Federal Court Cour fédérale

Date: 20150818

Docket: T-1339-13

Citation: 2015 FC 981

Ottawa, Ontario, August 18, 2015

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

NUNATUKAVUT COMMUNITY COUNCIL INC AND TODD RUSSELL, ON THEIR OWN BEHALVES AND ON BEHALF OF THE MEMBERS OF NUNATUKAVUT COMMUNITY COUNCIL INC

Applicants

and

THE ATTORNEY GENERAL OF CANADA AND NALCOR ENERGY

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review brought pursuant to ss 18 and 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, by which the Applicants challenge the decision of the Minister ("Minister") of the Department of Fisheries and Oceans ("DFO") to issue Authorization

No. 13-01-005 ("Authorization") to Nalcor Energy ("Nalcor"). The Authorization was issued on July 9, 2013 and, pursuant to ss 32(2)(c) and 35(2)(b) of the *Fisheries Act*, RSC 1985, c F-14 ("*Fisheries Act*"), permits impacts to fish and fish habitat arising from the construction of the Muskrat Falls hydro-electric generating station proposed by Nalcor for the lower Churchill River as part of the Lower Churchill Hydroelectric Generation Project in Labrador.

[2] The Applicants claim that they were not adequately consulted or accommodated, that the Minister breached her duty of procedural fairness; and, that her decision to issue the Authorization was incorrect or unreasonable and an improper use or an abuse of her discretion.

Background

[3] The NunatuKavut Community Council Inc. describes itself as the self-governing organization representing the interests of the Inuit descendants (sometimes referred to as Inuit-Metis) of central and southern Labrador. The NCC was formed in 2010 and at all relevant times Mr. Todd Russell ("Russell") was its President. The Applicants will be referred to, collectively, as "NCC" in this decision.

[4] In 1991, the NCC's predecessor, the Labrador Metis Association (later known as the Labrador Metis Nation), filed a land claim document with the government of Canada ("Canada"). It filed additional research in 1996 and did so again in 2010 in the form of a document entitled "*Unveiling NunatuKavut, Describing the Lands and People of South/Central Labrador, document in Pursuit of Reclaiming a Homeland, NunatuKavut, 2010*" ("*Unveiling NunatuKavut*"). Although the NCC has asserted a land claim in the region it describes as

overlapping the project area, this has not currently been accepted for negotiation by either Canada or the government of the Province of Newfoundland and Labrador ("Province").

[5] Nalcor was incorporated pursuant to the *Energy Corporation Act*, SNL 2007, c E-11.01, its predecessor being Newfoundland and Labrador Hydro. Nalcor was created to engage in and carry out activities pertaining to the energy resources of the Province, which is its sole shareholder.

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

[7] Given the nature of the NCC's claim, it is necessary to set out, in some detail, the factual background of this matter.

[8] On November 30, 2006, Nalcor registered the Project with the Newfoundland and Labrador Department of Environment and Conservation ("NL DEC") and the Canadian Environmental Agency ("Agency") to initiate the provincial and federal environmental assessment processes pursuant to the *Newfoundland and Labrador Environmental Protection*

Act, SNL 2002, c E-14.2 ("*NL EPA*") and the *Canadian Environmental Assessment Act*, SC 1992, c 37 ("*CEAA*").

[9] In January 2007, Nalcor was advised by NL DEC that, pursuant to the *NL EPA*, an Environmental Impact Study ("EIS") was required for the Project. In February 2007, the Minister advised the Minister of the Environment that DFO had determined that an environmental assessment ("EA") was required because, to proceed, the Project would require approval of Transport Canada ("TC") pursuant to s 5(1) of the *Navigable Waters Protection Act*, RSC 1985, c N 22 ("*NWPA*") as it involved dam construction, and, an authorization by DFO pursuant to s 35(2) of the *Fisheries Act*, as it would likely result in the harmful alteration, disruption or destruction of fish habitat, thereby triggering s 5(1)(d) of the *CEAA*. The Minister requested that the Project be referred to a review panel in accordance with s 25(a) of the *CEAA*.

[10] TC and DFO each identified themselves as a "responsible authority" ("RA") as defined in the *CEAA*, that is, a federal authority that is required to ensure that an environmental assessment is conducted (*CEAA*, ss 2(1) and 11).

Consultation Framework

[11] Canada, in its written submissions, divides the consultation process into five phases, based on the *Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project*, dated August 13, 2010 ("*Consultation Framework*").

[12] The *Consultation Framework* sets out additional details as to how the federal government would rely on the joint review panel ("JRP" or "Panel") process, to the extent possible, to assist it in fulfilling its legal duty to consult Aboriginal groups with respect to the proposed Project. The JRP process was identified as the primary mechanism for Aboriginal groups to learn about the Project and present their views, including with respect to their traditional knowledge, the environmental effects of the Project, effects on their land use, the nature and scope of their potential or established treaty rights, the impact the Project would have on them, and appropriate measures to mitigate. It identified the Agency as being responsible for coordinating federal Aboriginal consultation during the EA. As such, the Agency would ensure that the activities described in the *Consultation Framework* were carried out and that the Aboriginal groups were kept well informed. It divided the consultation process into five phases, which are adopted below for convenience:

- Phase 1 – Initial engagement and consultation on the draft Joint Review Panel Agreement ("JRP Agreement"), the appointment of the JRP panel members and the development of EIS Guidelines;
- Phase 2 – JRP process leading to hearings;
- Phase 3 – Hearings and preparation of the JRP Report;
- Phase 4 - Consultation on the JRP Report; and
- Phase 5 - Regulatory permitting.

Phase 1 – Initial Engagement and consultation on the draft JRP Agreement, the appointment of the JRP Panel members and the development of EIS Guidelines

[13] On October 19, 2006, DFO representatives met with representatives of the NCC, and other Aboriginal groups, in Goose Bay to discuss DFO's role with respect to the EA for the Project and to ascertain their early positions and perspectives. The NCC, amongst other things,

stated that it looked forward to formal consultation and noted its land claim. On August 8, 2007, DFO and TC wrote to the NCC advising that the Project would require an EA pursuant to the *CEAA* and that DFO and TC would be arranging consultation with Aboriginal groups concerning how they may be affected by the granting of authorizations and approvals permitting harmful alteration, disruption or destruction of fish habitat.

[14] In October 2007, the Agency and NL DEC jointly issued draft Environmental Impact Statement Guidelines ("EIS Guidelines") to Aboriginal groups, including the NCC, for comment. The draft EIS Guidelines were made available to the public for review on December 19, 2007. More than fifty interested parties responded, including the NCC, which provided comments on February 27, 2008.

[15] The NCC's *Comments on the Lower Churchill EIS Guidelines*, addressed various issues including reservoir preparation (tree stump removal to reduce methylmercury accumulation), cumulative effects, downstream effects on the entire downstream environment, timing and adequacy of fish habitat compensation programs, and, Aboriginal rights or title. It also addressed the gathering and funding of this information, the consultation or accommodation process, the use of Aboriginal Traditional Knowledge and a comprehensive environmental agreement. The NCC noted its limited time and funding in preparation of its comments.

[16] The final EIS Guidelines were issued by Canada and the Province in July 2008. The purpose of the EIS Guidelines was described as a process for identifying the Project's potential interactions with the environment, predicting environmental effects, identifying mitigation

measures and evaluating the significance of residual environmental effects. The document also stated that if the Project proceeded, the EA process would provide the basis for setting out the requirements for monitoring and reporting to verify compliance with the terms and conditions of approval and the accuracy and effectiveness of predictions and mitigation measure (EIS Guidelines, s 2.1).

[17] Further, Aboriginal and public participation, Aboriginal traditional and community knowledge, the precautionary principle (EIS Guidelines, ss 2.2, 2.3 and 2.5) and other matters were identified as basic principles of an EA. Regarding consultation with Aboriginal Groups, the EIS Guidelines stated:

> 4.8 Consultation with Aboriginal Groups and Communities
>
> The EIS shall demonstrate the Proponent's understanding of the interest, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project. The Aboriginal groups and communities to be considered include, in Newfoundland and Labrador, the Innu Nation, the Labrador Metis Nation and the Nunatsiavut Government and, in Quebec, the Innu communities of Uashat Mak Mani-Utenam, Ekuanitshit, Nutaskuan, Unamen Shipu, Pakua Shipi and Matimekush-Lake John.

[18] On May 7, 2008, the Province, with the consent of the Agency, provided the NCC with the draft JRP Agreement and its Terms of Reference ("TOR") in advance of making these publicly available for comment. The NCC was invited to provide comments and advised that these would be given full and fair consideration and that a written response would be provided prior to the execution of the JRP Agreement and TOR. The NCC could also request a meeting in

an effort to resolve any related issues. The NCC did not provide comments on the draft JRP Agreement and TOR.

[19] The JRP Agreement and TOR were finalized and released in January 2009. The JRP Agreement was subsequently amended to extend the consultation period for Aboriginal groups and to provide for translation of certain JRP documents into Aboriginal languages.

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

[21] The TOR specifically addressed Aboriginal rights as follows:

> Aboriginal Rights Considerations
>
> The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.
>
> The Panel shall include in its Report:

1. information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.

2. any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

The Panel will not have a mandate to make any determinations or interpretation of:

- the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
- the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
- whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
- the scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

Phase 2 – JRP Process leading to Hearings

[22] On February 17, 2009, Nalcor submitted its EIS to the JRP. The EIS comprised over 10,000 pages, including over sixty supporting component studies. On March 9, 2009, the JRP initiated a 75 day public consultation process on the EIS.

[23] In April 2009, the Science Branch of DFO reviewed sections of the EIS and component studies related to the aquatic environment for the purpose of offering advice with respect to the scientific reliability of the EIS, including an opinion on the accuracy of Nalcor's predictions regarding environmental impacts. The NCC was invited to attend the review, conducted by way

of a Regional Advisory Process, but did not participate. In June 2009, the Science Advisory report (entitled *Science Evaluation of the Environmental Impact Statement for the Lower Churchill Hydroelectric Project to identify Deficiencies with respect to Fish and Fish Habitat*) identified deficiencies in the EIS, including the exclusion of the environment below Muskrat Falls, including Lake Melville, from the study area; a lack of detail in the monitoring programs; and, that additional effort was required to document local knowledge of fish habitat, especially in the area below Muskrat Falls.

[24] The JRP invited the public, Aboriginal groups and governments to review the EIS received from Nalcor and to provide comments as to the adequacy of the additional information, as measured against the EIS Guidelines, and the technical merit of the information presented. Based on the comments received and the JRP's own questions, between May 1, 2009 and January 7, 2011, the JRP issued one hundred and sixty-six information requests ("IR") to Nalcor regarding the EIS. The IRs required Nalcor to provide additional information or analysis in respect of the questions raised. In response, Nalcor submitted approximately 5000 pages of additional documentation by way of information request replies ("IRR").

[25] On January 14, 2011, the JRP announced that it had sufficient information to proceed to public hearings.

Phase 3 – Hearings and Preparation of the JRP Report

[26] The hearings commenced on March 3, 2011. Between then and April 15, 2011, the JRP held thirty days of hearings in nine locations in Newfoundland and Labrador and in Quebec. DFO participated in the various sessions of the hearings.

[27] On March 4, 2011, the NCC advised the JRP that it would be seeking an injunction to enjoin the public hearings based on its belief that there were unanswered questions that must be resolved before the JRP Panel hearings could continue.

[28] By letter of March 10, 2011, the JRP expressed its disappointment that the NCC would not participate in the hearings but stated, if an injunction were not granted, that there would be time and opportunity in the remaining portion of the hearings for the JRP to hear from the NCC regarding its asserted claim to Aboriginal rights and title and how the Project may impact these. This information could supplement the information already provided by the NCC, including the "*Unveiling NunatuKavut*" report.

[29] The injunction was brought in the Supreme Court of Newfoundland and Labrador. In addressing the NCC's claims "that despite the frequent contacts it has had with the two levels of government, with Nalcor, with the CEA and with the JRP, it has never been meaningfully consulted or accommodated about the Lower Churchill Project", the Court stated that it did "not accept that Nunatukavut was not consulted appropriately" (*NunatuKavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corporation (Nalcor Energy)*, 2011 NLTD(G) 44

at paras 21 and 41 [*NCC I*]). The Court further found that the NCC would not suffer irreparable harm if the hearings proceeded, and that the NCC could face harm if it did not engage in the remaining phases of the EA process (*NCC I* at paras 50 and 52-53). The injunction was denied on March 24, 2011.

[30] In October 2012, the NCC conducted a protest which blocked access to a preliminary work site for the Project. The NCC asserted that Nalcor and the Province had failed to comply with their obligations to consult with it in respect of the Project. An interim injunction sought by Nalcor was initially granted, followed, in November 2012, by a permanent injunction (*Nalcor Energy v Nuntukavut Community Council Inc*, 2012 NLTD(G) 175). However, this was subsequently vacated on appeal (*NunatuKavut Community Council Inc v Nalcor Energy*, 2014 NLCA 46).

[31] On April 5, 2011, the NCC made a presentation to the JRP. This addressed consultation with Nalcor, a lack of funding to gather and present Aboriginal Traditional Knowledge, land use data gaps and issues with IR# JRP-151 (Aboriginal Consultation and Traditional Land and Resource Use), concerns about the status of Nalcor's work on downstream effects, cumulative effects, and methylmercury contamination. Two PowerPoint presentations were made, one including reference to "*Unveiling NunatuKavut*". On April 13, 2011, the NCC submitted a paper entitled "*A brief paper to the Joint Review Panel on the Lower Churchill Hydroelectric Generation Project*" which also addressed its concerns.

