated in *Little Salmon*, where adequately resourced and professionally represented parties have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limits as the honour of the Crown, the Courts should strive to respect those efforts (*Little Salmon* at para 54). This may even include circumstances where the parties themselves decide to

exclude consultation entirely which could be an acceptable outcome so long as, in the prevailing circumstances, it was also consistent with the maintenance of the honour of the Crown (*Little Salmon* at para 46).

[139] In my view, this means that the existence of consultation provisions within a modern day treaty, as in this case, will require that the Court first and foremost look to the text of those provisions to assess where a duty is owed, and the scope of that duty, i.e. the content of meaningful consultation appropriate to the circumstances. If necessary to interpret the text, or if the text is silent in some area, the Court can apply the common law principles concerning the duty to consult as they will, in either event, be underlying by way of the honour of the Crown. Thus, in that context, a treaty may perhaps never "exhaustively" define the Crown's duty to consult. However, in each case the extent, if any, to which reference must be made to the underlying principles concerning the duty to consult, will be fact driven. In this case, while s 2.11.1(b) of the Agreement states that it exhaustively sets out the rights in Canada of Inuit that are recognized and affirmed by s 35 of the *Constitution Act, 1982*, I do not understand this to preclude reference to the common law constitutional duty to consult if necessary to interpret the text or where there is a gap therein.

B. What was the Scope and Extent of the Duty to Consult and Accommodate in this Case?

Applicant's Position

[140] The Applicant submits that the Agreement's provisions for federal EAs treat both "projects" and "undertakings", as those terms are defined in the Agreement, in the same way.

Canada was required to consult with the Applicant about environmental effects in both cases as well as about the best way to achieve meaningful participation by the Applicant in the EA process, to supply the Applicant with the results of the EA and to consult with it before taking any action that would allow the Project to proceed or making a decision to issue a permit or other authorization (Agreement, ss 11.6.1, 11.6.2, 11.6.3 and 11.7).

[141] With respect to the duty to provide full and fair consideration to views presented by the party being consulted, the Applicant submits that the content of the duty will depend on the context, including the nature of the project or undertaking and the rights and interests affected. In this case, the obligation to accommodate inherent in "deep" consultation, as referred to in *Haida*, was engaged. This is because the Project was reasonably expected to have impacts in the LISA or on Inuit rights under the Agreement. Labrador Inuit rights and territory will likely be adversely impacted by increased mercury levels, Inuit are largely powerless to prevent or mitigate this, the consequences could be severe and incapable of remediation, and the fear of mercury contamination is well-founded. Specifically, Inuit subsistence rights are recognized by the Agreement, yet the sole mitigation measure in the event of methylmercury contamination, consumption advisories, is not truly mitigation as it does not protect the right. Accommodation was required.

[142] The Applicant submits that in the specific circumstances of this case, as part of the duty to consult, Canada had an ongoing requirement to inform and discuss plans with the Applicant prior to acting. Further, that the Agreement sets out specific consultation requirements which cannot be delegated. The fact that the Applicant participated in the JRP hearings did not relieve

Canada of the duty to consult and to provide meaningful consultation and accommodation. Further, Canada incorrectly assumed that if it acted in accordance with the federal and provincial protocols it would fulfill its duties under s 11.6 of the Agreement.

Canada's Position

[143] Canada submits that the source and content of the duty to consult the Applicant in the context of the Project is delineated by the Agreement as negotiated and agreed to by the parties. The content of the duty to consult falls in the mid-range of the consultation spectrum, more than low end consultation but significantly less than the deep consultation asserted by the Applicant (*White River* at para 98). The provisions of the Agreement shape the duty to consult in this case (*Little Salmon* at para 67; Agreement, ss 1.1.1, 11.6.2). Canada submits that a similar definition of "consult" applied in *Little Salmon* and that there the Supreme Court of Canada found that the duty to consult was at the low end of the spectrum (*Little Salmon* at paras 57, 74, 79).

[144] Canada acknowledges that the potential for an impact on the Applicant in this case would be more significant than that in *Little Salmon*, but submits that this factor does not lead to a requirement of deep consultation because the impacts on the Applicant are uncertain, indirect and contingent. As found by the JRP, there is a chance that fish and seal consumption advisories may be required if methylmercury levels rise beyond safe levels in Lake Melville. Should such advisories be issued, it would adversely affect seal hunting and fishing in Lake Melville. Further, as the Muskrat Falls dam and reservoir will not be constructed or operated within the LISA (i.e. it is an "undertaking" according to the Agreement), it has less exacting procedural

requirements than if it were constructed or operated therein (i.e. if it were a "project" under the Agreement), also pointing to a lower level of consultation.

[145] Canada also submits that the mid-range consultation requirement of the Agreement is consistent with other situations where a mid-range duty to consult has been found, such as in *Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2013 FC 1118 (at para 59), *Cold Lake* (at para 33) and *Katlodeeche* (at para 95). The scope of consultation in the mid-range includes adequate notice of the matter to be decided, an opportunity to discuss with decision-makers the potential adverse impacts of the decision and how those impacts might be mitigated, and a requirement that the decision-maker take the expressed concerns into account in making its decision (*Katlodeeche* at para 95).

[146] Canada submits that the Applicant's current position on the scope of consultation respecting the Project is not supported by the Agreement and is also contradicted by past positions taken by the Applicant within the process.

Nalcor's Position

[147] Nalcor submits that modern day comprehensive treaties are to be interpreted generously and within the context of the written terms of the treaty text ((*Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 12; *Little Salmon* at para 10).

[148] Like Canada, Nalcor submits that the Project is an "undertaking" as defined by the Agreement. As such, the EA obligations differ and the Applicant is entitled to less jurisdiction,

control and engagement than if it were a "project" (s 11.6.2). Therefore, consultation at the low end of the spectrum is required.

[149] To the extent that Nalcor is required to respond to a challenge to Canada's Response, the Course of Action Decision and the Authorization, Nalcor submits that ss 11.2.8, 11.2.9, and 11.6.1 to 11.6.6 of the Agreement apply.

[150] Further, there is no authority for the Applicant's assertion that the proper procedure pursuant to s 11.6.2 required Canada to provide the Applicant with a draft preliminary decision on Canada's Response and the Course of Action Decision for review and comment.

[151] Nalcor submits that a duty to accommodate may be triggered where the proposed Crown action is likely to infringe Aboriginal rights. This does not mean that the Aboriginal groups have a veto over the proposed Crown action, nor that the Crown has a duty to reach an accommodation agreement. This also does not guarantee the Aboriginal group the outcome it desires. It simply requires the Crown to balance the Aboriginal concerns and interests reasonably with competing interests. Additionally, Aboriginal groups must be flexible and reasonable when discussing accommodation options (*Haida* at paras 47-50, 62-63; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 66 [*Mikisew Cree*]; *Taku River* at para 2; *Native Council of Nova Scotia v Canada v Canada (Attorney General)*, 2007 FC 45 at para 60, aff'd 2008 FCA 113 [*Native Council of Nova Scotia*]; *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517 at para 124 [*Kwicksutaineuk*]).

Analysis

(i) The Agreement

[152] As set out above, the starting point for an analysis of the content of the duty to consult in this case is the text of the Agreement. Accordingly, the relevant provisions are set out below:

> **1.1.1** In the Agreement, unless otherwise provided:
>
> "**Consult"** means to provide:
>
> (a) to the Person being consulted, notice of a matter to be decided in sufficient form and detail to allow that Person to prepare its views on the matter;
>
> (b) a reasonable period of time in which the Person being consulted may prepare its views on the matter, and an opportunity to present its views to the Person obliged to consult; and
>
> (c) full and fair consideration by the Person obliged to consult of any views presented;
>
> …
>
> "**Environmental Assessment**" means:
>
> (a) an assessment of the Environmental Effects of a proposed undertaking, project, work or activity in Labrador Inuit Lands that is conducted in accordance with Inuit Laws made under part 11.3;
>
> (b) an assessment of the Environmental Effects of a Project or Undertaking that is conducted under the *Canadian Environmental Assessment Act*;
>
> (c) an assessment of the Environmental Effects of a Project or Undertaking that is conducted under *the Environmental Protection Act*; or
>
> (d) an assessment that is conducted under two or more Laws referred to in clauses (a), (b) and (c);

"**Environmental Effect**" means, in respect of a proposed undertaking, project, work or activity:

(a) any change that the proposed undertaking, project, work or activity may cause in the Environment, including any change to health and socio-economic conditions, to physical and cultural heritage, to the current use of lands and resources for traditional purposes by aboriginal individuals, or to any structure, site or thing that is of historical, archaeological, palaeontological or architectural significance; and

(b) any change to the proposed undertaking, project, work or activity that may be caused by the Environment,

whether the changes occur within or outside Canada;

…

"**Project**" means any undertaking, project, work or activity proposed to be located or carried out in the Labrador Inuit Settlement Area that requires an Environmental Assessment;

…

"**Undertaking"** means any undertaking, project, work or activity proposed to be located or carried out outside the Labrador Inuit Settlement Area that requires an Environmental Assessment under the *Canadian Environmental Assessment Act* or the *Environmental Protection Act*;

…

2.11.1 The Agreement:

(a) constitutes the full and final settlement of the aboriginal rights of Inuit in Canada; and

(c) exhaustively sets out the rights in Canada of Inuit that are recognized and affirmed by section 35 of *the Constitution Act, 1982*.

…

CHAPTER 11: ENVIRONMENTAL ASSESSMENT

11.1.1 In this chapter:

"**Authority**" means a federal or Provincial authority, or both, as the case may be, including a Minister, responsible for taking an action or making a decision pursuant to the *Canadian Environmental Assessment Act* or *the Environmental Protections Act*;

…

Part 11.2 General

11.2.7 When an Authority receives a registration document or an application for a Project or an application for a permit, licence or authorization in relation to a Project and the Project, in the opinion of the Authority, may reasonably be expected to have adverse Environmental Effects, the Authority shall give:

(a) timely written notice of the Project and shall provide relevant available information on the Project and the potential adverse Environmental Effects to the Nunatsiavut Government; and

(b) written notice of the Project to the other Authority.

11.2.8 When an Authority receives a registration document or an application for an Undertaking or an application for a permit, licence or authorization in relation to an Undertaking and the Undertaking, in the opinion of the Authority, may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area, the Authority shall give timely written notice of the Undertaking and shall provide relevant available information on the Undertaking and the potential adverse Environmental Effects to the Nunatsiavut Government.

...

Part 11.6 Federal Environmental Assessment Process

11.6.1 If, in the opinion of a federal Authority, a Project or an Undertaking that is subject to the *Canadian Environmental Assessment Act* may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area or adverse effects on Inuit rights under the Agreement, the Authority shall, in addition to providing the notice and information required under sections 11.2.7 and 11.2.8, ensure that the Nunatsiavut Government:

(a) is Consulted about the Environmental Effects of the Project or Undertaking;

(b) is Consulted about the best way to achieve meaningful participation of Inuit in the Environmental Assessment; and

(c) receives the report generated as a result of the Environmental Assessment including, where applicable, the rationale, conclusions, and recommendations of the official, mediator or review panel that carried out the Environmental Assessment.

11.6.2 A federal Authority shall Consult the Nunatsiavut Government before taking any action that would allow a Project or Undertaking referred to in section 11.6.1 to proceed or making a decision to issue a permit, licence, funding, or other authorization in relation to the Project or Undertaking.

11.6.3 If Canada refers a Project or Undertaking referred to in section 11.6.1 to a review panel under the *Canadian Environmental Assessment Act*:

(a) in the case of a Project, at least one member of the review panel shall be a nominee of the Nunatsiavut Government; and

(b) in the case of an Undertaking, the members of the review panel shall be selected from a list that includes candidates nominated by the Nunatsiavut Government.

…

11.6.5 The Nunatsiavut Government shall, in addition to its functions and duties in relation to the matters referred to in part 11.2 and sections 11.6.1 and 11.6.2 with respect to public reviews, be entitled to make representations to the mediator or review panel.

11.6.6 Upon completion of the mediation or of the hearings of the review panel, the mediator or review panel shall prepare and submit a report to the relevant Authorities and the Nunatsiavut Government which shall include, but shall not be limited to:

(a) a description of the Environmental Assessment process, including provisions for public participation;

(b) a summary of any comments and recommendations from the public; and

(c) the rationale, conclusions, recommendations and where applicable, Mitigation measures and Follow-up Program

> requirements recommended by the mediator or review panel.
>
> **Part 11.7 Monitoring**
>
> **11.7.1** If a Project or an Undertaking that may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area is allowed to proceed subject to a permit, licence or other authorization containing conditions that require Mitigation measures, the Nunatsiavut Government and the relevant Authorities, within their respective jurisdictions, shall:
>
> (a) coordinate their responsibilities for Follow-up Programs to the extent possible; and
>
> (b) in the exercise of their powers or the performance of their duties and functions, ensure that any Mitigation measures that they consider to be appropriate are implemented.

