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.

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REASONS FOR JUDGMENT

I. Background 4
A. The Project 4
B. The decision to subject the Project to a joint environmental assessment 4
C. The guidelines for the environmental impact assessment 6
II. The judge's decision 10
III. Issues 11
IV. Analysis 11
A. Did the judge err in finding that the decisions of the Governor in Council and the responsible authorities complied with the CEAA? 11
(1) Standard of review 12
(2) Reasonableness of the decisions of the Governor in Council and responsible authorities 15
(3) Conclusion 28
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? 29
(1) Standard of review 29
(2) The Crown's duty to consult 29
V. Conclusion 45

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

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