[32] The JRP Report was issued on August 25, 2011. It is a comprehensive, 392 page document (including the appendices) which describes the process leading to its issuance, and, for each topic addressed in the report, sets out Nalcor's views, the views of the participants and the JRP's conclusions and recommendation(s) concerning that topic. In total, the JRP made 83 recommendations, should the Project be approved. Of particular note to this matter is Chapter 6, Aquatic Environment. There, the JRP identified the key issues that emerged from the review process which included: the effects of reservoir preparation; the fate of methylmercury in reservoirs; downstream effects below Muskrat Falls and the likelihood that Project effects, including the bioaccumulation of mercury, would be seen in Goose Bay or Lake Melville; and, follow-up monitoring.

[33] In the concluding comments of Chapter 17, and as summarized in the executive summary, the JRP reported that it had determined that the Project would be likely to have significant adverse effects on: fish habitat and fish assemblage in reservoirs; terrestrial, wetland and riparian habitat; the Red Wine Mountain caribou herd; fishing and seal hunting in Lake Melville, should consumption advisories be required; and, culture and heritage. It also identified a range of potential benefits including economic, social and cultural benefits to future generations, and, identified crucial additional information required before the Project should proceed in the areas of long-term financial return, energy alternatives to serve island needs, and, to reduce the uncertainty about downstream effects. The JRP noted that it did not make the final decision about whether the Project should proceed but that government decision-makers would have to weigh all effects, risks and uncertainties in order to decide whether the Project was

justified in the circumstances and should proceed in light of the significant adverse environmental effects identified by the JRP.

Phase 4 – Consultation of the JRP Report

[34] Phase 4 concerned consultation on the JRP Report.

[35] On September 16, 2011, the Agency met with the NCC to discuss the JRP Report and Aboriginal consultation. On November 9, 2011, the NCC submitted its comments on the JRP Report. Among these comments, the NCC submitted that the JRP had discriminated against NCC communities, that it did not exercise its TOR as it had failed to insist that Nalcor or government(s) provide funding for studies so that the proper information from the NCC was forthcoming and that proper work be carried out with respect to Aboriginal Traditional Knowledge. Further, that more consultation was needed to address land and resource work in the footprint area, that Nalcor had not been candid with the NCC throughout the process, and that the JRP had failed to address the cumulative effects of the Project.

[36] On January 24, 2012, the Agency prepared an internal report entitled *Lower Churchill Hydro Electric Generation Project: Report on Aboriginal Consultation Associated with the Environmental Assessment* ("*Aboriginal Consultation Report*") which states that it describes how the federal government consulted with Aboriginal groups in the context of the EA, in particular, how it had relied on the JRP process, to the extent possible, to assist in discharging its legal duty to consult. The report states that it describes the positions of the Aboriginal groups with respect to how the potential adverse environmental effects of the proposed Project may impact their

potential or established Aboriginal or treaty rights, which was derived from presentations the Aboriginal groups made to the JRP and from comments made by the groups directly to federal government department officials.

[37] By Order-in-Council dated March 12, 2012, the Governor-in-Council, on the recommendation of the Minister, pursuant to s 37(1.1)(a) of the *CEAA*, approved Canada's response to the JRP Report.

[38] The "*Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador*" ("Canada's Response") describes the Project, the federal regulatory approvals and involvement, the EA process, the JRP Report and Canada's conclusions. Canada's Response states that DFO and TC, as the RAs under the *CEAA*, as well as other interested parties, such as Natural Resources Canada ("NRC"), reviewed the JRP Report, a subsequent independent supply report commissioned by Nalcor, an economic analysis of the Project that was conducted by Canada, and comments submitted by Aboriginal groups and other stakeholders during and following the JRP process.

[39] In considering whether the significant adverse environmental effects of the Project could be justified in the circumstances, Canada's Response stated that it accounted for the potential adverse effects of the Project and the commitments that had been made by the federal government related to the recommendations provided in the JRP Report, and those made by Nalcor in its EIS and during the panel hearings. Canada would require certain mitigation

measures, environmental effects monitoring and adaptive management be undertaken by Nalcor, as well as additional studies on downstream effects. This would be done through inclusion of requirements in federal authorizations and approvals. Canada's Response stated that ensuring that those commitments were carried out would minimize the negative effects of the Project and reduce the risks associated with the uncertainty about the success of mitigation measures.

[40] Further, that the potential social, economic and environmental benefits for the Province, communities and Aboriginal groups, as well as benefits beyond the Province that are associated with the Project, were also considered, as was an economic analysis of the Project by Canada.

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

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

[42] On March 16, 2012, in conformity with the Governor-in-Council's approval of Canada's Response, TC and DFO issued their course of action decision pursuant to ss 37(1) and 37(1.1) of the *CEAA* ("Course of Action Decision"). The Course of Action Decision noted that a follow-up program to verify the accuracy of the EA and/or determine the effectiveness of any mitigation measures was required for the Project, and that the estimated dates of the follow-up program were October 1, 2012 to October 1, 2037.

Phase 5 – Regulatory Permitting

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

[44] By letter of April 23, 2012, the Agency advised the NCC that the consultation process was moving into Phase 5, regulatory permitting, as set out in the *Consultation Framework*. Accordingly, responsibility for leading and coordinating the consultation for the federal government was being transferred from the Agency to DFO. DFO sent a similar letter on July 9, 2012.

[45] Around this time, the NCC, Grand Riverkeeper, Labrador Inc. and the Sierra Club of Canada, sought judicial review of the JRP Report and Canada's Response and "to prohibit the various federal Respondents from issuing permits, authorizations or financial assistance relating to the Project, and to quash the Governor in Council's Response to the Report" (*Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520 at para 1 [*Grand Riverkeeper*]). Justice Near (then of this Court) found that Canada's Response was not properly before the Court, as it had been released after the notice of application had been filed. As such, the judicial review in *Grand Riverkeeper* was limited to the JRP Report (*Grand Riverkeeper* at para 17). Ultimately, Justice Near dismissed the application for judicial review on December 20, 2012, concluding that the JRP reasonably considered the need for and alternatives to the Project (*Grand Riverkeeper* at para 54), reasonably recommended that the Province and an independent study panel augment the information gathered (*Grand Riverkeeper* at paras 59 and 62), and

turned its mind to questions regarding the cumulative effects of the Project (*Grand Riverkeeper* at paras 59 and 64).

[46] By letter of May 4, 2012, the NCC wrote to the Minister stating that because of the ongoing judicial review, any participation by it in Phase 5 would be under protest. Further, that it had not been provided with sufficient information regarding the regulatory permits that were to be granted and, therefore, it could not identify which of its Aboriginal rights and title may be impacted by the permitting process. The NCC also stated that it had a number of outstanding concerns not dealt with during the EA process and that it had not been provided with information regarding the process that DFO intended to follow in fulfilling its constitutional duty to consult. The NCC described what it considered that duty to entail, which included funding for participation in the consultation process, for research on cultural and environmental impacts of the Project and for relevant scientific, technical and, if necessary, legal advice.

[47] On May 9, 2012, at the NCC's request, its representatives met with DFO representatives to discuss the regulatory permits.

[48] On May 12, 2012, the NCC wrote to DFO describing the May 9, 2012 meeting. The NCC stated that DFO had advised that permitting would be by way of authorizations under ss 32 and 35 of the *Fisheries Act*; that a Letter of Advice had been issued on a portion of the Project; and, that DFO could provide the NCC with no funding for the Phase 5 consultations. The NCC stated that it had previously been advised that a *Consultation Framework* was being developed; that it had no resources to review or respond to permitting and that DFO had advised that it could

not provide such resources; that the NCC wanted to be consulted in a meaningful way regarding mitigation, compensation and accommodation; that the permitting process had begun without consultation; that the NCC should be provided with a copy of the Letter of Advice, which should be rescinded; and, that all further authorizations should be held in abeyance until an adequate consultation process was effected. The NCC formally requested a copy of the Letter of Advice on May 28, 2012.

[49] On June 1, 2012, DFO provided copies of two Letters of Advice issued to Nalcor concerning stream fording and explained that these were not regulatory permits. Further, that prior to the issuance of a *Fisheries Act* authorization, DFO would consult with Aboriginal groups, including the NCC, and that an Aboriginal consultation protocol governing that process was under development and would be provided to the NCC for comment.

[50] By letter of June 4, 2012, the NCC stated that the EA did not account for Aboriginal Traditional Knowledge of the NCC and that its members might hold very site-specific knowledge that would inform better decisions as to the placement of the culverts and stream fording which were addressed by the Letters of Advice. Further, that the NCC had sought resources to present that knowledge, but had been refused by Nalcor.

[51] DFO responded on June 14, 2012, noting that Letters of Advice are not regulatory instruments, encouraging the NCC to share information they may have on any site-specific stream and review crossings in the area at issue, and, stating that DFO would be formally

consulting with the NCC, and other Aboriginal groups, with respect to *Fisheries Act* authorizations for the Project.

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

[53] The NCC responded by way of email of August 8, 2012. This requested that a protocol be put in place to share the NCC's Aboriginal Traditional Knowledge, that more emphasis be placed on Aboriginal Traditional Knowledge and that a clear definition of the Project footprint area be provided. By letter of February 21, 2013 DFO stated that comments not directly related to the draft protocol would be addressed by follow-up letter and that the comments on the protocol had been fully and fairly considered and were reflected in the final version of the protocol, which was attached.

[54] The final *Regulatory Phase Protocol* stated that in Step 1, upon receipt of the Fish Habitat Compensation Plan ("FHC Plan") or the Environmental Effects Monitoring Program ("EEM Program" or "EEM Plan"), both conditions of the *Fisheries Act* authorization, a condensed Fish Habitat Compensation Report or condensed Environmental Effects Monitoring Program Report with a link to the full plan/program would be provided to the NCC. The NCC would then have 45 days for review and comment.

[55] In Step 2, within 10 days of receiving the application, the NCC could request a meeting with the RA, to be held within the 45 day period, to discuss the application/document. If no comments were received, then the RA would notify the NCC that the 45 day timeframe had ended and that the approval or authorization would be considered and, if appropriate, granted. If comments were received, then the RA would give them full and fair consideration and provide a written response. In Step 4, the RA would incorporate changes as appropriate and, in Step 5, within 5 days of issuance to Nalcor, copies of the *Fisheries Act* Authorization and the *NWPA* Approval would be provided to the NCC.

[56] Nalcor provided the FHC Plan to the NCC on December 21, 2012, and invited it to a public information session, which would provide a technical briefing on the FHC and EEM Plans, to be held in Goose Bay on January 16, 2013. Representatives of the NCC attended that session. The letter also extended an offer to meet with representatives of the NCC to brief them on the FHC and the EEM Plans. The NCC did not respond to Nalcor's offer of a meeting.

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

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

[59] On February 28, 2013, DFO wrote to the NCC advising that it was preparing to issue a *Fisheries Act* authorization and provided the draft FHC and EEM Plans, as received from Nalcor, and sought comments on the two plans within 45 days as per the *Regulatory Phase Protocol*. The letter also noted that the NCC could, within the first 10 days of receiving the plans, request a meeting with DFO to discuss the documents. DFO stated that it would give full and fair consideration to the comments and respond in writing. A follow-up reminder letter was sent to the NCC on April 5, 2013.

[60] The NCC responded on April 15, 2013. Its letter did not provide comments on the FHC Plan or the EEM Plan. It stated that there had been an absence of procedural engagement with

the NCC in preparing the plans; that the *Regulatory Phase Protocol* was unacceptable; that a meeting was sought with the official most directly involved in advising the Minister, or the Minister's delegate, regarding the Authorization to discuss non-compliance by Nalcor and the inadequacies of consultation and accommodation to date; that the 45 day review period of the *Regulatory Phase Protocol* was not acceptable; that the NCC's concerns on impoundment remained unaddressed; that no resources had been provided for the Phase 5 consultation and accommodation efforts; that there had been no direct consultation with the NCC in relation to the proposed authorizations; and, that a 60 day extension was required. The letter attached a table listing JRP Recommendations 6.6, 6.7, 6.9, 7.1, 7.2, 7.3, 8.4 and 9.3, the governments' responses, and the steps taken by Nalcor and the regulator which the NCC deemed deficient.

[61] On May 31, 2013, DFO responded to the NCC's letter of April 15, 2013 addressing twelve issues. These included that Nalcor had advised DFO that the NCC was provided with an opportunity to meet with Nalcor to discuss the FHC Plan, but that such a meeting did not take place. DFO stated that this fulfilled Canada's commitment in this regard. As to the advisory letters, because DFO had determined that the proposed activities would not cause harmful impacts and did not require the issuance of a *Fisheries Act* authorization, it was not required to consult with the NCC. As to Recommendation 6.7, Canada's Response stated that Nalcor would be required to collect additional baseline data on methylmercury accumulation in fish and on fish habitat downstream of Muskrat Falls in advance of reservoir impoundment. The EEM Plan provided for review of the detailed information that Nalcor would collect. Finalization and implementation of the EEM Plan as a condition of the Authorization would fulfil commitments of Canada in this regard. As to Recommendation 6.9, DFO referred to Canada's Response

agreeing with the intent of the Recommendation and stated that Nalcor had carried out public information sessions in Goose Bay on January 16, 2013 and had advised DFO that the NCC had been provided with an opportunity to meet with Nalcor to discuss the FHC Plan and EEM Plan, which meeting had not taken place. Canada had accordingly fulfilled its commitments in this regard.