[153] Chapter 4 of the Agreement defines the LISA and the LIL, the latter being a number of specified areas located within the LISA, as well as Inuit rights attached to both.

[154] The Project is an "undertaking" as defined by the Agreement because it is an undertaking, project, work or activity proposed to be located or carried out *outside* the LISA that requires an EA under the *CEAA*. It is not a "project", as that term is defined by the Agreement, as it is not located or carried out in the LISA.

[155] Part 11.6 deals with the federal EA process for a "project" or an "undertaking" that is subject to the *CEAA* and may reasonably be expected to have adverse Environmental Effects in the LISA or adverse effects on Inuit rights under the Agreement. Pursuant to Chapter 12 of the Agreement, that would include areas outside the LISA where Inuit rights include the harvesting

of wildlife and plants (s 12.13.10) and time limited harvesting of migratory birds (s 12.13.13) (see Schedule 12-E of the Agreement).

[156] It is this text that determines, or at the very least shapes, the content of the duty to consult in this case.

(ii) Scope of Duty to Consult at Common Law

[157] As noted above, the text of the Agreement is the primary source of the content of the duty to consult in this case. To the extent that the content of the duty to consult is not fully addressed by the terms of the Agreement, or there is some doubt as to what that duty is comprised of, the common law can be utilized to fill a gap or aid with interpretation.

[158] In that event, the starting place for an analysis of the scope of the common law duty to consult remains *Haida*.

[159] In *Haida*, which did not concern a treaty duty to consult, the Supreme Court of Canada held that the content of the duty to consult and accommodate varies with the circumstances. 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 claimed and the seriousness of the potential adverse effects on that right or title (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 (para 42). 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.

(Also see *Taku River* at para 29).

[160] In *Little Salmon*, the Supreme Court found that the adequacy of consultation 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 (para 72).

[161] In this matter Canada concedes, and I agree, that the duty to consult is higher than the duty at the lower end of the spectrum as was found to apply in *Little Salmon*.

[162] Although the Supreme Court in *Mikisew Cree* also ultimately concluded that the consultation required in that case was at the lower end of the spectrum, its description of the content of that duty is useful. There, the Supreme Court found that the determination of the content of the duty to consult will be governed by the context. One such contextual factor is the seriousness of the impact on the Aboriginal people of the Crown's proposed course of action. The more serious the impact, the more important will be the role of consultation. In that case the most important contextual factor was that Treaty 8 provided a framework within which to manage the continuing changes in land use. In that context, consultation was held to be key to achievement of the overall objective of the modern law of treaty and aboriginal rights, being reconciliation (para 63). The content of the duty in that context was as follows:

> [64] The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.
>
> [Emphasis added by Binnie J]

[163] A decision perhaps closer to the mid-range of the spectrum is *Taku River*. There the first nation objected to a company's plan to build a road through a portion of its traditional territory. The first nation participated in the EA process engaged by the province of British Columbia but took issue with the process' final outcome and challenged the Minister's decision to issue a project approval certificate. No treaty was in place. The Supreme Court found that the first nation's claim to rights and title was relatively strong, and that the potential adverse effects of the Minister's decision on the first nation's claims appeared to be relatively serious. Expert reports recognized the first nation's reliance on its system of land use to support its domestic economy and its social and cultural life. Although the proposed access road was only 160 km long, a geographically small intrusion on the 32,000 square kilometre area claimed, it would pass through an area critical to the first nation's domestic economy and could attract further development. Therefore, it could have an impact on the first nation's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim. The Supreme Court stated:

> [32] In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

[164] In *Katlodeeche*, a First Nations band applied for judicial review of the decision of the Minister of Indian and Northern Affairs to approve a decision of the MacKenzie Valley Land and Water Board that granted the proponent's application for a water licence that would allow it to use water for oil and gas exploration. This Court found that the first nation had nothing more than reasonably arguable treaty and Aboriginal rights in the project area, and that the seriousness of any potential adverse effects of the water licence on the asserted treaty rights could be no higher than moderate. The only convincing evidence of potential adverse impacts came from a report indicating that, with the implementation of the recommended measures and the proponent's commitments, the proposed development would likely not have a significant environmental impact or be cause for public concern. For that reason, the duty to consult was found to be no higher than the mid-range of the spectrum. More than mere notice and information sharing was required, but it was not a case where deep consultation and serious accommodation were required (paras 142-144).

[165] In *Squamish Nation v British Columbia (Minister of Community Sport and Cultural Development)*, 2014 BCSC 991, the British Columbia Supreme Court found a mid-range duty as the first nation had a strong *prima facie* claim to Aboriginal title and the potential for adverse impacts on the Aboriginal title claim was moderate. The Court discussed the content of a mid-range duty:

> [197] Although every situation is unique and should be approached flexibly and individually, I note some general parameters from the case law on what a mid-range consultation may consist of. It is more than a duty "to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation* at para. 43). It is less than "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 Nation* at para. 44).
>
> [198] In *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* Grauer J. found that the government engaged in a reasonable mid-range consultation by giving the First Nation the opportunity to make "extensive and wide-ranging submissions", exchanging reports and a "great deal of information, economic, environmental, scientific and speculative", and setting up processes to involve the First Nation "in ongoing development decisions that could give rise to potential adverse impacts on its treaty rights" (at para. 117).
>
> [199] In *Long Plain First Nation* Hughes J. held that a mid-range consultation required more than the minimum of giving notice, disclosing information and responding to concerns raised. He said the consultation ought to include "at least some of the higher duties including a duty to meet with the Applicants, to hear and discuss their concerns, to take those concerns into meaningful consideration and to advise as to the course of action taken and why" (para. 74).
>
> [200] In *Da'naxda'xw* at para. 197 Fisher J. found that a mid-range duty to consult
>
> > required the Minister to consider the Da'naxda'xw's request in the context of the terms of the Collaborative Agreement and the on-going negotiations about a government-to-government

> process for managing the conservancy and considering boundary amendments, and to provide the Da'naxda'xw with an opportunity to respond to any substantive concerns the Minister may have had. While the Minister was entitled to consider the public interest as described in the government's policy, this required something more than the opportunity for the Da'naxda'xw to make an application within the scope of that policy. It required an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Da'naxda'xw's interests in allowing the Project to be assessed in the [environmental review] process.

[166] Recently, in *Adam*, where the applicant challenged two decisions of the federal government made pursuant to the *CEAA*, Justice Tremblay-Lamer found that deep consultation was required. The proposed expansion of an open pit oil-sands mine would be carried out on the traditional lands of a first nation, which held Treaty 8 rights. The expansion would destroy a 21 kilometre stretch of the Muskeg River, much being the first nation's traditional land, including more than 10,000 hectares of wetlands, 85 percent of which were peatlands that could not be reclaimed. In addition, it would adversely affect the first nation's rights, notably its Treaty 8 rights to hunting, fishing and the harvesting of animals and plants, and would interfere with the maintenance of the first nation's culture and way of life. Justice Tremblay-Lamer concluded that a deep duty to consult was owed by the Crown as:

> The Project would destroy a large part of the ACFN's traditional lands and might also impinge upon the maintenance of their culture and way of life. Some of the harm to the ACFN is potentially irreversible or has not been mitigated through means of proven efficacy.

[167] Finally, I would note that although the duty to consult may require accommodation where appropriate, the test is not a duty to accommodate to the point of hardship for the non-Aboriginal population. Adequate consultation having occurred, the Court's task is to review the exercise of discretion taking into account all the relevant interests and circumstances, including the strength of the claim and seriousness of the impact on that claim (*Little Salmon* at para 81). Said another way:

> [2] ...Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process...
>
> (*Taku River*)

[168] Given these principles and decisions, the question is where does the duty to consult lie on the spectrum in this case? The rights at issue are established by the Agreement. Therefore, for the purposes of this spectrum analysis, the strength of the claim need not be assessed and this factor can be assumed to generally point to a higher level of consultation. However, the potential impact of the Project on those rights is a factor that requires assessment in the context of this application. In that regard, the Applicant is primarily concerned with the downstream effects of methylmercury bioaccumulation on its established subsistence rights.

[169] On that issue the JRP stated that it could not confidently conclude what the ecological effects would be downstream from Muskrat Falls, that Nalcor's assertion that there would be no measurable effect on mercury levels in Goose Bay and Lake Melville had not been substantiated, and, that there is a risk of mercury bioaccumulation in fish and seals in Goose Bay and possibly

Lake Melville. Therefore, it made Recommendation 6.7, that DFO require Nalcor to carry out a comprehensive assessment of downstream effects (JRP Report, Chapter 6, Aquatic Environment, pp 88-89).

[170] The JRP also determined that although there is still uncertainty about whether consumption advisories would be required, this would have a "significant adverse effect" on fishing and seal hunting in those areas because of the reliance by many Aboriginal and non-Aboriginal people on fish and seals caught there (JRP Report, Chapter 8, Land and Resource Use, p 146). As to Aboriginal land and resource use for traditional purposes (Chapter 9), the JRP stated that if consumption advisories are required in Lake Melville, this would likely have a marked effect on the acceptability and attraction of Goose Bay and Lake Melville as harvesting locations for fish and seals. Even if no advisories are required, the JRP noted that reduced confidence in the safety of fish and seal meat would have a negative effect on traditional harvesting activities, especially as the recent decline of the George River caribou herd may cause residents to rely more heavily on seal meat as a source of protein. Fishing and seal harvesting activities could be displaced or reduced (JRP Report, p 167).

[171] The JRP further recognized that methylmercury production is an inevitable result of reservoir impoundment and that the consumption of fish or country food contaminated with methylmercury can pose risks to human health, particularly in young children, and that consumption of these foods remains an important part of many Labrador and Quebec Aboriginal and non-Aboriginal peoples' diets for both health and economic reasons. Further, that there is no biophysical mitigation possible for this effect. It concluded that if consumption advisories are

required in Goose Bay and Lake Melville as a result of elevated methylmercury in fish or seals from the Project, this would constitute a "significant adverse effect" on the residents of the Upper Lake Melville communities and Rigolet (JRP Report, Chapter 13).

[172] Given these findings and considering the jurisprudence, it is my view that this matter, absent a specification of the content of the duty to consult in the Agreement, would fall between the medium and high end of the spectrum. The potentially significant adverse environmental impact moves it above the medium range but I am not convinced that it is a circumstance that falls at the highest end of the spectrum. As noted by the JRP Report, if mercury levels rise beyond the predicted levels thereby resulting in the use of consumption advisories, this would be a significant adverse impact. However, the risk is uncertain (JRP Report, pp 88-89, 238). Further, the JRP Report also indicated that it is anticipated that the levels will peak 5 to 16 years after flooding and then gradually decrease to background levels over 30 or more years (JRP Report, pp 71-72). While this will take decades and may impact harvesting rights and the Applicant's traditional way of life, it is not permanent or irreversible. Thus, these circumstances are unlike those in *Adam* where an open pit oil-sands mine would be located on traditional lands, would destroy a 21 kilometre stretch of river within those lands, including more than 10,000 hectares of wetlands that could not be reclaimed, and would negatively impact harvesting rights.

[173] Further, while I reach this conclusion that the duty owed is between the medium and high end of the spectrum based on the jurisprudence, and to the extent that the common law duty may have application to this matter as an interpretive tool or in the absence of a specific consultation provision, it cannot be viewed in isolation of the text of the Agreement. In *Little Salmon*, even

though the Supreme Court found that because of a gap in the relevant treaty the source of the duty to consult was the common law, it still found that the treaty set out the elements that the parties regarded as an appropriate level of consultation, including: notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter and an opportunity to present such views; and, full and fair consideration by the party obliged to consult of any views presented:

> [75] In my view, the negotiated definition is a reasonable statement of the content of consultation "at the lower end of the spectrum". The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree*.

[174] In this case, the Agreement sets out the requirements of the duty to consult in the same terms as described in *Little Salmon*. "Consult" is defined as including notice; time for the person being consulted to prepare its views and an opportunity to present them; and, full and fair consideration of those views (s 1.1.1). Further, where an "undertaking" is subject to the *CEAA* and may reasonably be expected to have adverse effects on Inuit rights under the Agreement, the additional consultation requirements as set out in ss 11.6.1 to 11.6.6 apply. While in *Little Salmon* the same definition of consult was at issue and the Supreme Court found consultation at the low end of the spectrum, here the additional requirements of the Agreement, in my view, require consultation at least at the mid-range of the spectrum.

