Federal Court Cour fédérale

Date: 20150417

Docket: T-1347-13

Citation: 2015 FC 492

Ottawa, Ontario, April 17, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NUNATSIAVUT GOVERNMENT

Applicant

and

ATTORNEY GENERAL OF CANADA (DEPARTMENT OF FISHERIES AND OCEANS)

Respondent

and

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

Second Respondent

and

NALCOR ENERGY

Third Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to ss 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c-7 ("*Federal Courts Act*"), by which the Applicant challenges the decision of the Minister of Fisheries and Oceans to issue Authorization No. 13-01-005 ("Authorization") to Nalcor Energy ("Nalcor"). The Authorization was issued on July 9, 2013 and, pursuant to ss 32(2)(c) and 35(2)(b) of the *Fisheries Act*, RSC 1985, c F-14 ("*Fisheries Act*"), it permits impacts to fish and fish habitat arising from the construction of the Muskrat Falls hydroelectric generation facility proposed by Nalcor for the lower Churchill River as part of the Lower Churchill Hydroelectric Generation Project in Labrador.

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

I. The Project

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

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

II. Factual Background

[5] On November 30, 2006 Nalcor submitted a project registration and description document for the Project with the Newfoundland and Labrador Department of Environment and Conservation ("NL DEC") and the Canadian Environmental Assessment Agency ("Agency"), to initiate the provincial and federal environmental assessment processes pursuant to the *Newfoundland and Labrador Environmental Protection Act*, SNL 2002, c E-14.2 ("*NL EPA*") and the *Canadian Environmental Assessment Act*, SC 1992, c 37 ("*CEAA*"). The Agency was responsible for coordinating federal Aboriginal consultation during the environmental assessment of the Project, and for acting as the Crown Consultation Coordinator as described in the *Consultation Framework* described below.

[6] Transport Canada ("TC") and DFO determined that an environmental assessment was required because, to proceed, the Project would require approval pursuant to s 5(1) of the *Navigable Waters Protection Act*, RSC 1985, c N-22 ("*NWPA*") as it involved dam construction, and an authorization pursuant to s 35(2) of the *Fisheries Act* as it would likely result in the harmful alteration, disruption or destruction of fish habitat, thereby triggering s 5(1)(d) of the *CEAA*. TC and DFO each identified themselves as a "responsible authority" ("RA") as defined in the *CEAA*, being a federal authority that is required to ensure that an environmental assessment ("EA") is conducted (*CEAA*, ss 2(1), 11(1)). Health Canada identified itself as being in possession of specialist or expert information or knowledge necessary to conduct the EA, as did Environment Canada ("EC"), Natural Resources Canada ("NRC"), and Aboriginal Affairs and Northern Development Canada (then Indian and Northern Affairs Canada).

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

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

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

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

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

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

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

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

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

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

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

[16] The EIS Guidelines described the EA as a process for identifying a Project's potential interactions with the environment, predicting environmental effects, identifying mitigation measures and evaluating the significance of residual environmental effects. The document also stated that if the Project proceeded, the EA process would provide the basis for setting out the requirements for monitoring and reporting to verify compliance with the terms and conditions of approval and the accuracy and effectiveness of predictions and mitigation measures (EIS Guidelines, s 2.1). Aboriginal and public participation, aboriginal traditional and community

knowledge, the precautionary principle (EIS, Guidelines, ss 2.2, 2.3 and 2.5) and other matters were identified as basic principles of an EA. Regarding consultation with Aboriginal groups, the EIS Guidelines stated:

> 4.8 Consultation with Aboriginal Groups and Communities
>
> The EIS shall demonstrate the Proponent's understanding of the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project.
>
> To assist in ensuring that the EIS provides the necessary information to address issues of potential concern to these groups, the Proponent shall consult with each group for the purpose of:
>
> (a) Familiarizing the group with the Project and its potential environmental effects;
>
> (b) Identifying any issues of concern regarding potential environmental effects of the Project; and
>
> (c) Identifying what actions the Proponent is proposing to take to address each issue identified, as appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

[24] The JRP Agreement required the Panel to conduct the EA in a manner that discharged the requirements of the *CEAA*, *NL EPA* and TOR. All JRP hearings were to be public and to provide for the participation of Aboriginal groups, the public, governments, Nalcor and other interested parties. Upon completion of the EA, the JRP was to prepare a report which would address the factors to be considered under s 16 of the *CEAA* and s 65 of the *NL EPA*, set out the rationale, conclusions and recommendations of the JRP relating to the EA, including any mitigation measures and follow-up program, and include a summary of issues raised by Aboriginal groups, the public, governments and other interested parties (JRP Agreement, ss 4.2, 4.3 and 6.3).

[25] The TOR set out the scope of the EA and the steps in the EA process. With respect to the scope, it specifically addressed Aboriginal rights as follows:

> Aboriginal Rights Considerations
>
> The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.
>
> The Panel shall include in its Report:
>
> 1. information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.
>
> 2. any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.
>
> The Panel will not have a mandate to make any determinations or interpretations of:
>
> - the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
> - the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
> - whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
> - the scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

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

Phase 2: JRP Process Leading to Hearings

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

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

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

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

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

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

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

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

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

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

Phase 3: Hearings and Preparation of the JRP Report

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

[37] The JRP Report was issued on August 25, 2011. It is a comprehensive, 355 page document which describes the process leading to its issuance and, for each topic addressed in the report, sets out Nalcor's views, the views of the participants and the JRP's conclusions and recommendation(s) concerning that topic. In total, the JRP made 83 recommendations, should the Project be approved. In Chapter 17, the Panel's Concluding Comments, and as summarized in the executive summary, the JRP reported that it had determined that the Project would be likely to have significant adverse effects in the areas of: fish habitat and fish assemblage; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville should consumption advisories be required; and, culture and heritage. It also identified a range of potential Project benefits, as well as crucial additional information required before the Project should proceed in the areas of long-term financial returns, energy

alternatives to serve island needs, and reducing uncertainty about downstream effects. The JRP noted that it did not make the final decision about whether the Project should proceed but that government decision-makers would have to weigh all effects, risks and uncertainties in order to decide whether the Project was justified in the circumstances and should proceed in light of the significant adverse environmental effects identified by the JRP.

[38] Chapter 6, Aquatic Environment, is particularly relevant to the issues raised by the Applicant in this application. There the JRP described the views of Nalcor and the participants on a number of issues including the fate of mercury and downstream effects. It identified the key issues that emerged from the review process which included: the effects of reservoir preparation; the fate of methylmercury in reservoirs; downstream effects below Muskrat Falls and the likelihood that Project effects, including bioaccumulation of mercury, would be seen in Goose Bay or Lake Melville; and follow-up monitoring. Related to this are findings in Chapters 4, 8, 9, 10 and 13.

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

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

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

Phase 4: Consultation on the JRP Report

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

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

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

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

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

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

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

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

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

i. **Inuit representation on management structure**

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

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

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

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

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

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

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

[50] On January 24, 2012 the Agency prepared an internal report entitled *Lower Churchill Hydroelectric Generation Project: Report on Aboriginal Consultation Associated with the Environmental Assessment* ("*Aboriginal Consultation Report*") which states that it describes how the federal government consulted with Aboriginal groups in the context of the EA, in particular, how it had relied on the JRP process, to the extent possible, to assist in discharging its legal duty to consult. The report states that it describes the positions of the Aboriginal groups with respect to how the potential adverse environmental effects of the proposed Project may impact their potential or established Aboriginal or treaty rights, which information was derived from presentations the Aboriginal groups made to the JRP and from comments made by the groups directly to federal government department officials.