[62] By email of May 31, 2013, DFO provided Nalcor with a draft of the Authorization and advised that it had completed its Aboriginal consultation related to the conditions of the Authorization, specifically the FHC and EEM Plans, and would be sending a letter outlining minor changes/clarifications needed prior to plan approval. On June 7, 2013, DFO sent Nalcor an email advising that there would be a requirement for some additions to the plans, in particular to EEM Plan, based on DFO's consultation.

[63] On June 17, 2013, AMEC Environmental and Infrastructure ("AMEC"), as consultants for and on behalf of Nalcor, provided DFO with a revised EEM Plan. The accompanying email stated that the method sections of the 2011 and 2012 baseline studies had been incorporated, where applicable, into the EEM document. Sample sizes had also been added, particularly pertaining to mercury. An addendum on sampling locations within Lake Melville was also added.

[64] Following further discussions, the EEM Plan was revised by AMEC and resubmitted to DFO on June 21, 2013. DFO responded on June 25th stating that the additional details added

went a long way to clarifying specifics of the EEM Plan to address concerns raised during consultations. Two further clarifications were requested along with some edits.

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

[66] On June 28, 2013, DFO responded to the NCC's submissions of November 9, 2011 and email of August 8, 2012 addressing the concerns raised therein on a point by point basis. These included the NCC's concern that more emphasis should be put on Aboriginal Traditional Knowledge and that a protocol should be put in place to share such knowledge. In response, DFO noted that the *Regulatory Phase Protocol* had been developed in collaboration with Aboriginal groups and provided the opportunity for meetings at which Aboriginal groups could share Aboriginal Traditional Knowledge for review and consideration in the issuance of permits or approvals. DFO had offered such meetings to the NCC on February 28, 2013 for the authorizations being prepared for Muskrat Falls. Further, prior to submitting a FHC Plan and EEM Plan, Nalcor may offer to meet with Aboriginal groups, at which time such knowledge could be shared for incorporation into the plans.

[67] As to the concern that a clear definition of the Project and the footprint area had not been provided, DFO stated that this was done during the EA. As to the NCC's concern that the federal and provincial governments had a duty to engage separately with the NCC before the JRP process which had not been done, nor had there been adequate consultation or accommodation of

the NCC's interests, DFO stated that the JRP provided various opportunities for participation during the JRP process. The public hearings provided Aboriginal persons and groups with the opportunity to be heard and for the JRP to gather such information. Further, DFO and TC had been and would continue to consult with the NCC in accordance with the *Regulatory Phase Protocol*, which would give the NCC the opportunity to provide input and have discussions with those departments on related conditions.

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

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

[70] Nalcor is also required to undertake the Project in accordance with the EIS, the Project Wide Environmental Protection Plan and the FHC Plan (1.4), and, to implement mitigation

techniques set out in such plans (2.1). It also requires that Nalcor monitor mitigation measures (3.0) and lists conditions concerning compensation for the authorized impacts to fish and fish habitat (4) and relating to monitoring and reporting of compensation habitat. Condition 6 requires Nalcor to undertake an EEM Program, as outlined in the EEM Plan, to monitor and verify the predicted impacts of the Project from a fish and fish habitat perspective, including Project-related downstream effects, methylmercury bioaccumulations in fish, and fish entrainment at the Muskrat Falls facility, in accordance with Conditions 6.1-6.5. This includes annual monitoring of methylmercury bioaccumulation to determine levels in resident fish species, including seals, both within the reservoir and downstream as per the established monitoring schedule, to record and report peak levels and subsequent decline to background levels (6.3).

Issues

[71] In my view the issues can be framed as follows:

1. What is the standard of review?
2. What is the content of the duty to consult and accommodate?
3. Did Canada satisfy its duty to consult and accommodate?
4. Was the decision to issue the Authorization reasonable?

Issue 1: What is the standard of review?

The NCC's Position

[72] As to consultation and accommodation, the NCC argues that both the standards of correctness and reasonableness may apply. The NCC relies on *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2012 FCA 212 at paras 33-34, referring to *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 61-62 [*Haida*], for the proposition that the determination of the existence and extent of the duty to consult or accommodate is a question of law and reviewable on a standard of correctness. Once the extent of the duty to consult or accommodate has been satisfactorily determined by the Crown, its decision will only be set aside if the ensuing process of consultation and accommodation is unreasonable.

[73] For the grounds of review relating to the abuse of the Minister's discretion, the NCC submits that the standard of review is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62 [*Baker*]).

Canada's Position

[74] Canada agrees with the Applicant that the standard of review for the content of the duty to consult is correctness (*Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 at para 97 [*Ekuanitshit FC*]; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Little Salmon*]). The question of whether Canada's efforts satisfied its duty to consult is reviewable on the reasonableness standard (*Ekuanitshit FC* at para 97; *Katlodeeche*

First Nation v Canada (Attorney General), 2013 FC 458 at paras 126-127 [*Katlodeeche*]; *Cold Lake First Nations v Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443 at paras 37-38 [*Cold Lake*]).

[75] As to the Minister's decision to issue the Authorization, Canada submits that the Court is to determine whether the Authorization rests on a reasonable basis, and not whether its measures will be effective. The standard of review on this question is, therefore, reasonableness (*Ekuanitshit FC* at para 94; *Grand Riverkeeper* at paras 27-39).

Nalcor's Position

[76] Nalcor's view is that questions regarding the extent of the duty are reviewable on the correctness standard only if they are questions of pure law. Where the extent of the duty depends on findings of fact within the expertise of a decision-maker, the reasonableness standard applies (*Haida* at para 61). The Crown has discretion as to the structure of the consultation process and whether the consultation process was adequately discharged involves determinations of mixed fact and law. These determinations are entitled to deference and are reviewed on a standard of reasonableness (*Cold Lake* at para 39; *Taku Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 40 [*Taku River*]; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763 at paras 91 and 92 [*Ka'a'Gee Tu #1*]). Further, the applicable standard of review for the adequacy of accommodation is also reasonableness (*Haida* at paras 47-50, 62 and 63; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 66 [*Mikisew Cree*]; *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45 at para 60, aff'd 2008 FCA 113).

[77] As to the Minister's decision to issue the Authorization, Nalcor submits that considerations involving the destruction of fish habitat and relevant mitigative measures fall within DFO's expertise and that discretionary decisions under s 35 are to be reviewed on a reasonableness standard. This is consistent with the general principle that discretionary decision-making powers of the Minister under the *Fisheries Act* are reviewable on that standard (*Prairie Acid Rain Coalition v Canada (Fisheries and Oceans)*, 2006 FCA 31 at para 11; *Malcolm v Canada (Fisheries and Oceans)*, 2013 FC 363 at para 57 [*Malcolm*]).

[78] To further this point, Nalcor contends that the NCC attacks the reasonableness of the decision by questioning the quality of the evidence relied upon by the Minister, therefore, no question of law arises and the decision demands deference. Otherwise the Court would usurp the role of the Minister and become an "academy of science". Similarly, qualitative decisions should not be disturbed unless they are made in bad faith or on the basis of irrelevant considerations (*Vancouver Island Peace Society v Canada (TD)*, [1992] 3 FC 42 at paras 7 and 12; *Alberta Wilderness Assn v Express Pipelines Ltd*, 137 DLR (4th) 177 at para 10; *Alberta Wilderness Assn v Cardinal River Coals Ltd*, [1999] 3 FC 425 at paras 24-26).

Analysis

[79] A standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the Court is well-settled by past jurisprudence, the reviewing court may adopt that standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57; *Kisana v Canada (Minister of Citizenship and*

Immigration), 2009 FCA 189 at para 18; *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189 at para 38 [*Ekuanitshit FCA*]).

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

> [61] On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> [62] The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> [63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would

> likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[81] Until the Supreme Court's subsequent decision in *Little Salmon*, the above reference in *Haida* was consistently interpreted as meaning that the scope or extent of the duty to consult (its content) should be reviewed on the standard of correctness whereas the adequacy of the process of consultation requires an analysis of the factual context and should be reviewed on a standard of reasonableness (*Katlodeeche* at paras 126-127; *Ka'a'Gee Tu #1* at paras 92-93; *Ka'A'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297 at para 89 [*Ka'a'Gee Tu #2*]).

[82] In *Little Salmon* the Supreme Court addressed the standard of review in one paragraph:

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

[83] In discussing the content of the duty to consult, the Supreme Court stated in part:

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

[84] At the hearing of this matter, I asked the parties to address the standard of review with respect to the adequacy of the process in light of *Little Salmon* and the Federal Court of Appeal's finding in *Ekuanitshit FCA*, as described below. The NCC submitted that the Courts appear to be struggling with the question. While the bulk of the jurisprudence contemplates a reasonableness standard, the Federal Court of Appeal in *Ekuanitshit FCA* appeared to accept the correctness standard. Canada submitted that while the Federal Court of Appeal's reasons appear confusing, they must be read in context. Further, that *Little Salmon* did not change the *Haida* test. *Haida* held that if constitutional or legal matters were at issue then the correctness standard applied. However, within the limits of the law, the adequacy of consultation is reviewable on the reasonableness standard. This has not changed (*Cold Lake* at para 39). And, approached on a principled basis, as the Minister's decision is discretionary, the standard must be reasonableness. Nalcor submitted that the Minister's decision is a discretionary one, accordingly, the standard is reasonableness (*Malcolm* at para 35).

[85] In my view, although it has been suggested that the effect of these paragraphs from *Little Salmon* is to alter the standard of review with respect to the adequacy of the consultation process from reasonableness to one of correctness, for the reasons I have set out in detail in *Nunatsiavut Government v Attorney General of Canada (DFO)*, 2015 FC 492 at paras 105-120 [*Nunatsiavut*], I do not understand this to be the case.

[86] There, I noted that in *Ekuanitshit FC* at para 126, and with respect to this Project, this Court has previously dealt with a challenge to the lawfulness of the March 12, 2012 Order-in-Council approving Canada's Response to the JRP Report and the related March 15, 2012 Course of Action Decision. In addressing the question of whether the Innu of Ekuanitshit had been properly consulted and accommodated, Justice Scott, relying on *Haida*, found that the consensus in the case law was that a question regarding the existence and content of the duty to consult is a legal question that attracts the standard of correctness. A decision as to whether the efforts of the Crown satisfied its duty to consult in a particular situation involves assessing the facts of the case as against the content of the duty which is a mixed question of fact and law to be reviewed on the standard of reasonableness (*Ka'a'Gee Tu #1* at para 91). The standard of reasonableness was not stated to be in error by the Federal Court of Appeal in *Ekuanitshit FCA*.

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

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

[88] And, the Alberta Court of Appeal in *Cold Lake*, leave to appeal to the Supreme Court of Canada refused, 35733 (May 15, 2014), considered the above provisions of *Little Salmon* but concluded that the standard of review applicable to the issue of adequacy of the consultation process was to be reviewed on a reasonableness standard (at paras 36-40). The British Columbia

Court of Appeal came to a similar conclusion in *West Moberly First Nations v British Columbia (Minister of Energy, Miners and Petroleum Resources)*, 2011 BCCA 247 [*West Moberly*], leave to appeal to the Supreme Court of Canada refused, 34403 (February 23, 2012), although the three separate judgments reached this conclusion in different manners (at paras 141, 174, 196-198) (see also *Dene Tha First Nation v British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 at paras 104-108; and *Adam v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1185 at paras 65-66, 87 [*Adam*]).

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

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

[91] In determining the extent of the duty to consult, the Crown is obliged to identify the applicable legal and constitutional limits, such as the specific treaty rights, legislative rights, common law rights and the administrative and constitutional law applicable to that case. That is, the Crown must correctly identify the legal parameters of the content of the duty to consult in order to also properly identify what will comprise adequate consultation. To proceed without

having done so would be an error of law. However, if those parameters are correctly identified, then the adequacy of the subsequent process of consultation employed would remain a question of reasonableness. This view can be seen as consistent with both *Haida* and *Little Salmon*.

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

[93] Where the standard of review is reasonableness, as is the case with respect to the adequacy of the consultation and accommodation, this Court's review is concerned with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paras 47-48; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 59). As stated by Justice de Montigny in *Ka'a'Gee Tu #2*, perfection is not required when assessing the conduct of Crown officials. If reasonable efforts have been made to consult and accommodate and the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, there will be no justification to intervene. Further, the focus should not be on the outcome but rather on the process of consultation and accommodation (*Ka'a'Gee Tu #2* at paras 90- 92; *Haida* at para 42).

[94] As to the Minister's decision to issue the Authorization, in *Ekuanitshit FCA*, the Federal Court of Appeal held that while reviewing courts must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme, "a

reviewing court must show deference when reviewing the exercise of power delegated by the Act to the Governor in Council or to a Minister" (*Ekuanitshit FCA* at paras 41 and 44) (see also *Malcolm* at paras 30-34; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 50 [*Agraira*]; *Canada (Citizenship and Immigration) v Kandola*, 2014 FCA 85 at paras 40-42 [*Kandola*]). While the reasonableness review in *Ekuanitshit FCA* related to a challenge to the lawfulness of the Order-in-Council approving Canada's Response and the related Course of Action Decision, made pursuant to s 37(1.1) and s 37(1) of the *CEAA* respectively, I see no reason why a different standard should apply to the decision to issue the Authorization under s 35(2)(b) of the *Fisheries Act*. Further, there is a presumption that decisions of Ministers and their delegates are to be reviewed deferentially (*Agraira* at para 50; *Kandola* at para 42). And, the reasonableness standard has previously been applied to the decisions of the Minister of Fisheries (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 30). Accordingly, in my view, the decision to issue the Authorization is a matter to be reviewed on the standard of reasonableness.