[175] In that regard, it is also to be recalled that the Project is not taking place in the LISA which, pursuant to the terms of the Agreement, would in some circumstances have required a

much higher level of engagement of the Applicant in the EA process. Chapter 11, Environmental Assessment, demonstrates that a higher level of direct involvement by the Applicant is required when "projects" occur in the LIL. For example, no "project" in the LIL shall commence until an EA has been completed and all necessary permits, licences or other authorizations required for the project to commence have been issued by the appropriate Authority and by the Applicant under an Inuit Law (s 11.2.1). No similar bar applies to "undertakings". Further, Part 11.3, which concerns the jurisdiction of the Applicant with respect to undertakings, projects, works or activities in LIL, states that the Applicant may decide whether a proposed matter in LIL should be allowed to proceed and, if so, on what terms (s 11.3.1(b)). There is no similar provision with respect to "projects" or "undertakings" taking place outside LIL, even where a project or undertaking which is subject to the *CEAA* may reasonably be expected to have adverse environmental effects in the LISA or on Inuit rights under the Agreement, thereby giving rise to specified consultation requirements.

[176] As the Agreement sets out circumstances in which the Applicant's consent to an undertaking, project, work or activity would be required, and the Project does not fall within that category, this is a factor that also supports my view that the Project would not fall at the highest end of the consultation spectrum. In short, the Agreement too supports a view that the appropriate range is above the mid-range but below the highest level of the spectrum.

[177] In conclusion, I am of the view that the scope of the duty to consult in this case is, in the first instance, determined by the text of the Agreement. To the extent that it may have application, the content of the common law duty to consult owed in the mid-range of the

spectrum includes adequate notice of the matter to be decided; a reasonable period of time to permit the party being consulted to prepare its views on the issues and an opportunity to present those views to the decision-makers; consultation in good faith, with an open mind and with the intention of substantially addressing the concerns of the party being consulted as they are raised through a meaningful process of consultation (*Haida* at para 42; *Makivik* at paras 76-78); direct engagement with the party being consulted, including the provision of information, soliciting, listening carefully to and seriously considering their concerns; taking the expressed concerns into account when making the decision; and attempting to minimize the adverse impacts (*Katlodeeche* at para 95; *Mikisew Cree* at para 64). As this matter falls above the mid-range, in my view the duty would also include a requirement of responsiveness on the part of the Crown (*Taku River* at para 25).

[178] Put otherwise, the duty includes a requirement to demonstrate that the views of the party being consulted were taken into consideration (*Mikisew Cree* at para 64) and to provide a response to those concerns (*Haida* at para 44; *Ka'a'Gee Tu* #2 at para 131; *West Moberly* at para 144) with a view to reasonable accommodation (*Da'naxda'xw/Awaetlala First Nation v British Columbia (Minister of Environment)*, 2011 BCSC 620 at para 197).

[179] There may also be a requirement to accommodate, to the extent possible, by taking steps to avoid or mitigate significant adverse effects or irreparable harm.

Issue 3: Was the Applicant Adequately Consulted and Accommodated?

A. Preliminary Issues

(i) Collateral Attack

[180] The Applicant submits that the Authorization was predicated on Canada's Response and the Course of Action Decision which permitted the Project to proceed such that any failure to adequately consult in respect of those decisions tainted or compromised the ability to issue the Authorization.

[181] Nalcor submits that this is an impermissible collateral attack on Canada's Response and the Course of Action Decision. First, the time period to challenge those decisions pursuant to s 18.1(2) of the *Federal Courts Act* has now expired (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 37, 40-42; *Cheslatta Carrier Nation v British Columbia (Environmental Assessment Act, Project Assessment Director)* (1998), 53 BCLR (3d) 1 (SC) at paras 71-73; *Aba-Alkhail v University of Ottawa*, 2013 ONCA 633 at para 12; *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 at para 114; *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2009 ABQB 576 at paras 19, 23; *Teletech Canada Inc v Canada (Minister of National Revenue)*, 2013 FC 572 at paras 43-51). Second, the Authorization was not predicated on Canada's Response and the Course of Action Decision. Rather, the Authorization is a separate decision made by a separate body, namely DFO. And while Canada's Response and the Course of Action Decision decided whether the Project should be permitted to proceed, the Authorization is a decision authorizing specific activities and the conditions to which they are

subject. Finally, the challenge to Canada's Response and the Course of Action Decision was improperly framed and pleaded as no relief is sought in relation to those decisions, the Applicant did not name the other ministries responsible for consultation in respect thereof, and, seeking judicial review of three separate decisions would be in contravention of Rule 302 as they did not form a continuous course of action (*Mahmood v Canada* (1998), 154 FTR 102 (FCTD) at para 10; *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6; *Servier Canada Inc v Canada (Minister of Health)*, 2007 FC 196 at paras 17-18).

[182] Nalcor also submits, however, that the Crown consultations that occurred before, during and after the EA relate to and inform the consultation and accommodation in respect of the Authorization. In this regard, the totality of the consultation between DFO and the Applicant in each phase of the EA must be considered in order to understand the extent of the consultation in respect of the Authorization.

[183] In my view, it is significant that while the EA process concluded with the issuance of the JRP Report, the consultation process did not. Canada's Response was largely informed by Phases 1 to 3 of the *Consultation Framework*, which culminated in the JRP report, and the Phase 4 consultation in response to that report. The *Consultation Framework* also required consultation on regulatory permitting in Phase 5, the process for which was determined by the *Regulatory Phase Protocol*, and which informed the issuance of the Authorization.

[184] It is also significant that other court decisions concerning the Project, described below, have held that challenges to the consultative process commenced prior to the conclusion of the

Phase 4 and 5 consultations were premature or failed to recognize that the consultation process had not concluded. This too suggests that the consultation process, as a whole, must be considered when viewing the adequacy of consultation and accommodation pertaining to the decision to issue the Authorization.

[185] This Court in *Ekuanitshit FC*, affirmed by the Federal Court of Appeal, leave to appeal to SCC refused, 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 federal government's consultation period had come to an end. At that time, the process was in Phase 5 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 because the acts that truly put the applicant's rights and interests at risk were those that required authorizations and approvals issued by DFO and TC. It was premature to evaluate the federal government's consultation process before those decisions were made (*Ekuanitshit FC* at paras 108-112). Regardless of that finding, 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. The Federal Court of Appeal agreed with this, 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.
>
> (*Ekuanitshit FCA* at para 108)

[186] The Federal Court of Appeal also stated that the Crown must continue to honourably fulfill its duty to consult until the end of the process (para 110).

[187] Further, in *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp (Nalcor Energy)*, 2011 NLTD(G) 44, the Nunatukavut Community Council, representing the Inuit Aboriginal people of central and southern Labrador, sought an interlocutory injunction to stop the JRP hearings until the court had dealt with its claim. In February 2011, Nunatukavut had sued Nalcor, Canada, the Province, the Agency and the five Panel members. It sought, amongst other things, a declaration that the defendants had breached their duty to consult with Nunatukavut and directions on how consultations should be conducted. Justice Handrigan of the Newfoundland and Labrador Supreme Court rejected the applicant'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 Nunatukavut could continue to be involved before the process would be finished.

[188] I would also note that the Applicant 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 [*Nunatsiavut, 2015 NLTD*], decided that matter subsequent to the hearing of the Applicant's judicial review application before me. That Court 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" (para 114). For that reason he expressed no opinion on whether the Province's response to the JRP Report, the release Order itself suffered from any legal defect relating to consultation, accommodation or reasonableness.

[189] Justice Orsborn also concluded that the Agreement, as regards to the Province, excluded any duty to consult with respect to the decisions involving specific regulatory permits in the context of an already approved undertaking, noting that it contained no equivalent to the federal duty to consult set out in s 11.6.2, although consultation obligations did arise from the Province's Aboriginal Consultation Guidelines.

[190] In contrast, in the matter before me, the Agreement specifically contemplates further consultation at the regulatory permitting phase. In accordance with that obligation, the *Consultation Framework* states that decisions on regulatory permitting may require federal departments to further consult Aboriginal groups on specific regulatory issues, and the decision to undertake additional consultation will be made *taking into consideration*:

- the consultation record;
- mitigation, compensation, accommodation measures to address outstanding concerns not addressed through the EA;
- the government response to the JRP Report; and
- any direction that may be provided by the federal Cabinet.

[191] Thus, the phases of the consultation process, and the consultation undertaken in each phase, are connected and, to some extent, cumulative.

[192] It is correct that the Applicant in its application for judicial review challenges only the decision to issue the Authorization. It is also correct that it is not open to the Applicant to collaterally attack the validity of Canada's Response or the Course of Action Decision by way of this application. However, while Canada's Response, the Course of Action Decision and the Authorization were separate decisions, the consultation process that underlies the JRP Report and all of the decisions made subsequent to it was an ongoing one. As described above, two Courts have found that the consultation process would not properly conclude until the Phase 5 consultation was complete, namely the issuance of regulatory permits, authorizations or approvals. And, as Nalcor submits, the consultation that occurred before, during and after the EA relates to and informs the consultation and accommodation required in respect of the

Authorization. Accordingly, I agree with Nalcor that, in that regard, the totality of the consultation between Canada and the Applicant in each phase of the EA must be considered to understand the extent of the consultation and accommodation in respect of the Authorization. To the extent that the Applicant questions the content or adequacy of the consultation with respect to the issuance of the Authorization, it is entitled to look to the prior consultation record for that purpose, but not as an attempt to impugn the validity of those prior decisions.

(ii) Delegation of Authority

[193] I do not accept the Applicant's argument that the consultation obligations in the Agreement could not be met, at least in part, by the JRP process.

[194] The Agreement explicitly incorporated the JRP process into the consultation process where Canada refers a project or undertaking to a review panel under the *CEAA* (Agreement, ss 11.6.3-11.6.6).

[195] Further, jurisprudence confirms that the duty to consult can be satisfied through the consultation that takes place within the regulatory process. In *Taku River*, where the Aboriginal rights and title claims were unproven and no treaty was in place, the Supreme Court of Canada held that the process engaged by the Province of British Columbia under its *Environmental Assessment Act*, in which the first nation had participated for three years, fulfilled the procedural requirements of its duty to consult:

> [40] The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (para.

> 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

[196] In *Little Salmon* the Supreme Court referred to its decision in *Taku River* and stated that there it had held "that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if in substance an appropriate level of consultation is provided" (para 39, emphasis in original).

[197] This issue has also previously been addressed in the context of this Project in *Ekuanitshit FCA*, described above. There the Federal Court of Appeal disagreed with the appellant that the Crown could not partially meet its constitutional duties by including the Aboriginal group in the EA process provided for under the *CEAA*. The Court ultimately concluded that the findings of the JRP regarding the Innu of Ekuanitshit and the territory covered by the Project were determinative in that case, and stated:

> [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).
>
> [Emphasis in original]

(Also see *Katlodeeche*, which held at paragraph 97 that the Crown is entitled to rely on regulatory processes in determining whether the duty to consult has been discharged).

[198] In my view, given that the use of the *CEAA* EA process in these circumstances was explicitly contemplated by the Agreement, there can be no question that the parties to the Agreement intended that it would comprise a part of the required duty to consult with respect to the Project.

[199] Similarly, I see no error in the use of the five-phase *Consultation Framework* or the *Regulatory Phase Protocol*. The Applicant was advised in May 2007 that Canada and the Province proposed a JRP process for the EA. In August 2010 the *Consultation Framework* was provided to the Applicant which noted one concern regarding response time but otherwise took no issue with process. As to the *Regulatory Phase Protocol*, this was provided to the Applicant by the Agency in draft form in July 2012, following which the Applicant commented on the draft and DFO revised the document in consideration of those comments.

[200] So long as the process established by those protocols satisfies the duty to consult required by the Agreement, and full and fair consideration was given to any response provided to the proposed process contained in the protocols, the requirement to consult as defined in the Agreement and set out in ss 1.1.1, 11.2.8, 11.6.1 and 11.6.2 could be met by utilization of such process. The Crown has discretion as to how it structures the consultation process, and there is significant flexibility in how the duty is met (*Cold Lake* at para 39).

[201] In that regard, the *Regulatory Phase Protocol* reflects the s 11.6.2 requirement to conduct ongoing consultation after the consultation specific to the *CEAA* EA process set out in s 11.6.1 has been concluded.