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

[52] The *Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador* ("Canada's Response"), which responded to the JRP Report and its recommendations, was approved by the Governor General, on the recommendation of the Minister of Fisheries and Oceans, pursuant to s 37(1.1)(a) of the *CEAA*, by Order-in-Council dated March 12, 2012. It was published on the Agency Registry on March 15, 2012. The Province's response was issued on the same day.

[53] Canada's Response states that it was prepared by the RAs (DFO, TC and NRC) pursuant to s 37(1.1) of the *CEAA*, in consultation with other federal agencies. It states that in preparing the response, the RAs reviewed the JRP Report, as well as a subsequent independent supply report commissioned by Nalcor, an economic analysis of the Project that was conducted by Canada, and comments submitted by Aboriginal groups and other stakeholders during and following the JRP process.

[54] In considering whether the significant adverse environmental effects of the Project could be justified in the circumstances, Canada's Response stated that it accounted for the potential adverse effects of the Project, the commitments that had been made by the federal government in relation to the recommendations provided in the JRP Report, and the commitments made by Nalcor in its EIS and during the JRP hearings. Canada would require certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as require additional studies on downstream effects. This would be done through inclusion of the requirements in federal authorizations and approvals. Canada's Response stated that ensuring that those commitments were carried out would minimize the negative effects of the Project and reduce the risks associated with the uncertainty about the success of mitigation measures.

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

[56] Canada determined that the expected significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects of the Project identified in the JRP Report:

> Therefore the Government of Canada concludes that the significant adverse environmental effects of the Lower Churchill Hydroelectric Generation Project are justified by the benefits of the Lower Churchill Hydroelectric Generation Project.
>
> (Canada's Response, p 8)

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

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

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

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

[60] On March 16, 2012, in conformity with the Governor-in-Council's approval of Canada's Response, the three RAs issued their course of action decision pursuant to s 37(1) of the *CEAA* ("Course of Action Decision"). The Course of Action Decision stated that the RAs may exercise any power or perform any duty or function with respect to the Project because, after taking into consideration the JRP Report and the implementation of appropriate mitigation measures, the RAs were of the opinion that the Project is likely to cause significant adverse environmental effects that can be justified in the circumstances. The Course of Action Decision noted that a follow-up program to verify the accuracy of the EA and/or determine the effectiveness of any mitigation measures was required for the Project, and that the estimated dates of the follow-up program were October 1, 2012 to October 1, 2037.

Phase 5: Regulatory Permitting

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

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

[63] On July 9, 2012 DFO wrote to the Applicant stating that, pursuant to the *Consultation Framework*, the federal government was entering the regulatory permitting phase (Phase 5) for the Project and wished to continue consultations respecting specific regulatory decisions, approvals or actions that may have potential adverse impacts on their asserted Aboriginal rights or title. DFO advised that the federal government anticipated issuing three kinds of approvals: the ss 32 and 35(2) *Fisheries Act* authorizations from DFO and the s 5 approval under the *NWPA* from TC. DFO proposed to conduct consultations during the regulatory phase in accordance with an attached *Proposed Protocol for Regulatory Phase Aboriginal Consultation Lower Churchill Generation Project* ("*Regulatory Phase Protocol*"), and sought comments on the proposed process within 14 days.

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

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

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

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

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

[68] A February 5, 2013 DFO memorandum for the DFO Regional Director General addressed the status of aboriginal consultations for Phase 5. Amongst other things, it noted that comments received on the proposed protocol indicated that some Aboriginal groups still had concerns about the EA that they felt had not been addressed. The majority of these related to impacts on Aboriginal rights and title, caribou, cumulative impacts, and the lack of land and resource use studies. "Close the loop" letters addressing the outstanding EA issues were to be sent to Aboriginal groups prior to sending the finalized *Regulatory Phase Protocol*.

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

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

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

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

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

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

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

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

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

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

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

[77] Following various communications between Nalcor and DFO, Nalcor submitted its revised, final EEM Plan and FHC Plan on June 26, 2013 and DFO advised Nalcor the next day that these were acceptable to DFO and would be attached as conditions to the Authorization.

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

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

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

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

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

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

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

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

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

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

[84] On July 9, 2013 the Authorization for the Project was issued to Nalcor, pursuant to ss 32(2)(c) and 35(2)(b) of the *Fisheries Act*, for the harmful alteration, disruption or destruction of fish habitat and the killing of fish. It is this Authorization that the Applicant has sought to have judicially reviewed.

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

- Condition 1.1 states that if, in DFO's opinion, the authorized impacts to fish and fish habitat are greater than previously assessed, DFO may suspend any works, undertakings, activities and/or operations associated with the proposed development to avoid or mitigate adverse impacts to fish and fish habitat. DFO can also direct Nalcor to carry out any modifications, works or activities necessary to avoid or mitigate such further adverse impacts. If DFO is of the view that greater impacts may occur than were contemplated by the parties, then it may also modify or rescind the Authorization.

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

- Condition 6 requires Nalcor to undertake an EEM program, as outlined in the EEM Plan, to monitor and verify the predicted impacts of the Project from a fish and fish habitat perspective including Project-related downstream effects, methylmercury bioaccumulation in fish, and, fish entrainment at the Muskrat Falls facility, in accordance with conditions 6.1-6.5. This includes annual monitoring of methylmercury bioaccumulation to determine levels in resident fish species, including seals, both within the reservoir and downstream as per the established monitoring schedule, as well as a requirement to record and report peak levels and subsequent decline to background levels (Condition 6.3). There are also a number of reporting mechanisms as well, including annual reports and comprehensive EEM Plan reports every 5th year starting in 2023.

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

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

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

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

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

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

III. Issues

[90] The Applicant submits that the issue is:

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

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

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

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

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

[92] Nalcor submits that the issues are:

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

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

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

Issue 1: What is the Standard of Review?

Applicant's Position

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

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

Canada's Position

[96] Canada agrees that the question of the content of the duty to consult is reviewable on the correctness standard (*Innu of Ekuanitshit v Canada (Attorney General)*, 2013 FC 418 at para 97 [*Ekuanitshit FC*]; *Little Salmon* at para 48) but submits that the question of whether Canada's efforts satisfied its duty to consult is reviewable on the reasonableness standard (*Ekuanitshit FC* at para 97; *Katlodeeche First Nation v Canada (Attorney General)*, 2013 FC 458 at paras 126-127 [*Katlodeeche*]; *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at paras 37-39, leave to appeal to SCC refused, [2014] SCCA No 62 [*Cold Lake*]).

Nalcor's Position

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

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

Analysis

[99] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the Court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]; *Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 38, leave to appeal to SCC refused [2014] SCCA No 466 [*Ekuanitshit FCA*]).