Issue 2: What was the content of the duty to consult and accommodate?

The NCC's Position

[95] In its written submission, the NCC referred to *Haida*, stating that the Supreme Court of Canada held that the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects on the right or title claimed (at para 39). The NCC did not put forward a view as to where the content of the duty to consult fell in this case in terms of a spectrum analysis.

However, when appearing before me, counsel for the NCC stated that their position was that this matter falls from the middle to the high end of the spectrum.

[96] The NCC also submitted that the Minister's duty to consult and accommodate should be read in light of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) ("UNDRIP"), which Canada endorsed on November 12, 2010. Values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review (*Baker* at para 70) and, although not binding, international law informs the interpretation of domestic law pursuant to the presumption of conformity (*R v Hape*, 2007 SCC 26 at paras 53-55). The Supreme Court has relied on UNDRIP to interpret Aboriginal rights (*Mitchell v Minister of National Revenue*, 2001 SCC 33 at paras 80-83 [*Mitchell*]) and, since its endorsement, this Court has accepted that UNDRIP applies to the interpretation of domestic human rights legislation and the interpretation of administrative manuals directed at Aboriginal peoples (*Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350-354; aff'd 2013 FCA 75; *Simon v Canada (Attorney General)*, 2013 FC 1117 at para 121 [*Simon*]).

Canada's Position

[97] Canada refers to the *Haida* spectrum analysis which it submits depends, in part, on the strength of the potential claim and the seriousness of the potential adverse impact of the proposed activity on the claimed Aboriginal right. In this case, the NCC's claim falls at the low end of the consultation spectrum as their claim to the Project area is not strong and the adverse

impact on them was found by the JRP to be adverse but not significant. Thus, the only duty on the Crown was to give notice, disclose information and discuss any issues raised in response to the notice (*Haida* at para 43).

[98] Alternatively, if the Court should find the NCC's claim to be more compelling but accepts the JRP's impacts finding, then a mid-range consultation standard would be appropriate. This would require notice of the matter to be decided, an opportunity to discuss with decision-makers the potential adverse impacts of the decision and how they might be mitigated, and, that the decision-maker take the expressed concerns into account when making the decision (*Katlodeeche* at para 95; *Yellowknives Dene First Nation v Canada et al*, 2013 FC 1118 at para 59; *Cold Lake* at para 33). In any event, the NCC was consulted in a manner that far exceeded either the low or mid-range consultation requirements.

[99] As to UNDRIP, Canada submits that it was adopted by a non-binding resolution of the United Nations General Assembly and has no legal effect in Canada; it does not override or alter Canada's existing constitutional and domestic legal framework; and, questions of whether an alleged duty to consult is owed are to be determined solely in relation to the test enunciated by the Supreme Court of Canada in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31 [*Rio Tinto*] (see also *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at para 51 [*Hupacasath*]). UNDRIP does not, therefore, assist the NCC in defining the duty to consult.

Nalcor's Position

[100] Nalcor submits that three factors trigger the Crown's duty to consult and accommodate – i) the existence of an Aboriginal claim or potential right; ii) the Crown's knowledge of the claim or right, and iii) the proposed Crown action that may adversely affect the claim or right (*Haida* at para 35; *Taku River* at para 25; *Rio Tinto* at para 31). Consultation can be fulfilled through an appropriately executed statutory or regulatory review process and failure on the part of an Aboriginal group to participate in such a process does not justify a claim of inadequate consultation (*Taku River* at para 40; *Ka'a'Gee Tu #2* at paras 91, 121; *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at para 42). The Aboriginal group to whom the duty is owed has a reciprocal duty to co-operate with the Crown's efforts (*Mikisew Cree* at para 65; *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 161 [*Halfway River First Nation*]; *Nalcor Energy v NunatuKavut Community Council Inc*, 2012 NLTD 175 at para 97), to make their concerns known, respond to attempts to meet those concerns and to try to come to a mutually satisfactory solution (*Cheslatta Carrier Nation v British Columbia (Environmental Assessment Act, Project Assessment Director)*, 53 BCLR (3d) 1 (SC) at paras 71 and 73; *Upper Nicola Indian Band v British Columbia (Environment)*, 2011 BCSC 388 at para 128). Further, the duty to consult does not imply a duty to agree and is not an outcome dependent obligation (*Haida* at para 42; *Ekuanitshit FC* at para 126). Nalcor does not dispute that the duty to consult exists in this case, but argues that it has been met.

[101] The Authorization is not an approval of the Project, which Nalcor had already obtained. Rather, it establishes conditions that address the anticipated harm to fish and fish habitat. The

consultation process must focus on the terms of the Authorization, not on broader issues related to the Project or prior approvals.

[102] Nalcor submits that UNDRIP was not ratified by Parliament and does not create substantive rights. The question of whether a duty to consult has been discharged must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. This Court has rejected the application of UNDRIP in the context of the duty to consult (*Hupacasath* at para 51). And, although UNDRIP may inform the contextual approach to statutory interpretation, there is no issue of statutory interpretation in this case.

Analysis

(a) *UNDRIP*

[103] I agree with the NCC's general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the

interpretation that conforms to international agreements that Canada has signed should be favoured.

[104] That said, in *Hupacasath*, Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.

[105] While the NCC refers to *Mitchell*, it is of little relevance. There Justice Binnie, in concurring reasons, at para 81 referred to Article 35 of a draft of UNDRIP to illustrate the difficulties Aboriginal peoples had in freedom of movement across borders, however, the declaration did not play a significant part of the interpretational analysis in that case.

[106] Most significantly, in this matter the NCC does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case.

(b) *Content of the Duty to Consult*

[107] In this matter there is no dispute as to whether the Crown owed a duty to consult to the NCC with respect to the Project, this is acknowledged by Canada and Nalcor.

[108] The seminal decision concerning the scope of the duty to consult remains *Haida*. There the Supreme Court of Canada held that the content of the duty to consult and accommodate varies with the circumstances. Generally speaking, the scope of the duty is proportional to a preliminary assessment of the strength of the case supporting the existence of the right or title claimed, and the seriousness of the potential adverse effects on that right or title (*Haida* at para 39). At all stages, good faith is required by both sides. The Crown must have the intention of substantially addressing Aboriginal concerns as they are raised through a meaningful process of consultation, however, there is no duty to agree. Further:

> [43] … the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev*. 49, at p. 61.
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of

written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

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

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

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

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

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

(See also *Taku River* at para 29).

[109] Thus, the first step in this case is to consider the strength of the NCC's claim.

[110] The Affidavit of Todd Russell sworn on December 6, 2013 in support of the NCC's application for judicial review ("Russell Affidavit") states that in 1991 the NCC filed a comprehensive land claim document with Canada. Additional research information was filed in 1996 and in 2010 additional substantive research on its claims was submitted by way of "*Unveiling NunatuKavut*". Further, that in *The Labrador Metis Nation v Her Majesty in Right of Newfoundland and Labrador*, (2006) 258 Nfld & PEIR 257; aff'd 272 Nfld & PEIR 178; leave to appeal to the Supreme Court of Canada refused, 32468 (May 29, 2008) [*Labrador Metis Nation*], the Newfoundland and Labrador Court of Appeal found that NunatuKavut had a credible rights claim in the area of the Trans-Labrador Highway and that the Government of Newfoundland and Labrador had a duty to consult with NunatuKavut in respect of the construction of the highway.

[111] In *Labrador Metis Nation* the Newfoundland and Labrador Court of Appeal stated:

> [51] A "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in *Haida*, at paras. 37 and 39, supports the view in the present case that the claim is more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. The respondents have established a prima facie connection with precontact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing.
>
> [52] The scope of consultation requested by the respondents was set out in a letter to the Minister of Environment and Conservation on October 26, 2004:
>
> > We now request that your office forward to us any and all applications for water crossings and other relevant permit requirements under your legislated mandate during the construction phase of the Trans Labrador Highway – Phase III. We also request adequate time to review and comment on the various permit applications.
>
> An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

[112] It concluded that the claim was at least strong enough to trigger a duty to consult at the low level requested.

[113] The status of the NCC's claim is also addressed in the record of this matter. The *Aboriginal Consultation Report* prepared by the Agency, addressed the status of NCC's claim:

> The *Labrador Metis Nation* submitted its comprehensive claim to Canada in 1991-92. In 1998, the Department of Justice advised that the *Labrador Metis Nation* did not meet the legal tests for proof of Aboriginal rights, as an Inuit group. The evidence failed to establish that the claimants were an Inuit Aboriginal group with rights protected under s. 35(1) of the *Constitution Act* (1982). Rather, it was primarily a political organization which represented, not distinctive Aboriginal communities, but individuals of various Aboriginal descents.
>
> The NunatuKavut asserted that Justice Canada's review was not impartial. In 2002, the claimants submitted further material to Canada. Upon review, the Department of Justice confirmed its earlier advice on the claimants' inability to demonstrate the continuing existence of Aboriginal rights in the south and central Labrador.
>
> On an exceptional basis, Canada committed, in 2003, to contract a legal agent to conduct a further legal review of the claim on the same basis as it was submitted to and reviewed by Canada. This outside review would only take place if Canada rejected the claim based on the new material the claimants intended to submit. Furthermore, the outside review would be based on the same material reviewed by Justice and would be non-binding on Canada. In the interim, the Minister of Indian Affairs wrote to the claimants on March 16, 2004, providing a detailed rationale for the claims rejection. The Assessment and Historical Research Directorate is now in the process of reviewing this material against the comprehensive claim policy and have informed NunatuKavut that their claim will be assessed in a timely manner.

[114] Thus, the circumstances are that the NCC's claim, although originally rejected, is still being re-assessed. The NCC has not made substantive submissions supporting the strength of its claim in the context of a spectrum analysis. And, while "*Unveiling NunatuKavut*" is in the record, the Court has not been asked to and is not in a position to assess that document so as to determine the strength of the NCC's claim. Accordingly, it is my view that the best the Court can do in these circumstances is adopt the finding of the Newfoundland and Labrador Court of

Appeal, being that the claim is at least strong enough to trigger a duty to consult at the lower level.

[115] As to the seriousness of the potential harmful effects of the Project, the NCC asserts that its Aboriginal rights and title, treaty rights and other interests over land and waters would be affected by the Project. Its members are concerned about a number of potential impacts on those rights including: adverse effects on aquatic and terrestrial wildlife and plants; methylmercury contamination; downstream effects; flooding of traditional lands and waters; water crossings which may disturb fish and aquatic life; access roads; the possible use of herbicides and defoliants; and, cumulative environmental effects. The NCC submits that these concerns are exacerbated by some of the problems it has identified pertaining to the Authorization.

[116] All of these concerns are related to land and resource use which was addressed by the JRP. In its report the JRP addressed current Aboriginal land and resource use of individual Aboriginal groups, including the NCC. In the executive summary it stated (p xxiii):

> The Panel was required to specifically consider Project effects on current use of lands and resources for traditional purposes by Aboriginal persons. Information available to Nalcor, submissions by Aboriginal groups and testimony during the public hearing suggested that current use of the Project area (deemed by the Panel to be within the last 20 years) for traditional purposes is generally intermittent and sporadic relative to use of other areas that would not be affected by the Project.
>
> Some Aboriginal persons suggested that there has been some decline in the intensity and extent of traditional land and resource use activities in recent time due to societal and economic changes. Nevertheless, the Panel recognized the importance, common to all Aboriginal persons, of practicing traditional activities within the entire extent of their traditional territory and the fact that for many groups, any effect from the Project on their practice of traditional

> activities would act cumulatively with impacts caused by the development of the earlier Churchill Falls project.
>
> …
>
> Inuit-Metis
>
> The NunatuKavut Community Council indicated that it was only able to provide limited information about current land and resource use activities for traditional purposes by Inuit-Metis because of its injunction application and the lack of time and financial resources to provide detailed hearing submissions. Most information was received from individual Inuit-Metis participants, rather than from the organization, and affiliation of participants could not always be confirmed.
>
> The Panel concluded that, based on information identified through the environmental assessment process, there were uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area. The Panel recognized that additional information could be forthcoming during government consultations. To the extent that there are current uses in the Project area, the Panel concluded that the Project's impact on Inuit-Metis land and resource uses, after implementation of the mitigation measures proposed by Nalcor and those recommended by the Panel, **would be adverse but not significant.**
>
> The Panel also observed that many land and resource use locations reported to be frequented by Inuit-Metis are outside of the Project area and would remain unaffected and accessible. Measures considered to mitigate the effects of the Project on trapping activities and to compensate for losses of trapping income, property or equipment attributed to the Project may also be particularly relevant for Inuit-Metis.
>
> …
>
> [Emphasis added]

[117] The JRP found that its significant finding in Chapter 8, with respect to the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville, would apply to traditional harvesting activities by Labrador Inuit, including the harvesting of country food in this area

should Project-related consumption advisories be required. The JRP did not make a similar finding with respect to the Inuit-Metis or any other Aboriginal group.

[118] Because the JRP concluded that the Project impacts on the NCC would be adverse but not significant, I would be inclined to also place the seriousness of the potential harm to the NCC on the lower end of the spectrum. However, I recognize that the JRP also stated that it had received limited information about current land and resource use activities for traditional purposes in the Project area by the NCC and other Aboriginal groups.