[202] Thus, I conclude that the Crown's consultation obligations could be met, at least in part, through the JRP process.

B. Was the Applicant Adequately Consulted and Accommodated?

Applicant's Position

[203] The Applicant submits that it has been consistent in making its concerns known and has attempted to establish an appropriate research program to understand how methylmercury enters the food chain and to ensure its early detection. Once levels begin to rise in fish and seals the only step that can be taken is the issuance of consumption advisories, which the Applicant submits is not a mitigation measure and will not protect the Labrador Inuit's right to engage in subsistence harvesting.

[204] The Applicant submits that Canada failed to carry out its consultation duties under the Agreement in three material respects: (i) it avoided and did not follow the requirements of ss 11.6.1 and 11.6.2 and failed to properly consult the Applicant; (ii) it did not adequately consult the Applicant with respect to its key decisions under s 11.6.2; and (iii) it failed to provide full and fair consideration of and to adequately accommodate the concerns of the Applicant.

[205] The joint letter of the Agency and the Province, dated May 1, 2008, contains no reference to s 11.6. The Applicant submits that Canada's approach to this obligation was to avoid the issue instead of fulfilling its obligations. This approach was applied consistently throughout the process, so that when key decisions and steps were taken in relation to the Authorization, Canada was not guided by s 11.6.2 but by reference to protocols and guidelines developed by the federal and provincial governments.

[206] Section 11.6.2 required Canada to provide a draft of the EEM Plan and Authorization once a preliminary decision on these matters was made, in order to provide the Applicant with an opportunity to provide its views thereon.

[207] Further, the Applicant submits that Canada did not adequately consult it with respect to Canada's Response and Course of Action Decision, as required by s 11.6.2, which compromised its ability to issue the Authorization. Specifically, the Applicant submits that its views were not given the required consideration in Canada's Response and Course of Action Decision, as Canada's Response does not refer to Inuit specifically or to the Agreement, and does not address whether the Project may reasonably be expected to have adverse environmental effects in the LISA or on Inuit rights under the Agreement. As such, Canada has failed to establish that it fully and fairly considered the Applicant's views.

[208] In addition, Ray Finn's final briefing note to the DFO Regional Director General prior to Canada's Response stated that the Applicant was "generally supportive" of the Project. A similar statement is found in the summary of Aboriginal positions contained in the *Aboriginal*

Consultation Report. These statements unfairly misrepresent the Applicant's position, and are not in keeping with the honour of the Crown or the requirement for meaningful consultation.

[209] The Applicant further submits that the Respondent did not give full and fair consideration to the Applicant's views on downstream mercury contamination, as required by the Agreement, either in Canada's Response, the Course of Action decision or in the decision to issue the Authorization. The Applicant had continually maintained the position that downstream effects needed to be addressed and understood, which was also the position expressed by the JRP in Recommendation 6.7. The decision to issue the Authorization shows that the fundamental concerns and views of the Applicant were not addressed.

[210] With one exception, Canada's Response to the views presented by the Applicant in relation to the Authorization was to reject them. The change in monitoring requirements in the EEM Plan was minor, did not address the Applicant's fundamental concerns or submissions, and was confined to what Canada's Response to Recommendation 6.7 directed. In short, Canada's Response served to predetermine what was considered and decided with respect to the Authorization and the EEM Plan which was not fair or reasonable.

Canada's Position

[211] Canada submits that the extensive consultations that took place in this case were genuine, comprehensive and sufficient to discharge its duty to consult pursuant to the Agreement, s 35 of the *Constitution Act, 1982*, and in the context of the honour of the Crown, even if "deep consultation" was required.

[212] The duty to consult does not constitute a veto over the proposed course of action (*Little Salmon* at para 14; *Mikisew Cree* at para 65) and there is no duty to agree (*Haida* at paras 42, 49).

[213] Canada submits that it met its duty to consult as defined by the Agreement, and that much of the consultation took place within the EA. The Applicant should be taken to have accepted the procedural and substantive consultation within the EA up to and including the issuance of the JRP Report and the consultation in response to that report as: the Applicant participated extensively in the JRP process; it directly provided input that resulted in Canada making procedural and substantive changes; the JRP examined and addressed its concerns; and, the Applicant acknowledged the adequacy and substance of the JRP Report in its press release and its own response to the JRP Report.

[214] Canada submits that the Applicant's assertion that it was not consulted on Canada's Response to the JRP Report attempts to isolate artificially one element of a complex and ongoing consultation process. In any event, Canada's Response and the process leading up to it have been reviewed by this Court and deemed reasonable (*Ekuanitshit FC* at para 95). The consultation in this case went further than that in *Little Salmon*, where a minimal process satisfied the similar definition of "consult" in the treaty at issue in that case.

[215] Similarly, Canada submits that the Applicant's assertion that it was not consulted in respect of the Authorization inappropriately isolates Phase 5 of the process. The process leading up to the issuance of the Authorization was comprehensive and fair. The Applicant did not ask

to review a draft of the Authorization and provides no authority to support its assertion that there was an obligation on Canada to provide such a draft. Further, the Applicant agreed to the consultation protocols that were followed.

[216] The Applicant was advised on many occasions that DFO was contemplating a *Fisheries Act* authorization and was consulted on the process to be followed, including input into draft consultation protocols. Although the Applicant now challenges the fact that DFO followed these protocols, it largely endorsed them at the time. Further, in addition to the steps set out in the *Regulatory Phase Protocol*, the Applicant met personally with the Minister of Fisheries and Oceans on February 12, 2013 to discuss particular issues. The Applicant was made aware that the FHC and EEM Plans would be key conditions of the Authorization, and the Applicant made known its concerns with respect to the EEM Plan. DFO responded to these concerns and required Nalcor to make changes to the EEM Plan based on them. There were no surprises in the text of the Authorization and the Applicant did not ask to see a preliminary draft or raise the issue as a problem prior to filing its Memorandum on judicial review. Aboriginal groups are required to make their concerns known in order to provide the Crown an opportunity to address them, and raising them for the first time in Court is not acceptable (*Mikisew Cree* at para 65; *Katlodeeche* at paras 119, 164-165).

[217] As to accommodation, Canada submits that although it did not accede to the Applicant's request to be put in charge of baseline data collection and monitoring of Lake Melville, and instead assigned the monitoring responsibilities to Nalcor, it still reasonably and fully accommodated the Applicant's concerns by adapting the EA process and the Authorization

conditions. Compromise rather than perfection is required (*Haida* at paras 62-63) and when consultation is meaningful, there is no ultimate duty to reach an agreement (*Taku River* at para 2). If consultation has been sufficient, it is acceptable for a decision-maker to make the contemplated decision, even where the Aboriginal group maintains that their concerns have not been addressed satisfactorily (*Little Salmon* at para 84; *Katlodeeche* at para 101; *Taku River* at para 42).

[218] Canada submits that each of the Applicant's concerns were responded to within the consultation process, summarized as follows:

i. "Full clearing" of the reservoir: The Applicant agreed with the JRP's recommendation until very late in the process, but wrote to the Minister of Fisheries and Oceans on July 2, 2013, changing its position such that full clearing would now include removal of all trees and the top layer of organic matter in the reservoir. The JRP had already addressed such a suggestion, however, noting that full clearing did not mean removal of all trees, and that soil removal was not a proven mitigation measure. Further, the Minister responded to this letter, advising that clear cutting of vegetation was a matter of Provincial jurisdiction. In any case, the Applicant's concerns have been substantially addressed, as Nalcor is engaged in extensive clearing of merchantable timber within the Muskrat Falls reservoir.

ii. Baseline data and monitoring program of potential downstream impacts: Recommendation 6.7 was the Applicant's highest priority. Canada's Response accepted the intent of this recommendation and made it clear that it would require Nalcor to collect further baseline data prior to impoundment, and to conduct a multi-year monitoring program on mercury and other potential downstream effects. The Applicant supported Recommendation 6.7 and took the position that Nalcor should be required to provide funding to the Applicant so it could lead a research group to gather baseline data and monitor Lake Melville.

DFO advised the Applicant that it would ensure that Nalcor gathered appropriate baseline data and conducted ongoing significant monitoring of Lake Melville. Further, that it would not direct Nalcor to retain or fund the Applicant to carry out this work. Canada required Nalcor to make enhancements to its draft EEM Plan in respect of baseline data and monitoring, and the Authorization satisfies the Applicant's main concerns in these respects. Furthermore, the Applicant is conducting its own baseline assessment and monitoring of downstream effects relating to the Project, so it will have the benefit of Nalcor's research as well as its own. Finally, DFO has the power to rescind the

Authorization or take other measures in the future if it is determined that the impacts are more serious than those authorized.

iii. Inuit representation on Project management, and framework agreement: In its November 2011 letter, the Applicant took the position that the Authorization should stipulate: (a) that the Applicant would participate in a high-level Project management structure; and (b) that Nalcor and the Applicant would have to conclude a framework agreement to address compensation if adverse impacts were to materialize. DFO responded to this letter, and there was no subsequent communication on the issue of participation in management.

[219] Canada submits that the conditions of the Authorization address the Applicant's underlying concerns and represent an appropriate and significant compromise although not precisely as proposed by the Applicant. As appropriate consultation took place, and the Applicant's concerns were heard, understood and taken into account, the discretion to authorize the Project was exercised reasonably and the terms of the Agreement and the honour of the Crown were upheld.

Nalcor's Position

[220] Nalcor submits that the Applicant was consulted on the high end of the spectrum, beyond what was required under the Agreement, and that its concerns were adequately accommodated.

[221] Pursuant to s 11.2.8, the Applicant was notified by DFO of the Project registration, the EA and the Authorization. The Applicant was also provided with substantial information before, during and after the EA including the EIS, the IRs (many of which responded directly to the Applicant's comments), the draft FHC Plan and EEM Plan, as well as information provided directly by DFO and Nalcor. Pursuant to s 11.2.9, the Applicant was consulted extensively about the EA process.

[222] With respect to s 11.6.1(a), consultation about the Environmental Effects of the Project, the Applicant received early notice of the Project, received thousands of pages of information, and had time to prepare studies, presentations and submissions on its views, as well as federal funding to do so. The Applicant attended the JRP hearings and had direct meetings with representatives of DFO and other government representatives for the purpose of presenting its views, including a meeting with the Minister.

[223] Nalcor submits that the very views that the Applicant now claims were not fully and fairly considered were expressly and demonstrably considered by the JRP, the RAs and the Governor-in-Council, and mitigation measures were imposed to directly accommodate the Applicant's views and concerns. In particular, IR # JRP.166 required Nalcor to increase the study area for downstream effects beyond those set out in the EIS. Further, the Applicant was directly consulted on the JRP Report, and Canada's Response and the Course of Action Decision accepted the majority of the JRP's recommendations with which the Applicant is concerned and mandated key mitigation measures to protect Aboriginal interests.

[224] In respect of the Authorization, once notice was given under ss 11.2.8 and 11.2.9, the only relevant provision was s 11.6.2, which required DFO to consult before making a decision to issue the Authorization. The Applicant received notice of the Authorization application and, prior to that, had been advised of the impending regulatory consultation. DFO consulted with the Applicant on the protocol for such consultation. The Applicant was also provided with advance copies of the FHC Plan and EEM Plan, summaries of these, and additional detail about these plans.

[225] The Applicant was provided with a reasonable period of time to prepare its views on the FCH Plan and EEM Plan and opportunities to present them.

[226] As to full and fair consideration, the body of the EA consultation record was before DFO. DFO had also consulted directly with the Applicant since 2006 and, therefore, had an advanced understanding of the Applicant's concerns. DFO also provided oral and written responses to the Applicant as to how its concerns were considered.

[227] In addition, the Applicant was reasonably accommodated. To the extent that DFO did not follow the Applicant's precise requests, this was because it was not within DFO's jurisdiction to do so or a reasonable alternative measure had already been adopted in the Authorization. The Crown is not required to agree to all of the Applicant's requests. Rather, its decision must fall within a range of reasonable outcomes.

[228] Aboriginal groups must also be flexible and reasonable when discussing accommodation options (*Haida* at paras 47-50, 62-63; *Mikisew Cree* at para 66; *Taku River* at para 2; *Native Council of Nova Scotia* at para 60; *Kwicksutaineuk* at para 124).

[229] As to full clearing of the Muskrat Falls reservoir, such a direction is *ultra vires* the Minister, and Canada's Response noted that this lay within provincial jurisdiction. Further, Nalcor concluded that there was no scientific evidence to support the assertion that full clearing would result in a meaningful reduction of methylmercury impacts downstream. In any event,

this issue was extensively considered, and such a direction would have been unreasonable in the circumstances.