[100] The standard of review applicable to the duty to consult was addressed by the Supreme Court of Canada in *Haida*, which stated that:

> [61] On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The

> existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> [62] The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> [63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[101] Until the Supreme Court's subsequent decision in *Little Salmon*, the above reference in *Haida* was consistently interpreted as meaning that the scope or extent of the duty to consult (its content) should be reviewed on the standard of correctness, whereas the adequacy of the process of consultation requires an analysis of the factual context and should be reviewed on a standard

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

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

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

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

> [48] In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?
>
> [Emphasis added]

[104] In discussing the analysis of the adequacy of consultation, the Supreme Court stated, in part:

> [72] The adequacy of the consultation was the subject of the First Nation's cross-appeal. The adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

[105] In *Ekuanitshit FC*, affirmed 2014 FCA 189, leave to appeal to SCC refused [2014] SCCA No 466, which also concerned the subject Project, this Court dealt with a challenge to the lawfulness of the March 12, 2012 Order in Council approving Canada's Response to the JRP Report and the related Course of Action Decision. In addressing the question of whether the Innu of Ekuanitshit had been properly consulted and accommodated, Justice Scott, relying on *Haida*, found that the consensus in the case law was that a question regarding the existence and content of the duty to consult is a legal question that attracts the standard of correctness. On the other hand, a decision as to whether the efforts of the Crown satisfied its duty to consult in a particular situation involves assessing the facts of the case as against the content of the duty which is a mixed question of fact and law to be reviewed on the standard of reasonableness (*Ekuanitshit FC* at para 98).

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

> [82] The judge noted in his reasons that issues relating to the existence and content of the duty to consult attract a standard of correctness. He further asserted that a decision as to whether the Crown met its duty to consult is reviewable on a reasonableness standard, as it is a mixed question of fact and law. In the present instance, the parties acknowledge that the Crown recognized its duty to consult from the outset. The issue is therefore not whether

> the Crown has a duty to consult but rather whether the efforts of the Crown met the requirements of its duty to consult. As Justice Binnie writes in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at paragraphs 48 and 77 [*Little Salmon*]: "the standard of review in that respect, including the adequacy of the consultation, is correctness", but nonetheless it "must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied".
>
> [83] It is through that lens that the following issues will be examined.

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

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

[108] In *White River First Nation v Yukon (Minister of Energy, Mines and Resources)*, 2013 YKSC 66 [*White River*], the Yukon Supreme Court referenced paragraphs 61 to 63 of *Haida* as well as paragraph 48 of *Little Salmon* and concluded:

> [92] The standard of review may be correctness if the issue relates to the legal and constitutional obligations of the Director, i.e., the existence and extent of the duty to consult and accommodate. On the other hand, the process of consultation, because it depends on the government's reasonable efforts to inform and consult, is reviewed on a reasonableness standard.

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

> [36] Parks submits that the reviewing judge erred in applying the correctness standard to the question of the adequacy of the consultation process and that both the consultation process and decision should be reviewed for reasonableness.
>
> [37] We agree. In *Haida*, the court held that the existence and extent of the duty to consult or accommodate (including the assessment of the seriousness of the claim and the extent of adverse impact) are questions of law, subject to review on a standard of correctness: at para 61. However, where these questions are infused with questions of fact or mixed fact and law, some deference to the initial adjudicator may be appropriate. With respect to the consultation process itself, "[w]hat is required is not perfection, but reasonableness": at para 62. Chief Justice McLachlin said:
>
> > Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation (at para 63).

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

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

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

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

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

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

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

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

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

> process which will itself, to an extent, determine the correctness of the scope. In other words, if the process did not accomplish a reasonable result, then it was probably carried out pursuant to an incorrect assessment of its proper scope.
>
> [106] One of the distinguishing features of this case is that, from at least the Crown's perspective, the consultation process is fluid and ongoing. From the perspective of the DTFN, however, that cannot cure the fact that it started out on the wrong foot because of a scope assessment that was wrong in law, judged on the correctness standard.
>
> [107] It is, however, clear to me from the evidence that the Crown's determination of the extent and scope of its duty to consult was inextricably bound up with its assessment of the underlying question of the direct and potential impact of the 21 tenure sales on the DTFN's treaty rights in the Key Response Area. This question turns on factual analyses, as indicated in the competing impact/disturbance reports. Thus, as suggested above, the issue of the scope and extent of the duty to consult in this case is intertwined with the issue of the adequacy of the consultation.
>
> [108] Whether a duty to consult and, if indicated, to accommodate existed is clearly a question of law, and was never in doubt in this case. Not only did the Crown acknowledge the existence of such a duty throughout, but the Crown had also entered into a Consultation Agreement with the DTFN aimed at covering the very sort of situation that arose. But when it comes to the Crown's assessment of the scope and extent of that duty, I conclude that in the circumstances of this case, the "correctness" of the Crown's assessment depends upon the "reasonableness" of that assessment's underpinning. We have a question of mixed law and fact so the standard, in effect, becomes one of reasonableness as noted in the passage from *Haida Nation* quoted above.

[113] It is clear from the above jurisprudence that the existence and extent of the duty to consult or accommodate is to be assessed on the correctness standard. However, even there, where the extent of the duty is premised on an assessment of the facts, deference may be owed and the standard of review is likely to be reasonableness (*Haida* at para 61).

[114] As to the adequacy of the process, based on *Haida*, *Ekuanitshit FCA*, *White River* and *Cold Lake*, I am not convinced that *Little Salmon* was intended to alter, in every case, the standard of review with respect to the question of whether the Crown adequately consulted and accommodated to one of correctness.

[115] In determining the extent of the duty to consult, the Crown is obliged to identify the applicable legal and constitutional limits, such as the specific treaty rights, legislative rights, common law rights and the administrative and constitutional law applicable to that case. That is, the Crown must correctly identify the legal parameters of the content of the duty to consult in order to also properly identify what will comprise adequate consultation. To proceed without having done so would be an error of law. However, if those parameters are correctly identified, then the adequacy of the subsequent process of consultation employed would remain a question of reasonableness. This view can be seen as consistent with both *Haida* and *Little Salmon*.

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

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

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

[119] Where the standard of review is correctness, as is the case with respect to the extent of the duty, no deference is owed to the Crown (*Dunsmuir* at para 34; *Little Salmon* at para 48).

[120] Where the standard of review is reasonableness, as is the case with respect to the adequacy of the consultation and accommodation, this Court's review is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paras 47-48; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). As stated by Justice de Montigny in *Ka'a'Gee Tu #2*, perfection is not required when assessing the conduct of Crown officials. If reasonable efforts have been made to consult and accommodate and the result is within the range of possible, acceptable outcomes which are defensible in respect of the

facts and the law, there will be no justification to intervene. Further, the focus should not be on the outcome but rather on the process of consultation and accommodation (paras 90-92).

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

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

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

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

Applicant's Submissions

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

Canada's Submissions

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

Nalcor's Submissions

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applicant's Position

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

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

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

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

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

Canada's Position

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

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

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

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

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

Nalcor's Position

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

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

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

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

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

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

Analysis

(i) The Agreement

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

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

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

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

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

whether the changes occur within or outside Canada;

…

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

…

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

…

2.11.1 The Agreement:

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

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

…

CHAPTER 11: ENVIRONMENTAL ASSESSMENT

11.1.1 In this chapter:

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

…

Part 11.2 General

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

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

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

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

...

Part 11.6 Federal Environmental Assessment Process

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

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

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

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

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

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

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

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

…

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

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

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

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

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

requirements recommended by the mediator or review panel.