[119] Given this, and currently unresolved status of the NCC's land claim, when considering both the strength of the NCC claim and the seriousness of the potentially adverse effects on the right or title claimed, I would place the duty to consult between the low and middle range of the spectrum.

[120] As to what is required in that range, the Supreme Court of Canada in *Haida* stated that every case must be approached individually and flexibly with the controlling question in all cases being what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interest at stake (*Haida* at para 45). The scope of consultation owed in the mid-range is something more than the giving notice, disclosing information and discussing any issues raised in response to the notice (*Haida* at para 43) and has been held to include:

- adequate notice of the matter to be decided, the opportunity to discuss the potential impacts of the decision and how these might be mitigated, and, that the concerns be taken into account in making the decision (*Katlodeeche* at para 145);

- that the Crown must inform itself of the impact of the project on the rights of the Aboriginal group, communicate its findings and engage directly and in good faith to hear concerns and attempt to minimise adverse effects, and, some mitigation of the adverse effects (*Cold Lake* at paras 32-33);

- providing notice, disclosing of information, responding to concerns raised; meeting, hearing and discussing the concerns; taking them into meaningful consideration; and advising as to the course of action taken and why (*Long Plain First Nations*, 2012 FC 1474 at para 74); and

- consultation in good faith, with an open mind and the intention of substantially addressing the concerns of the party being consulted as they are raised (*Haida* at paras 10 and 42).

[121] I note that when appearing before me the NCC asserted that Canada's consultation process was flawed because there was no evidence that Canada had conducted a spectrum analysis. In my view, that submission cannot succeed. Here Canada implemented a five phase *Consultation Framework* and the issue in this judicial review is whether there was adequate consultation in Phase 5 of that consultation process. In such circumstances, Canada was not required to undertake an explicit spectrum analysis, an analysis usually adopted by the Courts, in Phase 5 or otherwise.

Issue 3: Did Canada satisfy its duty to consult and accommodate?

The NCC's Position

[122] The NCC submits that it was not meaningfully consulted during Phase 5 because the Minister failed to address outstanding issues from the JRP, including uncertainties regarding the extent and location of current land use by the NCC members. Because of this, and, in the absence of Phase 5 funding, the ability of all parties to assess the Project's impact on the NCC's Aboriginal rights and title was limited.

[123] Further, a lack of funding or other resources at Phase 5 of the consultation process made it impossible for the NCC to adequately review, understand and comment on the highly technical FHC and EEM Plans which formed a critical part of the Authorization. Accordingly, there was no meaningful consultation at that stage (*Platinex Inc v Kitchenuhmaykoosib Inninuwag First Nation*, 2007 CanLii 20790 [*Platinex*]).

[124] A complete denial of funding at Phase 5 was also not reasonable or in good faith and that the NCC held a legitimate expectation that they would be provided with such resources.

[125] The NCC also submits that the lack of funding precluded its ability to present necessary Aboriginal Traditional Knowledge. The NCC submits that despite the requirement of s 2.3 of the EIS Guidelines that Aboriginal, traditional and community knowledge of the existing environment be an integral part of the EIS, to the extent that it was available to Nalcor, there was no commitment or effort on Nalcor's part to gather this knowledge from the NCC. The evidence suggests that while Nalcor funded some community consultation, communications broke down over funding for a traditional knowledge study and the gap was never addressed. The Minister also failed to consider the NCC's Aboriginal Traditional Knowledge and thereby failed to meaningfully consult and accommodate it.

[126] The NCC asserts that the JRP identified uncertainties regarding the extent and locations of current land and resource use by the NCC and that additional time and resources would have been necessary for the NCC to investigate this more fully. Further, that additional information could be forthcoming during government consultations. However, that additional time and

resources were not provided at Phase 5 to address this deficiency in information or data gap. This lack of information limited the ability of all parties to assess, and determine the Project's impact on the NCC's Aboriginal rights and title.

[127] The NCC also submits that the *Regulatory Phase Protocol* was imposed on it, midway through the consultation process. Further, the delay in responding to its comments on the proposed protocol and in responding to the NCC's response to the JRP Report until immediately prior to the issuance of the Authorization also demonstrates a lack of meaningful consultation as well as a lack of good faith (*Mikisew Cree* at paras 53-54) as demonstrated by the response itself, which did not address concerns raised during the consultation process, and DFO's "close the loop" approach to consultation.

Canada's Position

[128] Canada submits that the consultation process far exceeded the requirements of either a low or mid-range consultation. The majority of the consultations took place within the EA and Canada is entitled to rely on such consultations to discharge its duty to consult (*Taku River* at paras 2, 40-41; *Ekuanitshit FCA* at para 113). The JRP Report demonstrates that the NCC's concerns were heard and addressed and, in *Grand Riverkeeper*, this Court found that the NCC was treated fairly within that process.

[129] The consultation history demonstrates that the process leading to the issuance of the Authorization was comprehensive and fair. The NCC was consulted on all draft protocols and, once finalized, the protocols were followed. The NCC made no significant objection to the

protocols when asked for comments but, in some cases, criticized them later. The fact the NCC limited its engagement for strategic purposes does not invalidate the process or make it unfair.

[130] As to the timeliness of DFO's June 28, 2013 letter responding to the NCC's November 9, 2011 letter, Canada points out that its June 28, 2013 reply was just one letter among many communications over the five phase consultation process. On May 31, 2013, DFO provided a detailed response to the NCC's concerns raised on April 15, 2013 and DFO also met with the NCC within Phase 5 and sought its comments on the EEM and FHC Plans. The NCC's letter of November 9, 2011 focused primarily on what it felt was wrong with the JRP Report and, the Province's and Nalcor's activities, but it makes little reference to Canada. Further, between November 9, 2011 and June 28, 2013, the NCC's position on the JRP Report was rejected by this Court in *Grand Riverkeeper*.

[131] Canada submits that there is no requirement that the Crown must provide funding to facilitate consultation. Where some funding is necessary in order to allow for meaningful consultation, there is no right to a particular level of funding. The appropriateness of funding depends on the degree of consultation required and the circumstances of the case (*Adams Lake Indian Band v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2013 BCSC 877 at paras 85 and 87 [*Adams Lake*]).

[132] In this instance, Canada provided the NCC with $154,000 in funding specifically in relation to the Project consultations; $1.8 million in relation to its land claims; and, Nalcor provided $248,000 for land use research. This was more than sufficient to enable the NCC to

participate meaningfully, and the NCC had been advised in October 2006 and again in May 2012 that DFO would not be providing funding at Phase 5. Although no funds were specifically designated for Phase 5, the NCC did not make a proposal for funds at that stage, it has not said what resources would have been sufficient, and, it did not allocate any of its own funds for this purpose, although it did fund two unsuccessful applications challenging the consultation process.

[133] Further, additional funding was not essential to enable the NCC to communicate its traditional knowledge to Canada, given that traditional knowledge regarding land use in the Project area is solely within the NCC's collective knowledge (*Adams Lake* at para 85). The NCC was aware that traditional knowledge and land use information would be needed by the JRP and it was responsible for filling any perceived gaps in that information (*Grand Riverkeeper* at paras 69-70). The NCC elected to boycott much of the JRP process even though that was the primary venue for presenting such information. The NCC now seeks to avoid the consequences of its strategic decision not to fully engage and attempts to challenge the validity of the Authorization on the same basis.

[134] In any event, individual members of the NCC did participate and the NCC made a series of presentations near the end of the JRP hearings, after the injunction sought by them was refused. Thus, the NCC was provided with meaningful opportunities to present its traditional knowledge at that stage.

[135] Canada submits that the NCC has failed to show that a lack of funding hindered its participation in the Phase 5 consultations or that additional funding was necessary for meaningful consultation.

Nalcor's Position

[136] Nalcor submits that the scope and process set out in the Phase 5, *Regulatory Phase Protocol*, and followed by DFO was reasonable given the circumstances which led up to it. The NCC was provided with detailed information about the Authorization, which supplemented the extensive information previously provided about the environmental effects of the Project. It was given an opportunity to provide input into the consultation process and the Authorization including the FHC Plan and the EEM Plan. The NCC participated in the consultation process, by providing its views on both the process and the Authorization itself. These submissions were considered by DFO, as summarized in its letter to the NCC dated May 31, 2013.

[137] As to funding, Nalcor submits that in total the NCC received at least $438,200 in funding specifically intended to allow it to present its views on the Project. Further, a significant amount of information was presented, in particular during the EA process, included the "*Unveiling NunatuKavut*" report which documents all of the NCC land claims data and research, for which the NCC received $2.0 million in federal government funding.

[138] It was reasonable for the Minister to rely on the extensive Aboriginal and technical information which arose from the EA and to refuse to provide further funding, particularly as the NCC did not indicate how much funding it required or for what purpose (*Ktunaxa Nation v*

British Columbia (Forests, Lands and Natural Resource Operations), 2014 BCSC 568 at para 205 and 232 [*Ktunaxa*]; *Adams Lake* at para 85-88; *Ekuanitshit FC* at para 129). Further, the information is within the knowledge of the NCC and its members, and is not highly technical or complex nor is there any evidence that additional technical studies are required.

Analysis

[139] It must first be noted that the NCC in this application for judicial review challenges the decision of the Minister to issue the Authorization. Accordingly, it is not open to the NCC to collaterally attack the validity of Canada's Response or the Course of Action Decision by way of this application. However, as I found in *Nunatsiavut*, the five phase consultation process that underlies the JRP Report, and all of the decisions made subsequent to it by Canada, was an ongoing one.

[140] The phases of the consultation process, and the consultation undertaken in each phase, are connected. The prior consultation therefore serves, to a degree, to inform the consultation and accommodation undertaken in Phase 5. The consultation process cannot be considered to be complete until the end of Phase 5. Thus, the totality of the consultation between Canada and the NCC in each phase of the EA must be considered in order to understand and assess the extent of the consultation and accommodation in respect of the Authorization. To the extent that the NCC questions the content or adequacy of the consultation with respect to the issuance of the Authorization, it is entitled to look at the prior consultation for that purpose, but not as an attempt to impugn the validity of those prior decisions.

[141] In that regard, this Court in *Ekuanitshit FC* was faced with an argument by Canada that the Innu of Ekuanitshit had filed their application for judicial review challenging the Order-in-Council approving Canada's Response and the Course of Action Decision before the consultation period had come to an end. The application for judicial review was filed at the conclusion of Phase 4; at the time of the hearing the process was in Phase 5 (at para 13) of the *Consultation Framework*. This Court found that the judicial review at that stage of the federal government's consultation and accommodation process was premature:

> [112] The Court finds that judicial review of the federal government's consultation and accommodation process is premature at this stage. One of the goals of consultation and accommodation is to "preserve [an] Aboriginal interest pending claims resolution" (*Haida*, cited above, at para 38). This requires that Aboriginal groups be consulted and accommodated before the rights they lay claim to are irrevocably harmed. While it is true that preparatory work for the Project has begun, the acts that truly put the Applicant's rights and interests at risk are those which require permits issued by TC and DFO. It is premature to evaluate the federal government's consultation process before those decisions are made. Notwithstanding this finding, the Court considers it should nonetheless review and assess the adequacy of the consultation that has taken place up to the moment when this application for judicial review was filed.

[142] The Court went on to assess the adequacy of the consultation up to the time that the application was filed and found that the Crown had satisfactorily fulfilled its duty to consult (*Ekuanitshit FC* at para 137).

[143] On appeal of that decision, the Federal Court of Appeal in *Ekuanitshit FCA* agreed with this approach, stating that:

> [108] With respect, I find it difficult to conclude that the judge erred in finding that the appellant had been adequately consulted prior to the government's order being issued. Phase V of the

> *Consultation Framework* confirms that the consultation process between the Crown and the Aboriginal people continues up to the issuance of licences by Transport Canada and Fisheries and Oceans. These licences will authorize Nalcor to undertake certain activities, including the construction of dams that could have consequences on the navigable waters under the *Navigable Waters Protection Act* or on fish habitat under the *Fisheries Act*. But we are not at that point yet. As confirmed and acknowledged by the lawyers of the Attorney General of Canada, the federal government's consultation has not been completed and will remain ongoing until the final phase, namely, the issuance of licences.

[144] The Federal Court of Appeal also stated that the Crown must continue to honourably fulfil its duty to consult until the end of the process (*Ekuanitshit FCA* at para 110).

[145] Further, in *NCC I*, the NCC sought an interlocutory injunction to stop the JRP hearings until the Court had dealt with its claim. In February 2011, the NCC had sued Nalcor, the federal and provincial governments, the Agency, and the five JRP panel members. It sought, amongst other things, a declaration that the defendants had breached their duty to consult with the NCC and directions on how consultations should be conducted. Justice Handrigan of the Newfoundland and Labrador Supreme Court rejected the NCC's claim that it would suffer irreparable harm if the public hearings were not enjoined, as he disagreed that the consultation and accommodation to that stage had been deficient, and noted that there were still two phases following the hearings during which the NCC could continue to be involved before the process would be finished (*NCC I* at paras 50-53).

[146] In *Grand Riverkeeper* the NCC and the other applicants challenged the lawfulness of the JRP Report. There the issues were whether the JRP had fulfilled its mandate with respect to the

need for and alternatives to the Project and its cumulative effects. The NCC also claimed that the JRP had breached principles of procedural fairness or violated its right to be heard.