[230] As to the aquatic effects prediction and assessment program, this issue was the subject of extensive consultation and was a requirement of Canada's Response and the Course of Action Decision. DFO also required enhancements to the draft EEM Plan as a result of the Applicant's comments. Nalcor submits that the Applicant simply prefers its own program to that required by the Minister and is asking the Court to usurp the role of the Minister and become an "academy of science". It has provided no evidence to support the probability of adverse effects within the LISA, and Nalcor's research does not support the Applicant's theory that it will be affected by increased mercury levels. During the EA, the Applicant was dissatisfied with Nalcor's research and, in order to accommodate the Applicant's concerns, Nalcor was required to do additional research and modelling which supported the same conclusion. Nalcor has also undertaken to implement an extensive monitoring program to monitor mercury levels in fish and has committed to posting consumption advisories if mercury levels reach or exceed Health Canada's guidelines.

[231] DFO concluded that the plans contemplated by the Authorization are reasonable in the circumstances. This was the very decision that the Minister was empowered to make.

[232] Finally, as to a framework agreement between Nalcor and the Applicant, Nalcor submits that the scientific evidence before the Minister was that significant downstream impacts in the LISA are unlikely. Further, the plans already require engagement in respect of mitigation,

including compensation, if monitoring suggests downstream impacts are occurring in the LISA. As no downstream impacts are anticipated, it is unreasonable to require a framework agreement. The Authorization reasonably requires Nalcor to carry out the necessary monitoring and to act promptly if the predicted environmental effects are exceeded.

Analysis

(a) Discrete Consultation Issues

[233] In making the decision to issue the Authorization, I find that Canada adequately consulted and accommodated the Applicant in accordance with the terms of the Agreement. Before I give my reasons for this conclusion, I will briefly deal with some of the related concerns that the Applicant has raised which can be disposed of separately from the main analysis.

i. Adequacy of Consultation in Phases 1-3

[234] As discussed above, the Agreement specifically defines an EA as including an assessment of the environmental effects of an undertaking that is conducted under the *CEAA*. The Project is an undertaking as defined in the Agreement. Consult is defined in the Agreement as requiring notice, a reasonable period of time for the party being consulted to prepare and an opportunity to present its views on the matter, and, full, and fair consideration of those views. Further, because the Project was identified as one that would reasonably be expected to have adverse environmental effects in the LISA or on Inuit rights under the Agreement, there was a further obligation pursuant to s 11.6.1 of the Agreement to ensure that the Applicant was consulted about the environmental effects, the best way to achieve meaningful participation of

the Inuit in the EA, and that it received a report generated as a result of the EA, including the rationale, conclusions and recommendations of the JRP.

[235] It is my view that the summary of the facts set out at the beginning of these reasons demonstrate that the Applicant was adequately consulted in Phases 1-3 by way of the EA process conducted by the JRP as contemplated by the Agreement. That is, that the consultation requirements of s 11.6.1 were met.

[236] The Applicant was fully engaged in the JRP process and the JRP was mandated to and did set out in the JRP Report information provided by Aboriginal groups, including the Applicant, concerning traditional uses as related to the potential environmental effects of the Project on recognized Aboriginal rights, as well as their concerns in that regard. The issue of potential methylmercury bioaccumulation, including downstream of Muskrat Falls and in Goose Bay and Lake Melville, was at the forefront of the JRP's considerations and was the basis of many of its Recommendations. When the JRP Report was issued, the Applicant publicly expressed its general satisfaction with its conclusions (Nunatsiavut, News Release, "Nunatsiavut Government pleased with panel recommendations on proposed Lower Churchill project" (29 August 2011)) and, significantly, the focal point of the Applicant's concerns with the consultation and accommodation process that followed the issuance of the JRP Report is the extent to which Nalcor was required to comply with JRP Recommendation 6.7, the assessment of downstream effects.

[237] Further, although at various points in its written and verbal submissions the Applicant suggested that its concerns, in particular methylmercury bioaccumulation downstream of the Project, were not given adequate consideration throughout the EA process as well as prior to the issuance of the Authorization, the Applicant ultimately conceded at the hearing before me that it did not take issue with the adequacy of the consultation afforded to it by way of the JRP. Accordingly, the underlying consultation in those phases is not at issue with respect to the decision to issue the Authorization, as per s 11.6.2 of the Agreement, when taking into consideration the totality of the consultation in all five Phases.

ii. Aboriginal Consultation Report

[238] The Applicant also takes issue with the internal *Aboriginal Consultation Report* concerning the Project which was prepared by the Agency in January 2012. The Applicant submits that the report misrepresents its position, thereby acting contrary to the honour of the Crown, or that it indicates a lack of meaningful consultation.

[239] The Applicant was unaware of this document until the disclosure process connected with its application for judicial review. Importantly, however, the report describes the positions of each of the Aboriginal groups identified therein with respect to their views as to how the potential adverse effects of the proposed Project may impact their potential or established Aboriginal or treaty rights. This was based on the presentations the Aboriginal groups made to the JRP and on comments made by them directly to federal government department officials.

[240] Section 6.2 of the *Aboriginal Consultation Report* concerns the Applicant, the Nunatsiavut Government, as the representative of the Inuit of Labrador. It describes the community profile, the Agreement, including that Inuit living outside the LISA have rights to harvest wildlife, plants and migrating birds pursuant to the provisions of Chapter 12 (Schedule 12-E), and that s 11.6.1 of the Agreement requires consultation. The report notes that in its March 31, 2011 submission to the JRP the Applicant stated that it could not support the Project as currently proposed. In the Applicant's final submission to the Panel in April 2011, it expressed its concerns, as described, and provided a list of recommendations to address those issues. The report also describes the JRP conclusions as to the Applicant's concerns and the Applicant's response to the JRP Report of November 11, 2011, including the Applicant's three main mitigation recommendations. The report summarized the Applicant's position as follows:

> **7.1.1 Nunatsiavut**
>
> Nunatsiavut is primarily concerned with the potential effects of mercury downstream of the Project. The proponent did not consider that Inuit would be affected by its project and essentially excluded Labrador Inuit from their analysis of project impacts. Nunatsiavut emphasized that the Panel made a significant adverse effect pronouncement for Inuit, without making the same determination for any other Aboriginal group involved in the environmental assessment process.
>
> Nunatsiavut maintain that Inuit rights and title, and traditional territory as established under the Labrador Inuit Land Claims Agreement and agreed upon in the overlap agreement with Innu Nation will be significantly adversely affected if the proposed development proceeds. They stated that this must be accommodated for and mitigated by the proponent and the provincial and federal governments and clarified that further consultation does not constitute, and is not equal to, mitigation. Nunatsiavut also directed the provincial and federal governments to review a recent study on the human health effects of prenatal and childhood exposure to environmental contaminants, such as methylmercury, on the health and development of Inuit children in Nunavik (northern Quebec) that was released subsequent to Panel hearings.

[241] Section 7.2 of the report also noted that the Applicant had provided recommendations for addressing their concerns regarding mitigation while moving forward with Project development, being participation in a high level management mechanism for the Project and a minimum of $200,000 funding annually for baseline research and monitoring. An outstanding issue was identified, that being the Applicant's desire to have a mechanism to compensate Inuit for any Project effects: in its response to the JRP Report, the Applicant had proposed text that it wished to be included with the permit(s) associated with the Project.

[242] The Applicant takes issue with this report, in that it states that Nunatsiavut "are generally supportive of the Project" (*Aboriginal Consultation Report*, s 7). When asked about this by way of his Responses to Written Examination, Chapman stated that it was his understanding that this statement was based on the fact that the Applicant had provided recommendations to the JRP on how issues of concern to the Applicant could be remedied and had not refused outright to consider the Project proceeding in any form.

[243] Similarly, the Applicant takes issue with the January 30, 2012 internal DFO memo to the DFO Regional Director General, as it also states that the Innu Nation and Nunatsiavut Government "are generally supportive of the Project". The Applicant submits that this is a misrepresentation of its position. When questioned on this point by way of his Responses to Written Examination, Finn, the author of the memo, stated that his statement that the Applicant was generally supportive of the Project was based on the fact that the Applicant had provided recommendations to the JRP during and after the Panel hearings on how issues of concern to the Applicant could be remedied. By way of example, he referred to the recommendations made by

the Applicant in its April 13, 2011 submissions to the JRP and its recommendations made in its response to the JRP Report.

[244] In this regard it is of note that in its response to the JRP Report, the Applicant set out three major recommendations that would "help to mitigate impacts on Inuit and Inuit Rights and allow Inuit to constructively contribute to the Lower Churchill process going forward". Further, in its January 16, 2012 letter to the Province and DFO, the Applicant set out four core mitigative measures it had raised at a January 9, 2012 meeting with the Premier of the Province. Both of these documents predate both the internal DFO memo and the *Aboriginal Consultation Report* that the Applicant takes issue with.

[245] In my view, little turns on this issue. The *Aboriginal Consultation Report* as well as the JRP Report clearly communicated the Applicant's concerns, including its ongoing concern with the downstream effects of methylmercury bioaccumulation and the mitigation steps that it had proposed. More importantly, the comments reasonably reflect the Applicant's position at the time that they were made. Accordingly, I do not agree that DFO misrepresented the Applicant's position and thereby acted contrary to the honour of the Crown or that the comments indicate a lack of meaningful consultation.

[246] The Applicant also points out that while the internal DFO memo at issue is dated six days after the Agency's *Aboriginal Consultation Report*, it states that DFO would participate in the *Aboriginal Consultation Report* to ensure Aboriginal concerns were addressed, where

appropriate, prior to Canada making its decision. Again, in my view, while DFO's internal update memo was inaccurate, little turns on the point.

iii. Section 11.6.2 Procedure

[247] The Applicant also submits that the Agreement is to be interpreted as requiring a procedure whereby Canada was to provide the Applicant with copies of the reports generated as a result of the EA process as required by s 11.6.1(c), and then, under s 11.6.2, to make a preliminary decision on the Project. If that preliminary decision was to allow the Project to proceed, then the Applicant should have been notified, provided with sufficient information about the proposed decision to allow it to formulate its views and allowed a reasonable amount of time to prepare a response, which would then be fully and fairly considered.

[248] In my view, this is in effect an attempt to collaterally attack Canada's Response, as that was the decision that permitted the Project to proceed, subject to the requirements of the Course of Action Decision. I would note, however, that the Applicant was provided with the report required by s 11.6.1(c), which was the JRP Report. As to s 11.6.2, it requires consultation prior to any action that would allow the Project to proceed or the making of a decision to issue an authorization in relation to the Project. As described above, the Applicant was consulted on the JRP Report in Phase 4.

[249] As to the procedure envisaged by the Applicant, that would require Canada to make a preliminary determination as to whether the Project would proceed and then to consult on that preliminary determination, this is one of its own interpretation. Neither s 11.6.2 or any other of

the Agreement's consultation provisions specify that approach. Nor did the *Consultation Framework*, to which process the Applicant had largely agreed. In my view, it is not open to the Applicant to challenge, after the fact, a process to which it agreed.

[250] Similarly, Canada did not breach its duty to consult by virtue of the fact that DFO did not circulate a draft of the Authorization or the revised EEM Plan prior to its issuance.

[251] Section 11.6.2 does not specify that drafts must be circulated prior to approval or issuance, and the *Regulatory Phase Protocol*, upon which the Applicant had been consulted, did not contemplate that after comments were received, a revised draft EEM Plan would be circulated to the Applicant prior to approval by DFO. Rather, the *Regulatory Phase Protocol* specified that, if comments were received, they would be given full and fair consideration by the RA, in writing, and that the RA would incorporate changes as appropriate. This is what occurred.

[252] The Applicant did not seek such a requirement when commenting on the draft *Regulatory Phase Protocol*, or at any time, and it is not now open to the Applicant to subsequently challenge the sufficiency of the consultation process on a point with which it did not take issue at the relevant time.