Part 11.7 Monitoring

11.7.1 If a Project or an Undertaking that may reasonably be expected to have adverse Environmental Effects in the Labrador Inuit Settlement Area is allowed to proceed subject to a permit, licence or other authorization containing conditions that require Mitigation measures, the Nunatsiavut Government and the relevant Authorities, within their respective jurisdictions, shall:

(a) coordinate their responsibilities for Follow-up Programs to the extent possible; and

(b) in the exercise of their powers or the performance of their duties and functions, ensure that any Mitigation measures that they consider to be appropriate are implemented.

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

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

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

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

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

(ii) Scope of Duty to Consult at Common Law

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

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

[159] In *Haida*, which did not concern a treaty duty to consult, the Supreme Court of Canada held that the content of the duty to consult and accommodate varies with the circumstances. The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title claimed and the seriousness of the potential adverse effects on that right or title (para 39). At all stages good faith is required by both sides. The Crown must have the intention of substantially addressing Aboriginal concerns as they are raised through a meaningful process of consultation, however, there is no duty to agree (para 42). Further:

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

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

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

[46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations…

> [47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized *in R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".
>
> [48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> [49] This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise*":* *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

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

[160] In *Little Salmon*, the Supreme Court found that the adequacy of consultation must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied (para 72).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Issue 3: Was the Applicant Adequately Consulted and Accommodated?

A. Preliminary Issues

(i) Collateral Attack

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

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

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

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

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

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

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

[185] This Court in *Ekuanitshit FC*, affirmed by the Federal Court of Appeal, leave to appeal to SCC refused, was faced with an argument by Canada that the Innu of Ekuanitshit had filed their application for judicial review challenging the Order-in-Council approving Canada's Response and the Course of Action Decision before the federal government's consultation period had come to an end. At that time, the process was in Phase 5 of the *Consultation Framework*. This Court found that the judicial review at that stage of the federal government's consultation and accommodation process was premature because the acts that truly put the applicant's rights and interests at risk were those that required authorizations and approvals issued by DFO and TC. It was premature to evaluate the federal government's consultation process before those decisions were made (*Ekuanitshit FC* at paras 108-112). Regardless of that finding, the Court went on to assess the adequacy of the consultation up to the time that the application was filed and found that the Crown had satisfactorily fulfilled its duty to consult. The Federal Court of Appeal agreed with this, stating that:

> [108] With respect, I find it difficult to conclude that the judge erred in finding that the appellant had been adequately consulted prior to the government's order being issued. Phase V of the *Consultation Framework* confirms that the consultation process between the Crown and the Aboriginal people continues up to the issuance of licences by Transport Canada and Fisheries and Oceans. These licences will authorize Nalcor to undertake certain activities, including the construction of dams that could have consequences on the navigable waters under the *Navigable Waters Protection Act* or on fish habitat under the *Fisheries Act*. But we

> are not at that point yet. As confirmed and acknowledged by the lawyers of the Attorney General of Canada, the federal government's consultation has not been completed and will remain ongoing until the final phase, namely, the issuance of licences.
>
> (*Ekuanitshit FCA* at para 108)

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

[187] Further, in *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp (Nalcor Energy)*, 2011 NLTD(G) 44, the Nunatukavut Community Council, representing the Inuit Aboriginal people of central and southern Labrador, sought an interlocutory injunction to stop the JRP hearings until the court had dealt with its claim. In February 2011, Nunatukavut had sued Nalcor, Canada, the Province, the Agency and the five Panel members. It sought, amongst other things, a declaration that the defendants had breached their duty to consult with Nunatukavut and directions on how consultations should be conducted. Justice Handrigan of the Newfoundland and Labrador Supreme Court rejected the applicant's claim that it would suffer irreparable harm if the public hearings were not enjoined, as he disagreed that the consultation and accommodation to that stage had been deficient, and noted that there were still two phases following the hearings during which Nunatukavut could continue to be involved before the process would be finished.

[188] I would also note that the Applicant challenged a July 10, 2013 permit to alter a body of water issued by the Province with respect to the Project on the basis that the Province breached its duty to consult and accommodate the Applicant. The Supreme Court of Newfoundland and

Labrador, in *Nunatsiavut v Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1 [*Nunatsiavut, 2015 NLTD*], decided that matter subsequent to the hearing of the Applicant's judicial review application before me. That Court found that the conclusions of the EA provided an informed basis for subsequent regulatory decision-making as various permits are sought. Further, that the objection to the permit and to construction of the dam related to issues of mercury contamination were fully considered by the JRP and by the Province, although not to the Applicant's satisfaction, before the Province issued its Order-in-Council formally releasing the Project from the EA on March 15, 2012. Justice Orsborn was of the view that it was the decision to issue the Order-in-Council that should have been challenged, rather than a subsequent regulatory decision relating to the specifics of the Project construction. He stated that "… in the circumstances of this case, allowing issues relating directly to the response to the Joint Review Panel and the 2012 release Order to support a challenge to a later and separate issuance of a regulatory permit would be unfair" (para 114). For that reason he expressed no opinion on whether the Province's response to the JRP Report, the release Order itself suffered from any legal defect relating to consultation, accommodation or reasonableness.

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

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

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

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

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

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

(ii) Delegation of Authority

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

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

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

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

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

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

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

> [99] In *Taku River*, the Supreme Court held that participation in a forum created for other purposes, such as a social and environmental impact assessment process, may nevertheless satisfy the duty to consult if, *in substance*, an appropriate level of consultation is provided. This principle was recently explicitly reiterated in *Little Salmon* at paragraph 39 and in *Carrier Sekani* at paragraphs 55 to 58. The Supreme Court of Canada, per Justice Binnie, further teaches that, under the appropriate circumstances, the environmental assessment process provided under the *CEAA* may be applied by the federal government to carry out consultations and fulfill its duty to consult Aboriginal peoples (*Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557 at para. 45).
>
> [Emphasis in original]

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

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

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

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

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

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

B. Was the Applicant Adequately Consulted and Accommodated?

Applicant's Position

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

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

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

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

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

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

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

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

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

Canada's Position

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nalcor's Position

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

(a) Discrete Consultation Issues

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

i. Adequacy of Consultation in Phases 1-3

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

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

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

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

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

ii. Aboriginal Consultation Report

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

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

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

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

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

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

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

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

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

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

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

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

iii. Section 11.6.2 Procedure

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

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

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

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

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

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

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

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

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

iv. May 1, 2008 Letter

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

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

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

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

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

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

(b) Adequacy of Consultation prior to Issuance of Authorization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Accommodation

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

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

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

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

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

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

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

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

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

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

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

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

vi. High Level Management Structure

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

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

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

vii. Comprehensive Downstream Assessment

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

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

[284] In Chapter 6, Aquatic Environment, the JRP addressed a number of issues including methylmercury in the reservoirs and downstream. As to the fate of mercury in the reservoirs, the JRP set out the views of Nalcor and the participants. Nalcor included a description of how reservoir formation leads to the release of methylmercury into the aquatic environment. Specifically, that when soils in reservoir areas are flooded, bacterial breakdown of the vegetation causes methylation, a chemical process that converts inorganic mercury in the soils to

methylmercury, a more toxic form. Methylmercury then enters the aquatic ecosystem accumulating in aquatic animals mostly when they feed on organisms with elevated mercury. The concentration of methylmercury increases upward through the food chain (referred to as bioaccumulation) resulting in higher concentrations in predatory fish, in animals such as otters or seals that eat fish, and potentially in humans. Typically, as shown in experience from other reservoirs in boreal regions, mercury levels in fish peak 5 to 16 years after flooding and then gradually decrease to background levels over 30 or more years. Nalcor's modelling predicted that mercury concentrations in the reservoir would peak within 5 years after flooding, declining to baseline levels within 35 years.