[147] Justice Near, then of this Court, dismissed the application. With respect to the NCC's argument that the JRP had a duty to consult it on all matters and to compel evidence from the NCC on the issues in dispute, Justice Near held that the JRP's mandate was determined by its TOR which required it to invite information from Aboriginal groups or persons. Further:

> [69] Moreover, the Panel fulfilled its mandate by inviting, and accepting, on several occasions written submissions from NunatuKavut. In addition, the Panel heard from the group in the General Hearing Sessions it held in Happy Valley-Goose Bay and in St. John's. Indeed, the group received over $130,000 through the Participant Funding Program to participate in the EA process. NunatuKavut's choice not to participate in a portion of the hearings by virtue of its injunction proceedings, regardless of how good the group's intentions, cannot impose a duty on the Panel to compel evidence from it.

[148] Justice Near concluded that there was no infringement of NunatuKavut's right to be heard or of any other principle of procedural fairness with respect to the group's participation in the EA process.

[149] I would also note that the Nunatsiavut Government challenged a July 10, 2013 permit to alter a body of water issued by the Province with respect to the Project on the basis that the Province breached its duty to consult and accommodate the applicant. The Supreme Court of Newfoundland and Labrador, in *Nunatsiavut v Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1, found that the conclusions of the EA provided an informed basis for subsequent regulatory decision-making as various permits are

sought. Further, that the objection to the permit and to construction of the dam related to issues of mercury contamination were fully considered by the JRP and by the Province, although not to the applicant's satisfaction, before the Province issued its Order-in-Council formally releasing the Project from the EA on March 15, 2012. Justice Orsborn was of the view that it was the decision to issue the Order-in-Council that should have been challenged, rather than a subsequent regulatory decision relating to the specifics of the Project construction. He stated that "… in the circumstances of this case, allowing issues relating directly to the response to the Joint Review Panel and the 2012 release Order to support a challenge to a later and separate issuance of a regulatory permit would be unfair" (at para 114). For that reason he expressed no opinion on whether the Province's response to the JRP Report or the release Order itself suffered from any legal defect relating to consultation, accommodation or reasonableness.

[150] Given the foregoing, it is my view that the totality of the consultation between DFO, Nalcor and the NCC from initiation and including Phases 1 to 4 must also be considered when considering the adequacy of consultation and accommodation pertaining to the Phase 5 decision to issue the Authorization, including any concerns arising from an alleged lack of funding and resources (see *Adam* at para 77; *Ktunaxa* at paras 203-206).

(a) *Funding – Aboriginal Traditional Knowledge and Land and Resource Use*

[151] Section 8.1 of the JRP Agreement states that the Agency will administer a participant funding program to facilitate the participation of Aboriginal groups and the public in the EA of the Project. Section 58(1.1) of the *CEAA* states that the Minister shall establish a participant

funding program to facilitate the participation of the public in assessments conducted by review panels.

[152] Documentation from the Agency contained in the record of this matter indicates that the Participant Funding Program ("PFP") was designed to promote public participation in the evaluation and review process of projects that are subject to federal EAs pursuant to s 58(1.1) of the *CEAA*. A Funding Review Committee ("FRC"), independent from the JRP, was established to review funding applications and allocate up to $50,000 to applicants during the Phase 1 consultations. Five eligible applications were received, including that of the NCC. A total of $119,500 was requested to participate in the review of and to comment on the draft EIS Guidelines and to facilitate public participation for the EIS. The NCC requested $50,000, and, on August 23, 2007 was awarded $13,000 of the available $50,000. In connection with this, the NCC submitted a draft budget which sought a total of $420,911.50 to cover expenses in connection with the JRP, the EIS Guidelines, EIS review, JRP hearings and government responses. This would, in effect, encompass Phases 1-4.

[153] On March 9, 2009, the FRC reviewed three applications received by the PFP - Aboriginal Funding Envelope which requested a total of $1,183,393. The FRC recommended awarding a total of $664,439 to the three applicants to assist with their participation in the JRP hearings, including the review of the EIS and to engage in associated consultation activities. The NCC was awarded $120,000 of the available $664,439 on July 7, 2008. The related Contribution Agreement between the Agency and the NCC required the NCC to participate in the assessment by the JRP in compliance with the approved work plan, and to ensure that the information

gathered was submitted to the JRP. The approved work plan was attached as Appendix B and states, in part, that the NCC will: engage in consultation activities with the federal government that are linked to the EA; "have meetings to collect and distribute information pertaining to the project and to collect local traditional knowledge"; hold workshops to ensure an understanding of the process, science and technical issues involved with the Project; prepare for and participate in consultation meetings associated with the EA; and, to prepare for and participate in public hearings and to prepare their submission to the JRP.

[154] On May 19, 2011, the Agency advised the NCC that Phase 4 funding was being provided under the PFP – Aboriginal Funding Envelope. A total of $120,000 was available and was intended to support Aboriginal groups who had participated in the JRP review and now wished to engage in consultation activities with Canada concerning the JRP Report. The funds could be used to assist Aboriginal groups with reviewing the report, holding community meetings to review the report and expenses related to meeting with Crown representatives. In its application, the NCC described the proposed activities for which it was seeking funding, which included holding meetings to collect traditional knowledge. It sought $149,740.81 in funding. On August 12, 2011, it was granted $21,000 of the available $120,000 which related to the stated eligible activities. These were consultations on the JRP Report and its Recommendations, as well as seeking to establish whether potential impacts of the Project on potential or established Aboriginal or treaty rights had been addressed and consultations on the manner and extent to which any recommended mitigation measures may serve to accommodate those concerns and whether there remained any outstanding items.

[155] The Affidavit of Stephen Chapman, Associate Director, Regional Operations with the Agency ("Chapman Affidavit"), filed in support of Canada's position in this application, states that according to documentation from Indian and Northern Affairs Canada ("INAC"), the NCC also received funding outside the EA process for consultation on its comprehensive land claims. Attached as Exhibit 16 of the Chapman Affidavit is a document described as a spreadsheet from INAC that, after subtracting amounts that are core funding, indicates funding of $479,589 for 2006-7; $301,173.68 for 2007-8; $506,127 for 2008-9 and $581,665 for 2009-10.

[156] The referenced document is entitled Budget Allocation Per Year Report and the referenced entries pertain to POWLEY or POWLEY – Metis Aboriginal Rights. No explanation of this term is given in the Chapman Affidavit or in the document itself. Counsel for Nalcor referred the Court to page 41 of "*Unveiling NunatuKavut*" which refers to research for a comprehensive lands claims submission to the federal government and to four years of work funded by the federal government from two different programs, footnoted to be "Powley funding (Office of the Interlocutor) and Comprehensive Claims finding (INAC)". In my view, this adds little clarity to the matter. However, this issue was previously addressed by Justice Handrigan in *NCC I* who stated at paragraph 41 that:

> …I am not sure how much funding was actually allotted to either Nunatukavut or the Innu Nation specifically for the Lower Churchill EA process, but I do know that Nunatukavut received more than $2,000,000 to research and write "*Unveiling NunatuKavut*", its land claim document, which it did present to the JRP ...

[157] The Affidavit of Mr. Gilbert Bennett, Vice President of the Project for Nalcor ("Bennett Affidavit") filed in support of Nalcor's position in the application, states that Nalcor and NCC

entered into two community consultation agreements ("CCA") whereby the NCC was provided with an additional $248,000. Amongst other things, the CCAs were intended to allow the NCC to gather information related to its members' contemporary land and resource use surrounding the Project and Nalcor's proposed Labrador Transmission Link (Bennett Affidavit at para 39).

[158] The CCAs are found at Exhibit K of the Bennett Affidavit. The first is dated December 11, 2009. Its preamble states that the EIS Guidelines for the Project require Nalcor to consult with Aboriginal groups, including the NCC, to familiarize the groups with the Project and its potential environmental effects, to identify any related issues or concerns and identify what actions Nalcor proposed to take to address them.

[159] Further, that Nalcor wished to provide information respecting both the Project and the Transmission Project and to consult with the NCC in respect of the impacts of each project to fulfil the requirements of the EIS Guidelines and to obtain information with respect to the potential environmental effects of each project upon the interests and rights of the NCC and its members and communities. The community consultation process it described includes: the determination of what the NCC thinks about the projects and how each project may affect it, its members and communities; the communication of findings of the community consultation process to the NCC and Nalcor; and, "to identify traditional knowledge and current use of resources" (s 1.1). Should the CCA remain in effect for its full term (to March 31, 2010 with an option to extend by 12 months), it was agreed that compliance by Nalcor with its provisions would completely fulfil the requirements of the EIS Guidelines and discharge the obligations of

Nalcor with respect to the consultation with the NCC in that regard (s 8.8). The total amount of funding for the period of December 11, 2009 to March 31, 2010 was $103,800.

[160] The second CCA is dated January 19, 2011. In its preamble, it refers to the CCA that expired on March 31, 2010 and notes that the NCC requested that the parties continue the process of consultation, with a focus on the transmission project, and to collect information in relation to the contemporary land and resource use in the area depicted on the map attached as Schedule I (the Study Area) and relevant traditional ecological knowledge held by members of the NCC. A total maximum amount of funding for eligible expenditures was $108,400. It was also agreed that the report to be generated would contain sufficient information respecting NunatuKavut traditional knowledge, land and resource use and identification of NunatuKavut issues of concern to enable Nalcor to use the information as a source of material in the EA process.

[161] The Appendix A – Work scope states:

> 1. Objective
>
> Information on NunatuKavut's issues and concerns relating to, and land use and harvesting activities in the area of, the Lower Churchill Hydroelectric Generation Project (the "Generation Project") was provided by NunatuKavut under the Community Consultation Agreement which expired on March 31, 2010. NunatuKavut has also provided Nalcor with its supplemental land claims documentation ("*Unveiling NunatuKavut*"). This information, together with other publicly available information, has been provided in the Consultation Assessment Report (Supplemental Information to IR JRP. 151) which Nalcor submitted to the Joint Review Panel on September 27, 2010.
>
> Nalcor now proposes to conclude the Phase II Community Consultation Agreement with NunatuKavut to supplement existing and available information respecting NunatuKavut traditional

> ecological knowledge, contemporary land use and resource use in the Study Area (shown on the map attached as Appendix "A") and issues of concern in relation to the Labrador-Island Transmission Link (the "Transmission Project"). The proposed Agreement will provide funding for the following activities to be carried out over a four month period from December 15, 2010 to April 15, 2011:
>
> - A community consultation process
> - The collection of relevant traditional ecological knowledge, and
> - A survey of NunatuKavut land use and harvesting activities in the Study Area.

[162] The purpose of the CCA is stated to include collection of information on harvesting activities, intensity, seasonality, locations, and species and sites of socio-cultural importance to the NunatuKavut in the Study Area; to complement existing NunatuKavut land and resource use held by Nalcor; and, to collect information on NunatuKavut traditional ecological knowledge. Land and resource use data collection is described and includes the hiring of researchers and the conducting of interviews with key members of NunatuKavut determined to have contemporary land and resource use knowledge in the Study Area. The results of the land and resource use data collection and analysis was to be contained in the final report.

[163] The JRP Report also speaks to participant funding received by the NCC:

> 1.4.2 Participant Funding Program
>
> Pursuant to subsection 58(1.1) of the Canadian Environmental Assessment Act, participant funding was made available to help the public and Aboriginal groups participate in the environmental assessment of the Project. The Participant Funding Program consisted of two funding envelopes: the regular funding envelope and the Aboriginal funding envelope. Funding was available to help participants review the draft EIS Guidelines and the EIS and to participate in the public hearing.

> The Canadian Environmental Assessment Agency established Funding Review Committees, independent from the Panel, to review funding applications and to recommend funding allocations. In total, the Canadian Environmental Assessment Agency allocated funding to the following applicants:
>
> - Council of the Innu of Unamen Shipu and Council of the Innu of Pakua Shipu: $106,875;
> - Corporation Nishipiminan (Council of the Innu of Ekuanitshit): $55,850.25;
> - Fiducie Takuaikan (Nutashkuan First Nation): $46,000;
> - Grand Riverkeeper Labrador Inc.: $77,600;
> - Innu Nation: $533,968;
> - Labrador Métis Nation (now the NunatuKavut Community Council): $133,000;
> - Naskapi Nation of Kawawachikamach: $9,165;
> - Natural History Society of Newfoundland and Labrador: $16,400;
> - Nunatsiavut Government $23,471;
> - Sierra Club Canada - Atlantic Chapter: $50,000; and
> - Women in Resource Development: $5,000.
>
> The Canadian Environmental Assessment Agency will make additional funding available under the Aboriginal funding envelope for the participation of Aboriginal groups in consultation activities related to the Panel report.

[164] Based on the foregoing, it is apparent that the NCC did receive funding that was, at least in part, intended to assist it in gathering Aboriginal Traditional Knowledge and assessing current land and resource use. The NCC asserts that this was inadequate for that purpose and, therefore, that there was no meaningful consultation. However, the funds that it received from Nalcor and the Agency were in fact in excess of the NCC draft budget which sought a total of $420,911.50

to cover expenses in connection with the JRP, the EIS Guidelines, EIS review, JRP hearings and government responses. Additionally, it was funded so as to produce "*Unveiling NunatuKavut*" which documented its land claim. A stated purpose of that document was to act as a foundational treatise to be provided to the federal government in an effort to illustrate present day rights and title held by the Inuit descent people of South Central Labrador. That document also points the reader to the work of Dr. Hanrahan, entitled "Salmon at the Centre", which examined the Indigenous Knowledge, including local knowledge of animals, plants and landscape, of Inuit elders and experts.