[253] Similarly, when the Applicant commented on the draft *Regulatory Phase Protocol*, it did not request that it be provided with a draft of the Authorization prior to issuance. Rather, it requested that it be provided with the Authorization within 5 days of issuance. In fact, it was

provided with it on the same day that it was provided to Nalcor. This did not constitute a breach of DFO's duty to consult.

iv. May 1, 2008 Letter

[254] The Applicant also submits that because the joint letter of May 1, 2008 from the Province and the Agency refers only to ss 11.2.2, 11.2.8, 11.2.9 and 11.5.11, with no reference to Part 11.6 of the Agreement, this demonstrates that Canada avoided its ss 11.6.1 and 11.6.2 obligations, including determining whether the Project would reasonably be expected to have adverse environmental effects in the LISA or on Inuit rights under the Agreement, so that when key decisions and steps were being taken in relation to the Authorization, Canada was not guided by the terms of s 11.6.2, but by the protocols and guidelines developed by the federal and provincial governments.

[255] In my view, this submission is of no merit. The letter was written by the Province, with the consent of the Agency, which may explain why it referenced those provisions of the Agreement which pertained to the Province's obligations. Further, DFO and TC wrote to the Applicant on August 8, 2007 providing the registration document pursuant to s 11.2.8 of the Agreement and explaining that the Project would require *Fisheries Act* authorizations, triggering an EA. The EA process as contemplated by s 11.6 then commenced.

[256] Thus, in my view, the omission in the May 1, 2008 joint letter is not important when viewed in the context of the whole of the consultation process. The real issue is not whether Part

11.6 of the Agreement was explicitly referenced in that letter, but whether the substantive content of the duty to consult pursuant to the Agreement was met.

v. Failure to Identify the Applicant in Canada's Response

[257] The Applicant also submits that Canada's Response fails to mention the Labrador Inuit by name, instead referring only to Aboriginal groups, and that this brings into question whether its concerns were considered at all, let alone fully and fairly. Again, this is an improper collateral attack on Canada's Response. In any event, there is also no merit to the position. Canada's Response cannot be viewed in isolation from the JRP Report which, pursuant to the Agreement, properly formed a part of the underlying consultation process. The JRP Report explicitly identified the Applicant as one of the Aboriginal groups which participated in the EA process and identified and discussed in detail the Applicant's concerns as to methylmercury bioaccumulation, downstream effects and otherwise. Canada's Response was not required to restate the content of the JRP Report, and its failure to name the Applicant and the other Aboriginal groups identified in the JRP Report and in *Aboriginal Consultation Report* is not fatal.

(b) Adequacy of Consultation prior to Issuance of Authorization

[258] The real issue in this judicial review is whether the Applicant was adequately consulted and accommodated in respect of the decision to issue the Authorization. In that regard, in July 2010 DFO advised the Applicant that, pursuant to the *Consultation Framework*, the federal government was entering the regulatory permitting phase of the Project and wished to continue consultations with respect to specific regulatory decisions, approvals or actions that may have

potential adverse impacts on Aboriginal rights or title. Further, that the federal government anticipated the issuance of a s 35(2) *Fisheries Act* authorization from DFO for the harmful alteration, disruption or destruction of fish habitat and a s 32 *Fisheries Act* authorization from DFO for the destruction of fish. DFO provided the draft *Regulatory Phase Protocol* for the Phase 5 consultations. The Applicant provided comments on the draft protocol, and it was subsequently revised by DFO in consideration of the comments received.

[259] On February 12, 2013 the Applicant met with the Minister of Fisheries and Oceans to discuss its concerns about the Project including downstream effects and, for the first time, stated that its preliminary data suggested that total mercury from the Churchill River extends into Lake Melville and the LISA, although a copy of that data does not appear to have been provided by the Applicant. The Applicant also continued to seek annual funding for its research and monitoring of the overall effects on the downstream environment.

[260] On February 28, 2013 DFO advised the Applicant that it was preparing to issue a *Fisheries Act* authorization, provided it with the draft FHC and EEM Plans and sought comments within 45 days as per the *Regulatory Phase Protocol*. The Applicant did not provide comments on the FHC Plan but on several occasions expressed concerns regarding inadequacies in the EEM Plan with respect to baseline data. This included a meeting with DFO on March 22, 2013 and formal written comments regarding the EEM Plan on April 15, 2013 which, in essence, took the position that by way of Recommendation 6.7, the JRP had required a holistic and comprehensive downstream effects assessment, but that Nalcor was not being required to undertake this. The Applicant was of the view that without a comprehensive baseline

understanding of the whole of the Lake Melville system, an appropriate monitoring program could not be established. And, accordingly, that the EEM Plan was not of sufficient form and detail to allow the Applicant to prepare its views. The Applicant again sought, as a condition of the Authorization, that Nalcor fund the Applicant's comprehensive downstream effects assessment.

[261] DFO responded to these comments on May 30, 2013. It stated that it was of the view that the EEM Plan contained sufficient detail to allow the Applicant to prepare its views and comment on the plan. And, based on the comments received, DFO would require Nalcor to add to the EEM Plan additional details on the protocols for sampling and analysis of fish and seals for methylmercury currently set out in baseline monitoring reports. As to Recommendation 6.7, Canada's Response stated that Nalcor would be required to collect additional baseline data on methylmercury bioaccumulation in fish and on fish habitat downstream of Muskrat Falls prior to impoundment. Such information had been collected by Nalcor in 2011 and 2012, including Lake Melville, and would continue to be collected prior to impoundment. DFO also explained that the primary objective of an environmental effects monitoring or follow-up program was to verify specific predictions made by a proponent during an environmental assessment, especially where there may be uncertainty about the severity or extent of a possible impact. EEM programs are not designed or implemented to study environments or changes in them overall. The EEM Plan addressed those predictions for which DFO considered monitoring to be required for verification, including in relation to methylmercury bioaccumulation in fish. Finally, as to the Applicant's funding request, DFO stated that it typically sets out monitoring and reporting requirements that a proponent must meet, but does not specify who a proponent is to engage to carry this out. On

June 28, 2013 DFO also responded to the Applicant's letters of November 11, 2011 and July 24, 2012 addressing the concerns raised on a point by point basis.

[262] The Applicant wrote to the Minister of Fisheries and Oceans on July 2, 2013 reiterating its concerns with DFO's position as to downstream impacts of the Project and the related EEM Plan. It stated that throughout the EA and post-EA process, Nalcor had not provided meaningful baseline measurements or conducted sufficient research to characterize the downstream environment that would be impacted by the Project, particularly in Lake Melville. Further, that Canada's Response to Recommendation 6.7 was an extreme simplification of its intent. Canada's Response eliminated the need to understand the downstream environment at a holistic level and the ability to model or predict downstream impacts prior to flooding. The Applicant sought a comprehensive baseline study to provide foundational knowledge which it deemed essential for the prediction of downstream impacts and for the formulation of a meaningful EEM Plan and consultation respecting that plan. While acknowledging that the total elimination of increased mercury and methylmercury concentrations downstream may be impossible, the Applicant submitted that the primary and only mitigation measure that could reduce the risk or concentration of mercury prior to flooding was full clearing of the reservoir area, and took the position, for the first time, that removal of all the trees and the top layer of organic matter was also required as an aspect of this.

[263] The Authorization with conditions was issued on July 9, 2013 and was provided to the Applicant on the same day. On July 12, 2013 the Minister responded to the Applicant's

February 12, 2013 concerns and on August 27, 2013 the Minister responded to the Applicant's letter of July 2, 2013.

[264] In my view, the communications between DFO and the Applicant together with the *Regulatory Phase Protocol* process served to satisfy the consultation requirements of s 11.6.2 of the Agreement. I would have reached the same conclusion applying the content of the common law duty to consult above the mid-range but lower than the high end of the spectrum as described earlier in these reasons.

[265] This is because the Applicant was given notice by DFO that it was preparing to issue a *Fisheries Act* authorization and was provided with the draft EEM Plan for comment. DFO met with the Applicant to discuss its concerns regarding the EEM Plan. The Applicant then put its concerns in writing and DFO responded to them in writing. As will be discussed further below in the context of accommodation, DFO required Nalcor to add to the EEM Plan additional details on the protocols for sampling and analysis of fish and seals as a result of the Applicant's comments on the draft EEM Plan, indicating that the Applicant's concerns were considered. While the Applicant does not agree with DFO's responses and feels that they did not address its view that there was a need for a holistic and predictive downstream assessment, in my view DFO's response does reflect full and fair consideration of the issues that the Applicant raised.

[266] While the Applicant argues that the EEM Plan was not of sufficient form or detail to permit it to prepare its views, and that therefore there was no consultation as defined by the Agreement, what the Applicant is really saying was that it refused to address the EEM Plan

because its demands to lead a broad based, funded, comprehensive study of Lake Melville, from an Inuit perspective, had not been accommodated.

[267] Phase 5 was concerned with the regulatory process surrounding the issuance of the Authorization and, more particularly, with the preparation of the FHC and EEM Plans which were to be conditions of the Authorization. As noted by DFO in its communications to the Applicant, the EEM Plan deals with monitoring and follow up for the purpose of verifying the EA predictions. It is not designed or implemented to study environments or overall changes to them. The Applicant would also have been aware of this from an early stage in the EA process, as the summary of the EIS states that monitoring and follow up programs are designed to verify environmental effects predictions made during the EA as well as the effectiveness of the implemented mitigation measures.

[268] The Applicant, in challenging the Phase 5 consultation that led to the issuance of the Authorization, takes the position that Canada's Response eliminated the need to understand the downstream environment on a holistic basis and to conduct a comprehensive baseline study to provide foundational knowledge for the prediction of downstream impacts upon which the EEM Plan could then be based. In this regard, the Applicant is not challenging the adequacy of the Phase 5 consultation, but is attacking Canada's Response.

[269] For the reasons above, it is my view that the Applicant was adequately consulted and that Canada's duty to consult as per the Agreement was satisfied. That said, the Minister's response to the Applicant's July 2, 2013 letter was not timely, as it did not come until August 27, 2013,

long after the issuance of the Authorization. However, the issues that the Minister addressed therein had previously been raised by the Applicant and addressed by DFO, with the exception of the new suggestion that full clearing of the reservoir should include all trees and the top layer of organic matter, which issue is addressed below with respect to accommodation.

[270] Adequate consultation having taken place, the remaining question is whether, taking into account all of the relevant interests and circumstances, a duty to accommodate arose, and if so, whether it was satisfied.

(c) Accommodation

[271] The nub of this matter is that the Applicant does not agree that the assessment of downstream effects required of Nalcor was adequate, that the conditions of the Authorization, specifically the EEM Plan, do not remedy this and, therefore, that its concerns in this regard were not accommodated. On one level this is a technical, scientific issue comparing the baseline data collection, modelling, assessment, research and monitoring that Canada deems necessary to that which the Applicant deems necessary. It is not the role of this Court to make such a determination (*Ekuanitshit FC* at para 94, appeal dismissed by FCA, leave to appeal to SCC refused).

[272] However, the questions that are before this Court are whether any duty to accommodate arose, whether any such duty was it met in these circumstances, and, whether Canada, as represented by the Minister, had a reasonable basis upon which to decide to issue the Authorization in the form that he did.

[273] In *Little Salmon*, where the definition of consult was similar to that found in the Agreement, Justice Binnie stated:

> [14] The delegated statutory decision maker was the appellant David Beckman, the Director of the Agriculture Branch of the territorial Department of Energy, Mines and Resources. He was authorized, subject to the treaty provisions, to issue land grants to non-settlement lands under the *Lands Act*, R.S.Y. 2002, c. 132, and the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17. The First Nation argues that in exercising his discretion to approve the grant the Director was required to have regard to First Nation's concerns and to engage in consultation. This is true. The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise. The Paulsen application had been pending almost three years before it was eventually approved. It was a relatively minor parcel of 65 hectares whose agricultural use, according to the advice received by the Director (and which he was entitled to accept), would not have any significant adverse effect on First Nation's interests.

[274] And, in respect of the duty to accommodate:

> [81] The First Nation's argument is that in this case the legal requirement was not only procedural consultation but substantive accommodation. *Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation. The test is not, as sometimes seemed to be suggested in argument, a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the exercise of the Director's discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes. [Emphasis in original]

[275] In this case, as in *Little Salmon*, the Agreement is silent as to accommodation. Here the circumstances differ somewhat from those which prevailed in *Little Salmon* as the potential consequences are more serious and the Agreement itself contemplates the JRP process and further consultation with respect to permitting. And, in my view, although there is no requirement for substantive accommodation, the common law principles discussed can be utilized to interpret what, if any accommodation is required in these circumstances.

[276] In this regard, it is my view that Canada was obliged to consider, take into account and respond to the issue, accommodating the Applicant, where and to the extent possible, by taking appropriate steps to avoid or mitigate significant adverse effects or irreparable harm. To an extent, accommodation and reasonableness are related. The consultation process must serve to properly inform the Minister's decision i.e., his decision must be reasonable. This would include accommodation to the extent possible, which is also a question of what is reasonable in the circumstances based on properly informed considerations and competing interests.