[285] The JRP noted that Nalcor's proposed mitigation and monitoring related to methylmercury included monitoring fish mercury concentrations annually for the first 10 years following inundation to verify predictions. Monitoring frequency could then be adjusted, depending on results.

[286] As to the participants, the JRP noted that both EC and NRC concluded that Nalcor had modelled mercury increases in the lower Churchill River appropriately. DFO also stated that Nalcor's predictions about mercury levels were consistent with the current state of knowledge but questioned the accuracy of Nalcor's predictions regarding the magnitude and duration of methylmercury in the lower Churchill River. DFO therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream including at Goose Bay following reservoir creation. The frequency and timing of sampling should be sufficient to support a clear assessment of the magnitude and

timing of these changes and to inform determinations of risks to human health and implementation of related fisheries management measures. Further, that more baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

[287] Section 6.7 addressed downstream effects including flow dynamics, water quality, productivity and mercury. The JRP again set out Nalcor's position as well as those of the participants.

[288] Nalcor predicted that mercury levels would increase after impoundment in water and plankton downstream to the mouth of the river and into the Goose Bay narrows. Methylmercury levels would increase in fish downstream to and including Goose Bay, but levels would be lower compared to fish in the reservoirs with the exception of piscivorous fish feeding below the tailrace of Muskrat Falls. Mercury would not be detectable beyond Goose Bay because concentrations in the water would be gradually diluted, sediments would settle, and plankton and zooplankton would die-off before or at the saltwater interface. Effects of elevated mercury levels associated with piscivores feeding on entrained fish would only be seen fairly close to the tailrace area below Muskrat Falls. In any case, Nalcor predicted that at no time would fish methylmercury reach a level to affect fish health or behaviour at a population level. Peak methylmercury levels were expected to return to baseline levels within 35 years.

[289] Nalcor stated that a more extensive assessment of cumulative effects of mercury levels associated with the Churchill Falls hydroelectric project was not necessary. Nalcor

acknowledged some uncertainties associated with its modelling and the state of knowledge about bioaccumulation and the fate of mercury in the ecosystem that limited its ability to make accurate predictions of potential increases in methylmercury in Lake Melville. However, Nalcor said its methylmercury modelling in the downstream environment was sufficient for planning and assessment purposes. Further, that its modelling approach provided the necessary level of predictive capacity required to determine downstream methylmercury concentrations. This would be backed up by Nalcor's commitment to monitoring and follow up to verify predictions, address uncertainty and incorporate adaptive management. Nalcor's proposed mitigation measures included working with Aboriginal stakeholders to monitor mercury in fish and seals downstream of Muskrat Falls and collecting more baseline data on mercury levels in estuarine fish and seals downstream of Muskrat Falls and in Goose Bay.

[290] As to other participants, the JRP noted that they had raised concerns about the exclusion of Goose Bay and Lake Melville from the assessment area, changes to erosion and deposition downstream, mercury accumulation, including entrainment effects, in fish and seals, and changes to ice formation. DFO said that Nalcor had provided insufficient rationale for its decision to exclude Goose Bay and Lake Melville from the assessment area. The Applicant submitted that before any definitive conclusions could be reached on any trends in downstream methylmercury levels or their measurable effects, Nalcor should collect more data on suspended solids and fish and seal movements and conduct a better analysis of mercury.

[291] The JRP noted that DFO had released a research paper showing that mercury effects from the Churchill Falls project could be seen in several estuarine species (rainbow smelt, tomcod, sea

trout) in the waters of Lake Melville over 300 kilometres away from the Smallwood Reservoir. DFO expressed concern about the absence of downstream sampling of primary producers and macrobenthos because of their potential to bioaccumulate mercury. DFO therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream including at Goose Bay following reservoir creation. The frequency and timing of sampling should support a clear assessment of the magnitude and timing of these changes, and inform determinations of risks to human health and implementation of related fisheries management measures. More baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

[292] In its conclusions and recommendations the JRP acknowledged that there was limited literature on downstream, estuarine effects on hydro projects in a boreal region, and limited applicability of reports that were cited by participants, which lack of information it said was likely compounded by Nalcor's decision to place the study boundary at the mouth of the river and, therefore, not carry out baseline sampling in Lake Melville. As a result, the JRP stated that it could not confidently conclude what the ecological effects would be downstream of Muskrat Falls, particularly in the estuarine environment of Goose Bay and Lake Melville:

> The Panel concludes that Nalcor's assertion that there would be no measurable effect on levels of mercury in Goose Bay and Lake Melville has not been substantiated. Evidence of a long distance effect from the Churchill Falls project in estuarine species clearly indicate that mercury effects can cross from freshwater to saline environments, in spite of Nalcor's assertions to the contrary. The Panel also concludes that Nalcor did not carry out a full assessment of the fate of mercury in the downstream environment, including the potential pathways that could lead to mercury bioaccumulation in seals and the potential for cumulative effects of the Project

together with other sources of mercury in the environment. Because Nalcor did not acknowledge the risk that seals could be exposed to mercury from the Project, it did not address whether elevated mercury would represent any threat to seal health or reproduction.

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

The Panel is not convinced that all effects beyond the mouth of the river will be "nonmeasurable" as defined by Nalcor (within natural variability). The Panel concludes that downstream effects would likely be observed in Goose Bay over the long term caused by changes in sediment and nutrient supply and in water temperature. Effects in Lake Melville are more difficult to predict on the basis of existing information. The Panel acknowledges that there is difficulty in accurately predicting the scale of effects given the absence of long-term ecological studies of the effects of hydroelectric projects in northern environments on receiving waters. However, the Panel believes that this emphasizes the need for a precautionary approach, particularly because no feasible adaptive management measures have been identified to reverse either long-term adverse ecological changes or mercury contamination of renewable resources.

With the information before it, the Panel is unable to make a significance determination with respect to the risk of long-term alteration of ecological characteristics in the estuarine environment. The Panel concludes that there is a risk that mercury could bioaccumulate in fish and seals in Goose Bay and possibly in Lake Melville populations as well but would probably not represent a risk to the health of these species. The implications on health and land use are addressed elsewhere, but the following recommendation addresses the need to take a precautionary approach to reduce the uncertainty regarding both the potential ecological and mercury effects downstream.