[165] The NCC refers to *Platinex* in regard to the role of funding. That was a motion arising out of a decision directing the parties to continue the process of consultation and negotiation in the hope of implementing a consultation protocol and other steps. The Court reserved its right to make further orders in that regard if the parties could not reach agreement. As to funding, the consultation agreement appended a schedule of eligible costs. Ontario had offered to fund the first nation's reasonable costs for consulting in phase 1 and set a $150,000 target, with the quantum and other matters to be captured in a contribution agreement. This was rejected by the first nation as being inadequate, it sought $600,000 up front and an assurance that all of its consultation and litigation costs would be covered, and asserted that the imbalance between the financial positions of the parties rendered the consultation process unfair. The Court stated that the issue of appropriate funding is essential to a fair and balanced consultation process to ensure a level playing field, however, that there was insufficient material before the court for it to make an informed decision as to what level of funding would be available (*Platinex* at paras 23-27).

[166] In this matter, the NCC has not provided any evidence as to what level of funding, in addition to that which it did receive, would have been adequate for purposes of gathering Aboriginal Traditional Knowledge and assessing its current land and resource use. I would note that the FRC recommended the allocation of funding amounts that it deemed reasonable in light of the information provided in the funding applications, follow-up responses and funds received by applicants from other sources. Further, that the level of funding that was provided by the Agency to the NCC does not appear to be out of line with the funding provided to other Aboriginal groups, as reflected in the JRP Report listing above.

[167] Ultimately, this Court is simply not in a position to make an assessment as to the adequacy of funding and, in the absence of evidence to the contrary, must assume that the Agency had not only the authority to allocate funding, but also appropriately exercised its discretion to determine appropriate funding levels in the prevailing circumstances.

(b) *Funding – Phase 5*

[168] The NCC also submits that a complete denial of funding in Phase 5 precluded fair and meaningful consultation because the Minister failed to address the uncertainties regarding the extent and location of current land and resource use by the NCC and, without additional funding at Phase 5, the Project's impact on NCC's Aboriginal rights and title were not properly addressed.

[169] In my view, in this regard, it must be recalled that Phase 5 was not the only opportunity afforded to the NCC to make representation on Aboriginal Traditional Knowledge and current

land and resource use. During the consultation process the NCC not only received funding to collect Aboriginal Traditional Knowledge and to address land and resource use but also to participate in the JRP process. The NCC did participate as described in the JRP Report. For example, in considering the sufficiency of the EIS, the JRP issued 166 IRs in total. A table of concordance issued by the JRP indicates that 56 IRs were generated by the JRP taking into consideration submissions made by the NCC, including concerning Aboriginal Traditional Knowledge. The JRP also invited comments on Nalcor's responses. In that regard the NCC submitted its "*Response to Lower Churchill Hydroelectric Generation Project Environmental Impact Statement*" on June 19, 2009. On December 18, 2009, the NCC submitted a further response of the same name, taking issue with the level or lack of consultation by Nalcor in relation to the EIS.

[170] The JRP sought additional information concerning Aboriginal Consultation and Traditional Land and Resource Use by way of IR JRP.151. Nalcor submitted its response to JRP.151 in May, 2010. In it, Nalcor stated that consultation efforts with the NCC regarding the Project had been ongoing since April 2007, and included a record of consultation. Nalcor submitted a supplemental response in September 2010 which was comprised of its Aboriginal Consultation Assessment Report. This described consultation efforts and additional data collected pertaining to the NCC, and other Aboriginal Groups, including historic and contemporary activities including fishing, hunting, trappings and marine mammal and plant harvesting. It also set out a table listing issues of concern to the NCC and proposed and complete actions and responses. The NCC filed a submission in response.

[171] The JRP hearings commenced on March 3, 2011. On March 4, 2011, the NCC advised the JRP that it would not participate and had filed an injunction seeking to halt the hearing. The JRP responded with regret and stating that as it had said in the past, it viewed the public hearings as an opportunity for Aboriginal groups to provide it with valuable information on asserted or established Aboriginal rights and title and how the Project may impact them, such information could then be included in the JRP Report.

[172] On March 24, 2011, the injunction application in *NCC I* was dismissed by Justice Handrigan of the Newfoundland Supreme Court. He set out a detailed review of the communications and consultations to that point in time and also addressed the role of the JRP stating:

> [49] But Nunatukavut's criticism of the JRP casts the Panel in a poor light and unfairly so. In fact, the Panel quite vigorously, if not aggressively, insisted that Nalcor take its duty to consult and accommodate Nunatukavut and the other Aboriginal groups seriously. I note, for example, the four series of comprehensive information requests which it directed to Nalcor between May 1, 2009 and November 2, 2010, one of which related specifically to Nalcor's consultation with Aboriginal groups. I also note here the letter the JRP sent to Nalcor on February 5, 2010 instructing Nalcor to provide monthly updates to the Panel on its consultation activities with Aboriginal groups and the JRP's decision in January, 2010 that the information it had received from Nalcor by then was not sufficient to go to public hearings.
>
> [50] The JRP has been an important advocate for Aboriginal consultation and accommodation throughout the EA process. And it has, to the extent that its mandate will permit, sought and received information about the potential adverse impacts that the Project will have on asserted or established Aboriginal rights or title, including those of Nunatukavut. Nunatukavut has not and will suffer no harm, irreparable or otherwise, because of the Panel's actions. It does risk harm, though it will not likely be irreparable, if it declines the JRP's outstanding invitation to participate in public hearings and otherwise engage in the remaining phases of the EA process.

[173] Subsequent to the denial of the injunction, the NCC did participate and made oral submissions to the JRP, accompanied by presentation materials. The first presentation concerns perceived data gaps, the need for a literature review, archival records and the time and resources to address this. The second recommended that Aboriginal Traditional Knowledge be incorporated in the EIS, that there be more meaningful consultation and that outstanding environmental issues be resolved.

[174] The JRP acknowledged the significance of its report in the context of Canada's overall consultation process:

> In August 2010, the Canadian Environmental Assessment Agency released the Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project (the Framework) to clarify how the federal government would rely on the Panel review process in fulfilling its legal duty to consult Aboriginal groups. The Framework clarified the role of the Canadian Environmental Assessment Agency and federal departments in consultation activities during the Panel review process as well as consultation activities outside the Panel process.
>
> The Framework identified the importance of the Panel review process within overall federal government consultation activities and the importance of Aboriginal participation in that process. **The Framework also pointed out that the Panel report and records established through the Panel review would be the primary source of information to support the federal government assessment of potential impacts of the Project on potential and established Aboriginal and treaty rights.**
>
> [Emphasis added]

[175] The JRP Report, in Chapter 8, Land and Resource Use, addressed effects of the Project on harvesting activities (hunting, trapping, fishing, and berry picking), cabins, winter travel, navigation and other resource-based activities (mining, agriculture and ecotourism) applicable to

Aboriginal and non-Aboriginal land and resource users alike. The JRP noted that the available information suggested that the area affected is used for a variety of purposes, but is currently not a prime area for land and resource use activities. It concluded that the Project would have an adverse but not significant effect on fishing in the main stem of the Churchill River because this is not currently an important fishing destination.

[176] However, should new consumption advisories be required in Goose Bay and Lake Melville, the Project would have a significant adverse effect on fishing and seal hunting in this area because of the reliance by many Aboriginal and non-Aboriginal people on fish and seals caught there. It was uncertain whether consumption advisories would be required beyond the mouth of the Churchill River, and the JRP referenced its Recommendation 6.7 concerning the assessment of downstream effects in that regard. Thus, the Project would not have a significant adverse effect on land and resources use, with the exception of the potential effects on fishing and seal hunting in the Lake Melville area the JRP identified.

[177] In Chapter 9, Current Aboriginal Land and Resource Use of Traditional Purposes, the JRP set out Nalcor's and the participants' views, including that the NCC did not agree with Nalcor's conclusion that the NCC's members do not currently practice land and resource use activities within the Project area and its submission that this conclusion was based on deficient information. In particular, the NCC disagreed with Nalcor's use of information contained in "*Unveiling NunatuKavut*" as it was primarily concerned with a limited study area.

[178] The JRP noted that in reaching its conclusions on current Aboriginal land and resource use for traditional purposes, it had considered certain factors to be particularly relevant. These included information related to experiences on the land shared with the Panel by some Aboriginal persons which suggested that there has been some decline in the practice of traditional land and resource use practices in recent time; that the intensity of traditional activities practiced within the Project area varies across the various Aboriginal groups, but the area does not appear to be a prime area for land and resource use activities, with mostly intermittent and sporadic use relative to other areas outside of the assessment area; and, that the absence of negotiated consultation agreements with certain Aboriginal groups led to the JRP receiving limited and imprecise information with respect to current Aboriginal land and resource use within the Project area.

[179] The JRP then listed its findings and recommendation in connection with each Aboriginal group. For the NCC this was:

> Inuit-Metis
>
> The Panel recognizes that it received only limited information during the review process about current land and resource use activities for traditional purposes in the Project area by Inuit-Metis. While some efforts were achieved initially when the first phase of a consultation agreement to facilitate information gathering was agreed upon by the NunatuKavut Community Council and Nalcor, late participation of the NunatuKavut leadership in the public hearing due to their interlocutory injunction application limited their input into the review process. The Panel also recognizes that the NunatuKavut Community Council's lack of resources prevented it from submitting substantial information after it started participating in the public hearing. During the public hearing, most information was received from individual Inuit-Metis participants, rather than from the organization, and the Panel notes that affiliation of participants could not always be confirmed.

> The Panel notes that the main land and resource use activity practiced by NunatuKavut members, which has persisted for two centuries, is trapping and measures considered to mitigate the effects of the Project on trapping activities and to compensate for losses of trapping income, property or equipments attributed to the Project (Recommendation 8.1) might be particularly relevant to Inuit-Metis trappers. The Panel also observes that many land and resource use locations reported to be frequented by Inuit-Metis are outside of the Project area and would remain unaffected and accessible.
>
> **Based on the information on current land and resource use identified through the environmental assessment process, there are uncertainties regarding the extent and locations of current land and resource use by the Inuit-Metis in the Project area. The Panel recognizes that additional information could be forthcoming during government consultations. To the extent that there are current uses in the Project area, the Panel concludes that the Project's impact on Inuit-Metis land and resource uses, after implementation of the mitigation measures proposed by Nalcor and those recommended by the Panel, would be adverse but not significant.**
>
> [Emphasis added]

[180] Importantly, the JRP found that its significant finding in Chapter 8, with respect to the Project's effect on fishing and seal hunting in Goose Bay and Lake Melville, would apply to traditional harvesting activities by Labrador Inuit, including the harvesting of country food in this area should Project-related consumption advisories be required. The JRP did not make a similar finding with respect to the Inuit-Metis or any other Aboriginal group.

[181] It is also of note that in its findings concerning Quebec Aboriginal groups, the JRP recognized, as it did with respect to the Inuit-Metis, that it received only limited information during the review process regarding current land and resource use activities for traditional purposes in the Project area. In that case this was due to the fact that Nalcor and the Aboriginal

groups were unable to conclude consultation agreements, with the exception of the Council of the Innu of Pakua Shipu. In addition, time constraints during the hearing period did not allow the Panel to travel to each community in Quebec.

[182] However, like its treatment of the NCC, the JRP concluded that although there were uncertainties regarding the extent and locations of current land and resource use by Quebec Aboriginal groups in the Project area, and that additional information could be forthcoming during government consultations, to the extent that there are current uses in the Project area, the Project's impact on Quebec Aboriginal land and resource uses, would be adverse but not significant. In other words, the NCC was not singular in the JRP's findings that available information regarding current land use activities for traditional purposes in the Project area was limited. Regardless, and recognizing that further information might be forthcoming during consultation subsequent to the issuance of its report, it concluded that the Project impact on land and resource use would be adverse but not significant.

[183] In Chapter 10, Aboriginal Rights and Title, the JRP noted that in accordance with its mandate, it invited Aboriginal persons or groups to submit information related to the nature and scope of potential or established Aboriginal rights or titles in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project would have on asserted or established Aboriginal rights or titles. Information on Aboriginal rights and titles was received by the JRP through testimony during the public hearings and written submissions. A summary of that information was provided. Further, Appendix 7 contains a list of documents received from each Aboriginal group with information relative to their respective

Aboriginal rights and title. In accordance with its mandate, the JRP did not come to any conclusions or make any recommendations with respect to this information. However, it is significant that while acknowledging that further information might be forthcoming, the JRP was able to make a determination that the impact on the NCC's land and resource use would be adverse but not significant.

[184] From the foregoing it is clear that the JRP process was the primary mechanism by which Aboriginal groups could identify their concerns about potential adverse Project impacts on their Aboriginal rights or title. The NCC was aware of this. It received funding to address these issues in the JRP process. While it may not be satisfied with the level of funding, I am unable to conclude that this precluded the NCC from meaningfully participating in the JRP process. And, to the extent that it elected not to do so but to instead pursue its injunction, it was aware of the risk that it took by not taking full advantage of that process and, ultimately, it did make limited submissions.

[185] It is true that the JRP acknowledged that there were uncertainties regarding the extent and locations of current land use in the Project area. However, the NCC also received funding in Phase 4 which concerned consultation on the JRP Report. In its funding application for Phase 4 the NCC described the proposed activities for which it was seeking funding which included holding meetings to collect traditional knowledge. The funding received, $21,000, served to permit consultation on the JRP Report and its recommendations – which acknowledged the land use uncertainties – as well as to establish whether potential Project impacts on Aboriginal or treaty rights had been addressed, recommended mitigation measures and any remaining

outstanding items. Being aware of the JRP's findings regarding current land and resource use, the NCC was in a position to substantively address that alleged knowledge gap at Phase 4 by providing further information, but did not choose to do so.