[277] It is also of note that the parties do not suggest that there was no duty to accommodate in this case.

[278] The Applicant in its Phase 4 and 5 submissions identified four recommendations that it stated would help to mitigate impacts on Inuit and Inuit rights: i) its representation on a high-level management structure; ii) funding for it to conduct and lead baseline research and monitoring of the Lake Melville system, including a large scale, comprehensive understanding of the downstream environments (biophysical, cultural, socioeconomic and health impacts); iii)

framework language as a condition of permitting to effect a mechanism for compensation should impacts arise, including harvesting losses and loss of cultural practices resulting from events with significant environmental effects on Inuit or Inuit rights that result from the Project, such as an increase in mercury levels; and, iv) full clearing of the reservoir area including trees and the top layer of organic matter.

[279] As these are the mitigation or accommodation measures proposed by the Applicant itself, I will address them each below.

vi. High Level Management Structure

[280] As to the Applicant's request for Inuit representation on a high level management structure for the Project, which would be comprised of the Applicant, the Innu Nation, the Province and Canada, this was first raised by the Applicant in Phase 4 by way of its November 11, 2011 document, *Nunatsiavut Government Response to Panel Report*, as a way to mitigate impacts on Inuit and Inuit rights and to allow Inuit to constructively contribute to the Project. As indicated above, this was very belatedly responded to by DFO's letter of June 28, 2013. There DFO advised that a high level management structure was not contemplated for the Project but that the Applicant would be consulted by DFO and TC in the context of their regulatory functions and that DFO had consulted with the Applicant on the EEM and FHC Plans it was requiring as conditions of the *Fisheries Act* authorizations.

[281] There is, in my view, a requirement of responsiveness on the part of Canada as part of its duty to consult and accommodate (*Taku River* at paras 25, 32). Canada's response to the

Applicant's request for participation on a high level management structure was certainly not timely, coming some 19 months after the Applicant raised the issue in response to the JRP Report. However, it ultimately did respond and provided an explanation as to why the proposal was not adopted. Further, the Applicant has not challenged Canada's position nor indicated why not implementing a high level management structure was not reasonable in these circumstances. Thus, while the consultation process was not perfect, I see no basis for a finding that the Applicant was not adequately accommodated in this regard (*Ekuanitshit FC* at para 31).

vii. Comprehensive Downstream Assessment

[282] Upon review of the record, it is apparent that there is a fundamental difference of opinion between the Applicant and Canada as to what is scientifically necessary to address, and therefore to accommodate, the Applicant's concerns regarding potential downstream effects, including methylmercury bioaccumulation.

[283] In this regard, it is essential to recall that the JRP dealt extensively with methylmercury bioaccumulation in its report.

[284] In Chapter 6, Aquatic Environment, the JRP 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 modelling predicted that mercury concentrations in the reservoir would peak within 5 years after flooding, declining to baseline levels within 35 years.

[285] 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.

[286] 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 to 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.

[287] Section 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.

[288] 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 would 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.

[289] Nalcor stated that a more extensive assessment of cumulative effects of mercury levels associated with the Churchill Falls hydroelectric 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 modelling approach provided the necessary level of predictive capacity required to determine downstream methylmercury concentrations. This would be backed up by Nalcor's commitment to monitoring and follow up to verify predictions, 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.

[290] 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 from the assessment area. The Applicant submitted that before any definitive conclusions could be reached on any trends in downstream methylmercury levels or their measurable effects, Nalcor should collect more data on suspended solids and fish and seal movements and conduct a better analysis of mercury.

[291] 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.

[292] In its conclusions and recommendations the JRP acknowledged that there was limited literature on downstream, estuarine effects on hydro projects in a boreal region, and limited applicability 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 out 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.

(JRP Report, pp 88-89)

[293] 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 in order to reduce uncertainty regarding both the potential ecological and mercury effects downstream.

[294] Thus, the intent of Recommendation 6.7 was to obtain a greater level of certainty about mercury effects downstream prior to impoundment.

[295] Canada's Response stated that it considered whether the significant adverse environmental effects of the Project could be justified in the circumstances, taking into account 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 that 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 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*.

[296] Canada's Response in relation to Recommendation 6.7 stated that:

> 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 asses changes to downstream fish habitat.

(Applicant's Record, Vol II, p 749)

[297] There is no question that Canada's 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.

[298] 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, methymercury 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 of project impacts 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 to 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.
>
> …

[299] 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 hydroelectric developments 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 hydroelectric developments. And while baseline data had been collected since 2001, it had been for the purpose of developing the model used to predict post-project concentrations.

[300] The EEM Plan study area for mercury sampling includes the Muskrat Falls reservoir and downstream out to Goose Bay/Lake Melville area. 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".

[301] The EEM Plan states that baseline total mercury concentrations in fish had 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 to collect as much data as possible from each fish captured. A graph shows the mean mercury concentrations that have been measured in the mainstem below Muskrat Falls for nine types of fish to date, while another shows mean mercury concentrations measured in Goose Bay and Lake Melville for 11 types of fish. Similar information concerning seals is provided.

[302] As noted above, Canada's Response does not fully adopt Recommendation 6.7. The Applicant puts forward no authority that suggests that Canada is bound to accept recommendations made by the JRP as part of the EA process. However, 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, in my view, simply be ignored or rejected without reasons. To do so would be to entirely undermine the EA process and its use by Canada to fulfill its consultation obligations.

[303] 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. One of these adverse effects was, of course, the impacts on the Applicant if consumption advisories are required.

[304] In short, 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.

[305] And, while 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 modelling and data gathered by Nalcor 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.

[306] The consultation process demonstrates that Canada was fully informed of the Applicant's view as to the extent of the downstream assessment that was required. However, it is apparent that it did not agree with this view. The May 30, 2013 letter from DFO, which responded to the Applicant's comments on the EEM Plan, addressed 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, which was collected in 2011 and 2012 and would continue to be collected prior to impoundment.

[307] Importantly, it also explained that the EEM Plan was to verify specific predictions made by a proponent during an EA, especially where there may be uncertainty about the severity or extent of a possible impact. And significantly, that Nalcor's EEM Plan addressed those predictions for which DFO considered monitoring to be required for verification, including in relation to methylmercury bioaccumulation.

[308] In written examination, Finn was asked if proper prediction of downstream impacts required an understanding of how the specific downstream ecological system in question works. And, if not, why not. He responded that scientifically defensible predictions about downstream impacts on fish and fish habitat can be made using a combination of baseline sampling and studies in the area to be affected, scientific literature, modelling, and comparison with other projects, local knowledge, and other information. He added that as of the date of his response,

baseline information downstream into Lake Melville had been compiled for three years, and would continue to be compiled for the next three years until impoundment of the Muskrat Falls reservoir. He stated that Lake Melville is understood sufficiently for the purpose of assessing predictions about potential impacts by the project on the downstream aquatic environment.

[309] 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 Applicant 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.

[310] 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).

[311] In the context of accommodation, the Authorization effected the EEM Plan. The Applicant did not provide substantial comments on the EEM Plan and does not identify how it

was not accommodated in this regard other than as described above. Nor does it take issue with any other aspect of the Authorization.

[312] Canada submits that based on the comments that were received with respect to the EEM Plan, DFO required Nalcor to add additional details on the protocols for sampling and analysis of fish and seals for methylmercury currently set out in baseline monitoring reports and that this was accommodation of the Applicant's concerns. A review of a black line version of the EEM Plan (Bennett Affidavit sworn November 25, 2013, Nalcor's Record, Vol 10, Tab 2) indicates that these changes really were little more than "additional details". The changes to s 2.5, Mercury Bioaccumulation, provide clarification of descriptions and made only a couple of substantive changes, being that additional fish samples will be collected and analysed for mercury body burden during pre-inundation, and seals will be analyzed for trophic feeding pattern.

[313] I agree with the Applicant's view that these changes were modest. However, in the circumstances described above, this does not amount to a failure of the duty to accommodate.

[314] As to the Applicant's funding request for the study that it was carrying out by way of ArcticNet, in its letter of May 30, 2013 DFO stated that it typically sets out monitoring and reporting requirements that a proponent must meet but does not specify who a proponent is to engage to carry this out. As stated above, accommodation does not require agreement, nor do I see any basis on which to find that Canada was obliged to direct Nalcor as to who it was to engage to carry out the required monitoring as an accommodation measure.

viii. Framework Language for Compensation

[315] As to the Applicant's recommendation that framework language be incorporated as a condition of permitting to effect a mechanism for compensation should impacts arise, DFO advised the Applicant by its letter of June 28, 2013 that the requested framework language would not be included as a condition of the authorizations or approvals as it would not be enforceable as a condition under the *Fisheries Act* or the *NWPA*. The Applicant has not challenged that position.

ix. Full Clearing

[316] As to the proposed mitigation measure of full clearing of the reservoir, including the removal of all trees and the top layer of organic matter, it should first be noted that the JRP addressed reservoir preparation both in Chapter 4, Project Need and Alternatives, and Chapter 6, Aquatic Environment.

[317] In Chapter 4 the JRP described Nalcor's submissions on the environmental, technical and economic reasoning for three alternative clearing scenarios: no clearing, full clearing and 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 and 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 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 Applicant submitted that Nalcor must clear wood and brush within the reservoir boundaries to decrease methylmercury contamination within and downstream of the Project area.

[318] 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 operating 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.

[319] The JRP listed the factors it considered to be particularly relevant in reaching its conclusions on alternate means of reservoir preparation. It also 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 Natural 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.

[320] 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, that Nalcor be required to apply its full clearing reservoir preparation option to that reservoir.

[321] In Chapter 6, the JRP also addressed reservoir clearing and described the participants' views. Nalcor stated that mobilization of methylmercury in the reservoirs is an unavoidable impact of hydroelectric projects and that the "full clearing" option 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's recommended 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.

[322] NRC pointed out that development of knowledge about the methylmercury problem 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.

[323] 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.

RECOMMENDATION 6.5 Pilot study for methylmercury mitigation through soil removal

The Panel recommends that Natural Resources Canada, in consultation with Nalcor and, if possible, other hydroelectricity developers in Canada, carry out a pilot study to determine (a) the technical, economic and environmental feasibility of mitigating the production of methylmercury in reservoirs by removing vegetation and soils in the drawdown zone, and (b) the effectiveness of this mitigation measure. The pilot study should take place in a location where the relevant parameters can be effectively controlled (i.e. not in the Lower Churchill watershed) and every effort should be made to complete the pilot before sanction decisions are made for Gull Island. If the results of the pilot study are positive, Nalcor should undertake to employ this mitigation measure in Gull Island to the extent possible and monitor the results.

(JRP Report, p 74)

[324] Recommendation 6.5 did not pertain to the Muskrat Falls reservoir.

[325] Canada's Response to Recommendation 4.5 was to note that it was directed to Nalcor's operations as regulated by the Province but that Canada would work with the parties as required. The Applicant has not challenged that jurisdictional finding in this application for judicial review. If Canada did not have jurisdiction over clear cutting then its ability to accommodate the Applicant in that regard would be similarly constrained. On this basis it was reasonable for Canada not to have done so.

[326] It is also of note that, despite the fact that the Province elected the partial clearing option in March 2012, the Applicant did not subsequently raise the issue of reservoir clearing as a mitigation measure until July 2, 2013, seven days before the issuance of the Authorization. This was also when the issue of soil removal was raised by the Applicant for the first time. In its letter to the Minister, the Applicant stated that while the total elimination of increased mercury and methylmercury concentrations downstream may be impossible, the primary mitigation measure that could be taken was full clearing of the reservoir area, including trees and the top layer of organic matter, and that a first step towards accommodation of Inuit concerns would be to require this. The Minister responded to this submission in his August 27, 2013 letter, noting that Canada's Response agreed with the intent of the JRP recommendations on the issue but did not commit to undertaking a pilot study on the removal of organic matter or other recommended actions in this regard, and restated that requirements relating to clear cutting of vegetation fall under provincial legislation.

[327] While it would assuredly have been preferable for the Minister to have responded to the Applicant's submission on full clearing and the removal of the top layer of organic matter prior to the issuance of the Authorization, the late response is not fatal in this case given the six year consultation process and the late stage at which the Applicant raised the issue as a required mitigation step, as well as the Applicant's prior support of full clearing without stipulating that in its view this should include the removal of all trees and the top layer of organic matter.