RECOMMENDATION 6.7 Assessment of downstream effects

The Panel recommends that, if the Project is approved and before Nalcor is permitted to begin impoundment, Fisheries and Oceans Canada require Nalcor to carry out a comprehensive assessment of downstream effects including:

> - identifying all possible pathways for mercury throughout the food web, and incorporating lessons learned from the Churchill Falls project;
>
> - baseline mercury data collection in water, sediments and biota, (revised modelling taking into account additional pathways, and particularly mercury accumulation in the benthos) to predict the fate of mercury in the downstream environment;
>
> - quantification of the likely changes to the estuarine environment associated with reduction of sediment and nutrient inputs and temperature changes; and
>
> - identification of any additional mitigation or adaptive management measures.
>
> The results of this assessment should be reviewed by Fisheries and Oceans Canada and by an independent third-party expert or experts, and the revised predictions and review comments discussed at a forum to include participation by Aboriginal groups and stakeholders, in order to provide advice to Fisheries and Oceans Canada on next steps.
>
> (JRP Report, pp 88-89)

[293] It is important to consider the context of this Recommendation. The JRP, based on the information before it, was not able to make a significance determination with respect to the risk of long term alteration of ecological characteristics in the estuarine environment. However, it concluded that there was a risk of mercury bioaccumulation in fish and seals in Goose Bay and possibly Lake Melville. It made its Recommendation in order to reduce uncertainty regarding both the potential ecological and mercury effects downstream.

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

[295] Canada's Response stated that it considered whether the significant adverse environmental effects of the Project could be justified in the circumstances, taking into account Canada's commitments made in response to the JRP Recommendations, as well as those of Nalcor in the EIS and at the JRP hearings. Further, that Canada would require that certain mitigation measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as additional studies on downstream effects by way of requirements in federal authorizations and approvals. *Canada determined that ensuring those commitments were carried out minimized the negative effects of the Project and reduced the risks associated with the uncertainty about the success of the mitigation measures. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report*.

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

> The Government of Canada agrees with the intent of this recommendation and notes it is directed to Fisheries and Oceans Canada.
>
> As a condition of a subsection 35(2) authorization under the *Fisheries Act*, and prior to impoundment, Fisheries and Oceans Canada will require Nalcor to collect additional baseline data on bioaccumulation of methyl mercury in fish and on fish habitat downstream of Muskrat Falls.
>
> Fisheries and Oceans Canada will require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methyl mercury in fish (including seals) within the reservoirs and downstream, including the Goose Bay/Lake Melville area. Fisheries and Oceans Canada will also require that Nalcor carry out multi-year post-project monitoring and reporting downstream into Lake Melville on a variety of parameters including nutrients, primary production, fish habitat utilization and sediment transport in order to asses changes to downstream fish habitat.

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

[297] There is no question that Canada's Response does not fully adopt Recommendation 6.7. While the Recommendation suggests that there be further pre-impoundment assessment to better predict the levels of mercury in the downstream environment, that this assessment be reviewed by DFO and an independent third party expert(s), and, that the revised predictions be discussed at a forum, including Aboriginal groups, to advise DFO on "next steps", Canada's Response requires the pre-impoundment collection of additional baseline data and a comprehensive multi-year program to monitor and report on bioaccumulation of methylmercury in fish and seals within the reservoir and downstream into Lake Melville.

[298] The Authorization addressed these requirements in Condition 6:

> 6. The Proponent shall undertake an Environmental Effects Monitoring Program as outlined in the "Lower Churchill Hydroelectric Generation Project - Aquatic Environmental Effects Monitoring Program - Muskrat Falls" (EEM Plan), dated February 2013, to monitor and verify the predicted impact of the proposed development from a fish and fish habitat perspective including project related downstream effects, methymercury bioaccumulation in fish and fish entrainment as the Muskrat Falls facility by:
>
> […] 6.3 Methylmercury bioaccumulation shall be monitored annually to determine levels in resident fish species, including seals, both within the reservoir and downstream as per established monitoring schedule, to record and report peak level and subsequent decline to background levels.
>
> 6.4 Information collected from the baseline and post-project surveys to compare and verify predictions of project impacts to fish and fish habitat is to be reported by:
>
> 6.4.1 Providing a comprehensive annual report summarizing all aspects associated with the EEM Program (including baseline data collection) to

> DFO by March 31. This will include on-going baseline monitoring up to and including 2016, as well as post-project monitoring for a period of no less than twenty (20) years from 2018 through to and including 2037.
>
> 6.4.2 Providing a comprehensive EEM Program review report summarizing all aspects associated with the post-Project EEM Program to DFO by March 31 of every fifth (5th) year, commencing in 2023. This will facilitate adjustments as needed, and as approved by DFO.
>
> …

[299] The EEM Plan notes that transport of mercury into Goose Bay and Lake Melville was modelled with the results showing minimal increases within Goose Bay. The report includes a table setting out the predicted total mercury concentrations in water, five months following impoundment. However, it also states that bioaccumulation of mercury in river reaches downstream of hydroelectric developments is a known phenomenon. Therefore, relying solely on a before and after comparison of mercury concentration is not considered an appropriate means of monitoring environmental effects. Post-project mercury concentration would, therefore, be compared to modeled results as well as baseline data in conjunction with literature from similar hydroelectric developments. And while baseline data had been collected since 2001, it had been for the purpose of developing the model used to predict post-project concentrations.

[300] The EEM Plan study area for mercury sampling includes the Muskrat Falls reservoir and downstream out to Goose Bay/Lake Melville area. Sampling is to occur on an annual basis until

the visible peak and decline in concentration is observed. Further analysis will be conducted at that point, and additional monitoring will occur "with an efficient schedule".

[301] The EEM Plan states that baseline total mercury concentrations in fish had been collected over a 13 year period (since 1999) and that actual concentration at the time of inundation may be different. Therefore, additional fish samples would be collected and analysed for mercury body burden during pre-inundation in order to continue collection of mercury concentrations and to collect as much data as possible from each fish captured. A graph shows the mean mercury concentrations that have been measured in the mainstem below Muskrat Falls for nine types of fish to date, while another shows mean mercury concentrations measured in Goose Bay and Lake Melville for 11 types of fish. Similar information concerning seals is provided.

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

[303] Here, however, Recommendation 6.7 was not ignored or rejected in whole. Rather, the intent of the Recommendation was accepted to the extent that the uncertainty identified by the JRP was acknowledged and addressed, although not in the manner recommended by the JRP.

Canada's Response explained that ensuring commitments made by Nalcor and the provincial government were carried out would minimize the negative effects of the Project *and reduce the risks associated with the uncertainty about the success of the mitigation measures*. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report. One of these adverse effects was, of course, the impacts on the Applicant if consumption advisories are required.

[304] In short, Canada's Response acknowledged the concerns and balanced the competing interests, explaining why it arrived at its conclusion (*Haida* at para 45; *Taku River* at para 2). While Canada's Response could, undoubtedly, have provided a more in-depth explanation as to why it accepted the intent of Recommendation 6.7, but not its adoption in whole, its rationale is apparent from the record. In the context of this judicial review of the issuance of the Authorization, this is relevant as it pertains to the underlying consultation and rationale supporting Canada's Response and the Course of Action Decision which, in turn, led to the issuance of the Authorization and its conditions.

[305] And, while the further assessment recommended by the JRP may have permitted a higher level of predictive certainty as to mercury levels, it is also apparent from DFO's submissions to the JRP, which were essentially adopted by Canada's Response, that DFO was satisfied that the modelling and data gathered by Nalcor served to provide a sufficient predictive basis against which future monitoring could be compared when combined with the further baseline sampling and monitoring required by the EEM Plan. That is, Canada was satisfied that the uncertainty and

risk pertaining to methylmercury bioaccumulation could be managed by way of the monitoring programs.

