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.