[328] Ultimately, in the Province's Response to the JRP Report, also issued on March 15, 2012, the Province supported only "partial clearing" (*Nunatsiavut, 2015 NLTD* at para 55).

[329] As I stated above, Canada's decision not to accommodate the Applicant's request in this regard was reasonable given the jurisdictional limitation. It would also be defensible based on the fact that soil removal as a mitigation measure was acknowledged to be experimental and that the JRP did not recommend either removal of all trees or the removal of soil.

[330] However, 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 major concern of the Applicant 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 Applicant 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.

[331] However, as discussed above, Canada was satisfied that Nalcor's modelling, baseline data collection, sampling and monitoring, as enhanced by the EEM Plan that formed a part of the Authorization, were sufficient to address the uncertainty and risk and to identify any unpredicted increase of methylmercury levels in fish and seals. Therefore, its decision to issue the Authorization without accommodating the Applicant with respect to 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.

IV. Conclusion

[332] As a general conclusion on the issue of accommodation, I note that in *Little Salmon*, the Supreme Court of Canada stated the test of accommodation is not a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the Minister's exercise of discretion, taking into account all of the relevant interests and circumstances (also see *Haida* at paras 47-50).

[333] And as stated in *Katlodeeche*:

> [101] Sometimes a decision must be made even when an Aboriginal group asserts that consultation is not adequate, and to make a decision in these circumstances is not unreasonable (*Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2007 FC 567 (CanLII) [*Ahousaht*]). There is no duty to

> reach agreement, and no reason that a rapid conclusion to a consultation process will necessarily deprive an Aboriginal group of meaningful consultation when the preceding process itself has been lengthy and adequate (*Taku River*, above).

[334] Further, the Supreme Court of Canada in *Taku River* stated:

> [2] I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

[335] In this case, methylmercury bioaccumulation had been at the forefront of Project issues since 2006. At the JRP stage, the EIS Guidelines were amended to require Nalcor to determine whether the Project may be reasonably expected to have adverse environmental effects on the LISA for the purpose of determining the applicability of the Agreement and to require Nalcor to provide the rationale used to delineate study areas (Exhibit 21 to Chapman Affidavit, pp 2560 2570). That rationale was rejected by the Applicant, DFO and the JRP with the result that Nalcor was required to consider impacts downstream of Muskrat Falls including Goose Bay and Lake Melville.

[336] With respect to the effects downstream of Muskrat Falls, the JRP concluded that should consumption advisories be required in Goose Bay and Lake Melville, the Project would have significant adverse effects on the pursuit of traditional harvesting activities by Labrador Inuit, including the harvesting of country food. It extensively addressed consumption advisories, and their impact, in other parts of its report, including Chapters 8, 9, 10 and 13.

[337] The JRP fully considered the downstream impacts of methylmercury, including with respect to reservoir clearing as well as consumption advisories. Therefore, Canada fully understood both the risk that existed and the seriousness of that risk. It was informed that the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville would apply to traditional harvesting activities of Labrador Inuit if consumption advisories were required.

[338] Canada's Response specifically acknowledges that the JRP recommended further analysis to reduce uncertainty about downstream environmental effects. And, when considering whether the significant adverse environmental effects of the Project could be justified, it accounted for the potential adverse effects of the Project and the commitments that had already been made by the federal government and Nalcor. That is, Canada acknowledged and weighed the adverse impacts with the benefits and decided to proceed, requiring certain mitigation measures, environmental effects monitoring and adaptive management to be undertaken by Nalcor, as well as additional studies on downstream effects. It found that these measures would reduce the risks associated with the uncertainty about the success of mitigation measures.

[339] Thus, by way of Canada's Response, the potential risk of consumption advisories and related impact on the Applicant's rights, was, in effect, accepted when balanced against the Project benefits. By way of the Authorization and Condition 6 of the Authorization, Canada did impose some additional requirements on Nalcor as to sampling and monitoring for mercury levels in fish and seals. The Applicant feels that this was inadequate accommodation. However, this is based on its view that a holistic study of Lake Melville is required before an adequate EEM Plan can be effected. Canada does not share that view. While Canada could have done a far better job of explaining, at Phase 4 and 5 of the consultation, why it was satisfied with a monitoring program rather than requiring more predictive modelling before flooding, I cannot find that it has failed to meet its duty to accommodate.

[340] My view in this regard is somewhat shaped by the fact that throughout the JRP process, the only pro-active mitigation measure identified as potentially feasible was reservoir site preparation. The pre-impoundment assessment proposed by Recommendation 6.7 was not accompanied by the identification by the JRP of further pro-active mitigation measures that could be implemented if necessary. Re-active mitigation options were limited to monitoring followed by consumption advisories if required.

[341] Because the available mitigation measures pertaining to methylmercury bioaccumulation are limited, so too are the methods of accommodation. The JRP did not reject the concept and use of consumption advisories, which have previously been used in the Churchill River, albeit acknowledging that their use would have a significant adverse effect on fish and seal hunting in the area. The Applicant acknowledges in its May 30, 2013 letter that methylmercury levels

rising may be an inevitable consequence of inundation and that the only mitigation measure that could reduce the risk or concentration of mercury prior to flooding was reservoir clearing and soil removal. Even though the Applicant submits, in accordance with Recommendation 6.7, that further pre-impoundment predictive assessment should be carried out, it has not suggested that there are other mitigation measures that could be effected should that assessment indicate levels of methylmercury will be higher than those predicted by Nalcor. In the EEM Plan, DFO imposed the sampling and monitoring measures it deemed necessary to verify Nalcor's predictions, recognizing the uncertainties, as to downstream methylmercury in fish and seals. While the changes made to the EEM Plan as a result of the Phase 5 consultation did not greatly vary from what had been originally proposed, in all the circumstances, the accommodation and decision to issue the Authorization was reasonable.

[342] When appearing before me, Canada submitted that the Authorization also permits DFO to take other measures should Nalcor's monitoring and follow up indicate that its predictions are not verified. Specifically, Condition 1.1 of the Authorization stipulates that should the authorized impacts to fish and fish habitat be greater than previously assessed, DFO may suspend any works, undertakings, activities or operations associated with the Project and direct Nalcor to carry out any modifications, works or activities deemed necessary. Further, if DFO is of the view that greater impacts may occur than were contemplated, it may also modify or rescind the Authorization.

[343] Nalcor, of course, predicts that mercury bioaccumulation in fish and seals will not rise to levels that require consumption advisories. If they are wrong in this prediction and monitoring

indicates that levels are rising and that advisories will likely be required, it is not disputed that at that stage there is little that can be done to reduce the levels. When appearing before me, counsel for Canada suggested that if that were to occur, the Project could be halted. I do not think, at that stage of such a significant, multi-billion dollar construction project, there is even a remote possibility that the Project would be scrapped or mothballed because downstream mercury levels exceeded Nalcor's predictions. Counsel for Canada also suggests that if that were to occur, the Applicant could sue Nalcor for damages. That may be so.

[344] However, from my perspective, such an outcome would pertain to accommodation. If, down the road, monitoring establishes that mercury bioaccumulation in fish and seals is exceeding Nalcor's predictions and that consumption advisories will be required, then pursuant to the honour of the Crown, further consultation and accommodation will be required. At that time, Canada may well be required to accommodate the Applicant by providing financial redress, or causing it to be provided, or taking such other measures as may be appropriate.

[345] In summary, the Applicant was consulted and its concerns were reasonably identified and considered. They also were balanced reasonably with the potential impact of the Authorization on those concerns and with the competing societal concerns. While the Applicant did not obtain its desired outcome, the duty to consult was satisfied, the Applicant was adequately accommodated, and the decision to issue the Authorization was reasonable.

[346] Accordingly, the Applicant's motion for judicial review and the relief sought is dismissed. However, given the nature of the subject matter and that the question raised by the

Applicant concerning mercury bioaccumulation was an important one, there will be no order for costs against the Applicant regardless of its lack of success.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1347-13
STYLE OF CAUSE:	NUNATSIAVUT GOVERNMENT v ATTORNEY GENERAL OF CANADA (DEPARTMENT OF FISHERIES AND OCEANS) ET AL
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	OCTOBER 20-21, 2014
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	APRIL 17, 2015

APPEARANCES:

Randall J. Earle Raman Balakrishnan	FOR THE APPLICANT, NUNATSIAVUT GOVERNMENT
Reinhold M. Endres James Gunvaldsen-Klaassen	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA (DEPARTMENT OF FISHERIES AND OCEANS)
Rolf Pritchard Justin Melor	FOR THE SECOND RESPONDENT, HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
Maureen Killoran Thomas Gelbman	FOR THE THIRD RESPONDENT, NALCOR ENERGY

SOLICITORS OF RECORD:

O'Dea, Earle Law Offices Barristers and Solicitors St. John's, Newfoundland and Labrador	FOR THE APPLICANT, NUNATSIAVUT GOVERNMENT

William F. Pentney Deputy Attorney General of Canada St. John's, Newfoundland and Labrador	FOR THE RESPONDENT, ATTORNEY GENERAL OF CANADA (DEPARTMENT OF FISHERIES AND OCEANS)
Department of Justice St. John's, Newfoundland and Labrador	FOR THE SECOND RESPONDENT, HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR AS REPRESENTED BY THE MINISTER OF THE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
Osler, Hoskin & Harcourt LLP Barristers and Solicitors Calgary, Alberta	FOR THE THIRD RESPONDENT, NALCOR ENERGY

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 Nunatukavut[11], 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 JRP[12].
- 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 Panel[14] 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.

Federal Court Cour fédérale

Date: 20150818

Docket: T-1339-13

Citation: 2015 FC 981

Ottawa, Ontario, August 18, 2015

PRESENT: The Honourable Madam Justice Strickland

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

JUDGMENT AND REASONS

[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 I*]). 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 I* 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 Nuntukavut 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*, *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 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 (*Katlodeeche* 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), 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), 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 (*Katlodeeche* 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 co-operate 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 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*], 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 (*Katlodeeche* 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 Nishipiminan (Council of the Innu of Ekuanitshit): $55,850.25;
> - Fiducie Takuaikan (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, made 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*, *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)* (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 Minster 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 an 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

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.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1339-13
STYLE OF CAUSE:	NUNATUKAVUT COMMUNITY COUNCIL INC AND TODD RUSSELL, ON THEIR OWN BEHALVES AND ON BEHALF OF THE MEMBERS OF NUNATUKAVUT COMMUNITY COUNCIL INC v THE ATTORNEY GENERAL OF CANADA AND NALCOR ENERGY
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 2, 3, 4, 2015
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	AUGUST 18, 2015

APPEARANCES:

Derek Simon Jason Cooke	FOR THE APPLICANTS
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

SOLICITORS OF RECORD:

Burchells LLP Barristers and Solicitors Halifax, Nova Scotia	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA
Osler, Hoskin & Harcourt LLP Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENT, NALCOR ENERGY

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" (*MiningWatch 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 pronunciation 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 CEAA sets out the purposes of the Act:

Purposes	Objet
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	Commission d'évaluation environnementale
34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,	34. La commission, conformément à son mandat et aux règlements pris à cette fin :
(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;	(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) hold hearings in a manner that offers the public an opportunity to participate in the assessment;	(b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;
(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	(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) submit the report to the Minister and the responsible authority.	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:

Factors to be considered	Éléments à examiner
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.

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.

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:

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) the purpose of the project;

(a) les raisons d'être du projet;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

(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.

(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.

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

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; or	(a) à l'autorité responsable;
(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 CEAA 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**

APPEARANCES:

Lara Tessaro Robert Peterson	FOR THE APPLICANTS Grand Riverkeeper, Labrador Inc., Sierra Club of Canada
Charles O'Brien	FOR THE APPLICANTS NunatuKavut Community Council Inc.
Maureen Killoran Thomas Gelbman	FOR THE RESPONDENTS Nalcor Energy
Vincent Veilleux Bernard Letarte	FOR THE RESPONDENTS Attorney General of Canada Minister of Natural Resources Minister of Fisheries and Oceans Minister of Transport

SOLICITORS OF RECORD:

EcoJustice Canada Vancouver, British Columbia	FOR THE APPLICANTS Grand Riverkeeper, Labrador Inc., Sierra Club of Canada

Charles O'Brien Montréal, Quebec	FOR THE APPLICANTS NunatuKavut Community Council Inc.
Osler, Hoskin, Harcourt LLP Calgary, Alberta	FOR THE RESPONDENTS Nalcor Energy
Department of Justice Ottawa, Ontario	FOR THE RESPONDENTS Attorney General of Canada Minister of Natural Resources Minister of Fisheries and Oceans Minister of Transport