[306] The consultation process demonstrates that Canada was fully informed of the Applicant's view as to the extent of the downstream assessment that was required. However, it is apparent that it did not agree with this view. The May 30, 2013 letter from DFO, which responded to the Applicant's comments on the EEM Plan, addressed this issue in the context of Phase 5. DFO explained that with respect to Recommendation 6.7, per Canada's Response, Nalcor would be required to collect additional baseline data, which was collected in 2011 and 2012 and would continue to be collected prior to impoundment.

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

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

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

[309] In essence, Recommendation 6.7 sought further assessment prior to impoundment to obtain a greater predictive level of certainty about mercury effects downstream. Canada's Response, in effect, accepted that this uncertainty presented a risk. However, balanced against the Project benefits, the significant adverse environmental effects were outweighed and could be managed by way of the Authorization conditions. The Applicant disagrees with this conclusion, however, its objections are not concerned with any perceived flaws in the EEM Plan. It does not suggest, for example, that annual sampling is insufficient, that the number of fish species tested is not representative or that there are specific steps that could be taken that would improve the baseline sampling or monitoring efforts described. Rather, it again raises its disagreement, in principle, with Canada's Response.

[310] Again, while Canada undoubtedly could have done a far better job explaining why a more in depth assessment was not required and why the EEM Plan sufficed, its explanation was sufficient to provide an understanding of its rationale (*Haida* at para 44; *Ka'a'Gee Tu #2* at para 131; *West Moberly* at para 144).

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

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

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

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

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

viii. Framework Language for Compensation

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

ix. Full Clearing

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

[317] In Chapter 4 the JRP described Nalcor's submissions on the environmental, technical and economic reasoning for three alternative clearing scenarios: no clearing, full clearing and partial clearing. It also described the participants' views. This included NRC's view that the methods Nalcor had used to model the fate of mercury in the environment after reservoir clearing were appropriate. However, that the EIS did not indicate whether Nalcor had considered the effectiveness of partial clearing. Nor had Nalcor assessed removing the organic layer of soil or selective clearing of brush and other organics to reduce methylmercury production. Based on new information from experimental lakes, NRC recommended the removal of trees, brush and possibly soils in the drawdown zone between high and low water levels, as research indicated

that this area would be the greatest contributor of methylmercury, thus supporting Nalcor's scenario of partial clearing. The Applicant submitted that Nalcor must clear wood and brush within the reservoir boundaries to decrease methylmercury contamination within and downstream of the Project area.

[318] The JRP noted that Nalcor's "partial clearing" alternative involved clearing trees only in the ice and stick-up zones around the perimeter of the reservoirs and only in areas in these zones that are within Nalcor's pre-defined safety, environmental and economic operating constraints. Otherwise, the trees are left standing. The "full clearing" alternative involved, in addition to partial clearing, clearing wood in the flood zone in areas that meet the same operating criteria as for "partial clearing". In other words, "full clearing" did not mean the removal of all trees.

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

> The Panel also notes, as further discussed in Chapter 5, the more trees cleared, the more benefits accrue in terms of reducing methylmercury accumulation and greenhouse gas emissions, though gains may be small. The Panel also notes that Natural Resources Canada recommended that Nalcor study the removal of soils in the drawdown area to reduce the production of methylmercury in flooded terrain. This is discussed in Chapter 6.

[320] The JRP concluded that it was both technically and economically feasible to carry out "full clearing" for the Muskrat Falls reservoir. Its Recommendation 4.5 was that, if the Project was approved, that Nalcor be required to apply its full clearing reservoir preparation option to that reservoir.

[321] In Chapter 6, the JRP also addressed reservoir clearing and described the participants' views. Nalcor stated that mobilization of methylmercury in the reservoirs is an unavoidable impact of hydroelectric projects and that the "full clearing" option would only reduce mercury levels in fish by about ten percent, which would not justify the extra expense. It also indicated that other types of mitigation, such as intensive fishing of certain species, were unproven and likely not feasible. Nalcor also noted that NRC's recommended large scale removal of vegetation and soils before inundation had only been tried at an experimental level, would not be technically or economically feasible, and would have considerable environmental effects.

[322] NRC pointed out that development of knowledge about the methylmercury problem associated with reservoir creation was still at an early stage and that mitigation to date had been largely confined to consumption advisories (which the Panel addressed in Chapter 13). Recent research had shown that the most effective mitigation may be removal of vegetation and the upper soil layer in what would become the drawdown area of the new reservoir. NRC therefore recommended that Nalcor consider large-scale removal of mercury and carbon-rich soils within this area, the so-called "bathtub ring", to mitigate methylmercury production, acknowledging that this form of mitigation had so far only been conducted at a smaller experimental scale.

[323] The JRP concluded that:

> The Panel notes that Natural Resources Canada challenged the notion that mercury mobilization is an inevitable consequence of hydro power development and consumption advisories are adequate as the only response. The benefits of carrying out pre-inundation mitigation such as more extensive clearing of vegetation or soils would need to be evaluated in the context of effects of the predicted mercury levels on fish-eating wildlife (Chapter 7), the use of renewable resources (Chapter 8) and human

health (Chapter 13). Similarly, the significance of the cumulative effect of another period of methylmercury contamination on the lower Churchill system, following the effects of the Churchill Falls project, should be evaluated in the context of human health and the use of renewable resources.

[…]

The Panel accepts that selective soil removal around the reservoir rim is not yet proven as mitigation but observes that this approach appears to have merit, especially if the clearing can be confined to the reservoir rim. The Panel also notes that the type of preparation required for this mitigation might be complementary with the riparian and fish habitat measures that Nalcor would already be undertaking.

The Panel concludes that consumption advisories transfer part of the cost of generating hydroelectricity to local populations and it is therefore important to find better approaches to reducing methylmercury in reservoirs. Therefore the Panel believes that Natural Resources Canada should move ahead with testing the mitigative approach of removing soil in the drawdown zone, including determining how to avoid or minimize environmental impacts, and ways to make beneficial use of the materials removed.

RECOMMENDATION 6.5 Pilot study for methylmercury mitigation through soil removal

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

(JRP Report, p 74)

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

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

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

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

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

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

[330] However, tree removal as a mitigation measure is directly related to the issue of methylmercury bioaccumulation and related potential need for consumption advisories downstream of Muskrat Falls and in Lake Melville. Thus, while Canada's Response was based on jurisdiction, Canada would have known that the Province was intending to require partial rather than full clearing as recommended by the JRP. Yet Canada did not account for the resultant increase in methylmercury in its response to Recommendation 4.5 or explain how this was elsewhere considered. Given that methylmercury levels were a major concern of the Applicant and a central issue for the JRP, and that the JRP process fulfilled part of Canada's duty

to consult and its report informed Canada's Response, the Applicant could well have expected that the issue would be explicitly addressed, rather than simply disposed of on the basis that clear cutting was within Provincial jurisdiction.

[331] However, as discussed above, Canada was satisfied that Nalcor's modelling, baseline data collection, sampling and monitoring, as enhanced by the EEM Plan that formed a part of the Authorization, were sufficient to address the uncertainty and risk and to identify any unpredicted increase of methylmercury levels in fish and seals. Therefore, its decision to issue the Authorization without accommodating the Applicant with respect to full, as opposed to partial clearing, was informed and reasonable. This is particularly so as the JRP had acknowledged that the gains of requiring full rather than partial clearing may be small.

IV. Conclusion

[332] As a general conclusion on the issue of accommodation, I note that in *Little Salmon*, the Supreme Court of Canada stated the test of accommodation is not a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the Minister's exercise of discretion, taking into account all of the relevant interests and circumstances (also see *Haida* at paras 47-50).

[333] And as stated in *Katlodeeche*:

> [101] Sometimes a decision must be made even when an Aboriginal group asserts that consultation is not adequate, and to make a decision in these circumstances is not unreasonable (*Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2007 FC 567 (CanLII) [*Ahousaht*]). There is no duty to

> reach agreement, and no reason that a rapid conclusion to a consultation process will necessarily deprive an Aboriginal group of meaningful consultation when the preceding process itself has been lengthy and adequate (*Taku River*, above).

[334] Further, the Supreme Court of Canada in *Taku River* stated:

> [2] I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

[335] In this case, methylmercury bioaccumulation had been at the forefront of Project issues since 2006. At the JRP stage, the EIS Guidelines were amended to require Nalcor to determine whether the Project may be reasonably expected to have adverse environmental effects on the LISA for the purpose of determining the applicability of the Agreement and to require Nalcor to provide the rationale used to delineate study areas (Exhibit 21 to Chapman Affidavit, pp 2560 2570). That rationale was rejected by the Applicant, DFO and the JRP with the result that Nalcor was required to consider impacts downstream of Muskrat Falls including Goose Bay and Lake Melville.

[336] With respect to the effects downstream of Muskrat Falls, the JRP concluded that should consumption advisories be required in Goose Bay and Lake Melville, the Project would have significant adverse effects on the pursuit of traditional harvesting activities by Labrador Inuit, including the harvesting of country food. It extensively addressed consumption advisories, and their impact, in other parts of its report, including Chapters 8, 9, 10 and 13.

[337] The JRP fully considered the downstream impacts of methylmercury, including with respect to reservoir clearing as well as consumption advisories. Therefore, Canada fully understood both the risk that existed and the seriousness of that risk. It was informed that the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville would apply to traditional harvesting activities of Labrador Inuit if consumption advisories were required.

[338] Canada's Response specifically acknowledges that the JRP recommended further analysis to reduce uncertainty about downstream environmental effects. And, when considering whether the significant adverse environmental effects of the Project could be justified, it accounted for the potential adverse effects of the Project and the commitments that had already been made by the federal government and Nalcor. That is, Canada acknowledged and weighed the adverse impacts with the benefits and decided to proceed, requiring certain mitigation measures, environmental effects monitoring and adaptive management to be undertaken by Nalcor, as well as additional studies on downstream effects. It found that these measures would reduce the risks associated with the uncertainty about the success of mitigation measures.

[339] Thus, by way of Canada's Response, the potential risk of consumption advisories and related impact on the Applicant's rights, was, in effect, accepted when balanced against the Project benefits. By way of the Authorization and Condition 6 of the Authorization, Canada did impose some additional requirements on Nalcor as to sampling and monitoring for mercury levels in fish and seals. The Applicant feels that this was inadequate accommodation. However, this is based on its view that a holistic study of Lake Melville is required before an adequate EEM Plan can be effected. Canada does not share that view. While Canada could have done a far better job of explaining, at Phase 4 and 5 of the consultation, why it was satisfied with a monitoring program rather than requiring more predictive modelling before flooding, I cannot find that it has failed to meet its duty to accommodate.

[340] My view in this regard is somewhat shaped by the fact that throughout the JRP process, the only pro-active mitigation measure identified as potentially feasible was reservoir site preparation. The pre-impoundment assessment proposed by Recommendation 6.7 was not accompanied by the identification by the JRP of further pro-active mitigation measures that could be implemented if necessary. Re-active mitigation options were limited to monitoring followed by consumption advisories if required.

[341] Because the available mitigation measures pertaining to methylmercury bioaccumulation are limited, so too are the methods of accommodation. The JRP did not reject the concept and use of consumption advisories, which have previously been used in the Churchill River, albeit acknowledging that their use would have a significant adverse effect on fish and seal hunting in the area. The Applicant acknowledges in its May 30, 2013 letter that methylmercury levels

rising may be an inevitable consequence of inundation and that the only mitigation measure that could reduce the risk or concentration of mercury prior to flooding was reservoir clearing and soil removal. Even though the Applicant submits, in accordance with Recommendation 6.7, that further pre-impoundment predictive assessment should be carried out, it has not suggested that there are other mitigation measures that could be effected should that assessment indicate levels of methylmercury will be higher than those predicted by Nalcor. In the EEM Plan, DFO imposed the sampling and monitoring measures it deemed necessary to verify Nalcor's predictions, recognizing the uncertainties, as to downstream methylmercury in fish and seals. While the changes made to the EEM Plan as a result of the Phase 5 consultation did not greatly vary from what had been originally proposed, in all the circumstances, the accommodation and decision to issue the Authorization was reasonable.

[342] When appearing before me, Canada submitted that the Authorization also permits DFO to take other measures should Nalcor's monitoring and follow up indicate that its predictions are not verified. Specifically, Condition 1.1 of the Authorization stipulates that should the authorized impacts to fish and fish habitat be greater than previously assessed, DFO may suspend any works, undertakings, activities or operations associated with the Project and direct Nalcor to carry out any modifications, works or activities deemed necessary. Further, if DFO is of the view that greater impacts may occur than were contemplated, it may also modify or rescind the Authorization.

[343] Nalcor, of course, predicts that mercury bioaccumulation in fish and seals will not rise to levels that require consumption advisories. If they are wrong in this prediction and monitoring

indicates that levels are rising and that advisories will likely be required, it is not disputed that at that stage there is little that can be done to reduce the levels. When appearing before me, counsel for Canada suggested that if that were to occur, the Project could be halted. I do not think, at that stage of such a significant, multi-billion dollar construction project, there is even a remote possibility that the Project would be scrapped or mothballed because downstream mercury levels exceeded Nalcor's predictions. Counsel for Canada also suggests that if that were to occur, the Applicant could sue Nalcor for damages. That may be so.

[344] However, from my perspective, such an outcome would pertain to accommodation. If, down the road, monitoring establishes that mercury bioaccumulation in fish and seals is exceeding Nalcor's predictions and that consumption advisories will be required, then pursuant to the honour of the Crown, further consultation and accommodation will be required. At that time, Canada may well be required to accommodate the Applicant by providing financial redress, or causing it to be provided, or taking such other measures as may be appropriate.

[345] In summary, the Applicant was consulted and its concerns were reasonably identified and considered. They also were balanced reasonably with the potential impact of the Authorization on those concerns and with the competing societal concerns. While the Applicant did not obtain its desired outcome, the duty to consult was satisfied, the Applicant was adequately accommodated, and the decision to issue the Authorization was reasonable.

[346] Accordingly, the Applicant's motion for judicial review and the relief sought is dismissed. However, given the nature of the subject matter and that the question raised by the

Applicant concerning mercury bioaccumulation was an important one, there will be no order for costs against the Applicant regardless of its lack of success.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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