[186] The NCC's comments on the JRP Report were set out in its November 9, 2011 submission. It alleged that:

- The JRP process was impaired by Canada and the Province's failure to engage separately with the NCC prior to the JRP process;
- Aboriginal and treaty rights were not adequately considered, and the obligation to consult and accommodate had not been met;
- The Province and Nalcor were indistinguishable and the Province was biased and intent on obstructing consultation;
- The JRP discriminated against the NCC and gave preferential treatment to other Aboriginal groups;
- The JRP recognised that the NCC required additional time and financial resources to investigate more fully current land and resource use but failed to make a recommendation in that regard. Further, resources were still unavailable to conduct proper studies;
- The JRP applied a Eurocentric world view to its consideration of what constitutes traditional land use which was prejudicial and an error of law;
- The JRP did not exercise its TOR as it failed to insist that the NCC be provided with funding and that proper work on Aboriginal Traditional Knowledge be carried out;
- As to accommodation, the JRP should have required that licenses and permits issued to Nalcor be conditional on adequate consultations, financial accommodations and impact-benefit arrangements and royalty sharing;
- The JRP abdicated its jurisdiction and responsibility to consider Project alternatives and to assess cumulative effects;
- Nalcor was not candid and kept information from the JRP that was contrary to its interests and misrepresented information received from the NCC or its members:

    > NCC completed its contractual expectations by delivering information to Nalcor and then, when Nalcor did not present that information fairly and completely, lacked the resources to re-

> present the material directly to the JRP. As a result, the data before the JRP with respect to the NCC communities was seriously flawed.

– Further, that Nalcor had failed to engage the NCC at any level during the assessment.

[187] Many of these concerns had already been addressed by Justice Handrigan in his decision denying the NCC's injunction and were later addressed by Justice Near in *Grand Riverkeeper*. But what is significant for the purpose of this judicial review is the absence of a substantive response to the alleged lack of information concerning Aboriginal Traditional Knowledge and current land and resource use information when Phase 4 funding was provided and could have been directed to that issue. Even if the funding was not at a level that the NCC might have wished, given the importance that it places on this issue, it would have permitted at least some form of substantive response to factually ground its concerns. And, if the NCC felt that the data it gathered with the funding received from Nalcor was inaccurately presented by Nalcor to the JRP, it could have presented the information at Phase 4 and explained the basis of its concerns. As that research had previously been funded, there would have been little or no cost restriction in that regard.

[188] In summary, the NCC has not identified how much additional funding it would have required at Phase 5 to address Aboriginal Traditional Knowledge and current land and resource use. However, it had been provided with funding that was or could have been used for that purpose in Phases 1-4. Further, the JRP process was the primary mechanism by which Canada was to effect consultation with Aboriginal groups. Therefore, it was incumbent upon the NCC to fully utilize that process. If, at Phase 4, it remained unsatisfied as to the lack of information concerning Aboriginal Traditional Knowledge and current land and resource use it could, at that

phase, made some effort to further factually address its concerns; specifically, to address, at least at a preliminary level, the uncertainty identified by the JRP. However, no substantive submission was made in that regard. The NCC also does not explain how the alleged gaps in such knowledge and information affected the Phase 5 consultation, which is concerned, in particular, with the FHC and EEM Plans. For all of these reasons, I am unable to conclude that the NCC has established that a lack of funding at Phase 5 precluded it from presenting necessary Aboriginal Traditional Knowledge and current land and resource use information which resulted in a lack of meaningful consultation during that Phase.

(c) *Funding – Phase 5, Legitimate Expectations*

[189] As to the doctrine of legitimate expectations, in my view the NCC's argument on this point cannot succeed. The Supreme Court laid out the test for legitimate expectations in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 131:

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra*; *Mount Sinai*, *supra*, at para. 29; Brown and Evans,*supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[190] As stated in *Agraira* at para 94, if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been.

[191] In its written submissions, the NCC states that its legitimate expectations regarding funding, and other matters, are informed largely by the JRP process. However, the NCC does not point to anything within that process that can be characterized as clear, unambiguous and unqualified and that induced in the NCC a reasonable expectation that they would receive Phase 5 funding. Rather, the NCC simply states that as it received funding for Phases 1 to 4, its expectation as to Phase 5 is legitimate. In my view this does not meet the test for legitimate expectations. As the EA process concluded at Phase 4, it is unsurprising that funding for Phase 5, the regulatory permitting phase, would not have been addressed by the JRP or the PFP.

[192] Further, the Participant Funding Program Review Report for Phase 2 of the EA process contains no mention of further or future funding to be provided and the Funding Report for Phase 4 is virtually identical. Nor has the NCC provided any evidence that a similar funding application process for Phase 5 funding was contemplated.

[193] In short, the record contains no evidence that the Minister represented in a clear, unambiguous and unqualified manner, or in fact in any manner, that funding for Phase 5 would be provided. Nor did the NCC provide evidence that there is a practice of providing Phase 5

funding that would give rise to such an expectation. Accordingly, the NCC's submission as to legitimate expectations cannot succeed.

(d) *Funding – Phase 5, Review of FHC and EEM Plans*

[194] The NCC also submits that the lack of Phase 5 funding prevented it from adequately reviewing and commenting on what it describes as the highly technical FHC and EEM Plans. As a result, the NCC could not meaningfully participate at this stage of the consultation. As noted above, the NCC has at no time indicated what level of funding it would have required in this regard.

[195] The FHC Plan describes itself as outlining Nalcor's plan to offset fish habitat loss and harmful alteration caused by the Project through a series of physical habitat creations and enhancements that will be added to the predicted use of the reservoir by resident fish, together with a detailed adaptive monitoring program to measure function, effectiveness and to direct any required mitigations.

[196] It is also of note that the roots of the FHC Plan existed prior to Phase 5. The Chapman Affidavit indicates that Nalcor recognized that a FHC Plan would be required in order to obtain the Authorization and that its development started in 2006. The first step was the development by AMEC, engaged by Nalcor, of a Fish Habitat Compensation Framework for submission to DFO. This was also submitted to the JRP by way of response to IR# JRP.107. In May 2010, the Fish Habitat Compensation Strategy was completed. This was provided to the JRP by Nalcor in respect to IR# JRP.153. The Nalcor submission on its Fish Habitat Compensation Strategy states

that it provides habitat requirements for fish species present and demonstrates how these will be met through habitat creation and enhancement, the intent being to sustain, to the extent possible, the existing and natural patterns of fish habitat utilization. Values attributed to fish and fish habitat by the public, Aboriginal groups and other stakeholders were identified as part of its development and would continue to be incorporated in the future work on the FHC Plan.

[197] Fish habitat compensation workshops were held by Nalcor in April 2009. A representative of the NCC attended each of the two Fish Habitat Compensation workshops held in Happy Valley – Goose Bay on April 7, 2009. Exhibit KKK of the Chapman Affidavit contains notes from the workshops, the objective of which is stated to be to gain input from people that use and are knowledgeable about the river or are familiar with fish habitat compensation measures. A PowerPoint presentation provided an overview of the process, existing information and the approach of the strategy and raised questions for discussion, such as the importance of preferred species, angler access, preferred rivers for downriver enhancements, etc.

[198] Additional workshops were held in St. John's, Newfoundland on March 12, 2010 and in Happy Valley – Goose Bay on March 23, 2010. Nalcor prepared a summary of questions, comments and concerns arising from these, based on the minutes of those meetings. The NCC does not appear to have attended, although various other stakeholders did, such as Grand Riverkeeper, the Innu Nation and others.

[199] On December 21, 2012, Nalcor wrote to the NCC advising that it intended to consult with stakeholders concerning the draft FHC Plan and EEM Plan. This letter extended an offer to meet with representatives of the NCC to offer a briefing on the FHC Plan. It also extended an invitation to the NCC to attend a public information session in Happy Valley - Goose Bay on January 16, 2013 when the plan would be discussed. Nalcor enclosed a copy of the FHC Plan for the NCC's review. The letter stated that the FHC Plan was an important mitigation strategy for the Project effects and that Nalcor looked forward to engagement with the NCC. It also stated that if the NCC had any questions or required further information, it could contact Nalcor to discuss the matter further. The Bennett Affidavit states that the NCC did not respond to this offer to meet.

[200] On January 16, 2013, Nalcor hosted a public information session to present the draft FHC and EEM Plans. Representatives of the NCC attended the information session and the Summary Report of that session indicates that the draft FHC Plan was posted on Nalcor's website at that time.

[201] As to the EEM Plan, the Bennett Affidavit states that AMEC was engaged to prepare the plan which focuses on predictions made in the EA, and is designed to verify the environmental effect predictions and determine the effectiveness of mitigation measures.

[202] With regard to DFO's consultation in Phase 5, as set out above in the background facts, on May 9, 2012 at the NCC's request, its representatives met with those of DFO's to discuss the regulatory permits. At that time a number of issues were raised, including that the NCC had no

resources to review or respond to the permitting, and DFO advised that it could not provide such resources.

[203] By letter of June 1, 2012, DFO advised that prior to the issuance of the Authorization it would consult with Aboriginal groups, including the NCC, and that an Aboriginal consultation protocol governing that process was being developed and would be provided to the NCC for comment.

[204] On July 9, 2012, DFO wrote to the NCC advising that, pursuant to the *Consultation Framework*, the Project was now entering the regulatory permitting phase and proposed to conduct the Phase 5 consultations in accordance with the attached draft *Regulatory Phase Protocol*. DFO sought comments on the process within 14 days.

[205] Although the NCC did respond, more than 30 days later, its August 8, 2012 email reply did not substantially address the proposed *Regulatory Phase Protocol*. Instead, it made the following comments, and stated these were all of its comments at that time:

> – We would like to have a protocol put in place to share/review NCC's aboriginal traditional knowledge;
>
> – We would like more emphasis placed on aboriginal traditional knowledge;
>
> – As well as, a clear definition of the project in the footprint area.

[206] The draft FHC Plan was provided to the NCC by Nalcor on December 21, 2012. Both the draft FHC and EEM Plans were provided to the NCC on February 28, 2013 by DFO which also stated that detailed biological and engineering designs associated with the plans "are provided in

the Fish Habitat Compensation Plan and Environmental Effects Monitoring Plan which can be accessed on the Nalcor's website at http://nalcorenergy.com/news-and-publications.asp". Pursuant to the *Regulatory Phase Protocol*, DFO sought comments, within 45 days, and noted that the NCC could request a meeting within 10 days if necessary to discuss the plans with DFO. DFO also stated that it would provide a written response to such comments.

[207] The NCC responded on April 15, 2013, but did not provide comments on the FHC Plan or EEM Plan. It stated, amongst other things, that the NCC did not accept the *Regulatory Phase Protocol*, that the 45 day review period was unreasonable, that there had been an absence of procedural engagement with the NCC in preparing the plans, that no resources had been provided for Phase 5, and that there had been no direct consultation with the NCC in relation to the proposed Authorizations.

[208] The letter also stated that none of the agencies or companies holding a direct or delegated duty to consult in relation to the Authorization had met with the NCC directly on its concerns. The NCC sought a meeting to discuss its concerns as to non-compliance by the proponent and inadequacies in consultation and accommodation. It attached a table listing certain of the JRP recommendations, and deficiencies in response to them, as identified by the NCC.

[209] The FHC Plan is, undoubtedly, a technical document. The question is, did a lack of funding for Phase 5 preclude meaningful consultation. While it certainly would have been preferable if further funding had been provided at this stage, I am not convinced that without it there could be no meaningful consultation. The NCC was aware that Phase 5 funding would not

be provided. It was provided with opportunities to meet with Nalcor to discuss the FHC and EEM Plans. While Nalcor, as the Project proponent, may not have been viewed by the NCC as an independent source of information, it could at least have sought to have Nalcor explain the technical aspects of the FHC Plan to ascertain whether or not it adequately addressed and mitigated the NCC's interests, in particular, being any adverse impact on its current land and resource use.

[210] Similarly, although DFO was not able to provide Phase 5 funding, it effected and followed the *Regulatory Phase Protocol* and offered the NCC the opportunity to comment on that process. That encompassed the opportunity for the NCC to request a meeting within 10 days of receipt of the draft plans. The NCC did not make such a request, although it did subsequently challenge the protocol process and sought a meeting. DFO had no self interest in the Plans and it was in a position to provide the NCC with technical expertise in interpreting them. With such information, the NCC could have determined whether or not the FHC Plan was deficient in mitigating any adverse Project effects on its interests in the affected fish resources. It is also of note that the Affidavit of Ray Finn, Regional Director of Ecosystems Management, Newfoundland and Labrador Region, DFO, sworn February 5, 2014 in support of DFO's position in this application, states that he was advised that at the May 9, 2012 meeting requested by the NCC to discuss regulatory permitting, the NCC was told that, although DFO could not provide Phase 5 funding, it could meet as required to discuss the documents.

[211] The Todd Affidavit states that the NCC does not have the technical expertise or the resources to interpret the Plans. However, as Canada and Nalcor point out, the NCC was able to

find resources to bring an injunction and later an application for judicial review of the JRP decision as well as this current application. In my view, it would not seem unreasonable, therefore, for it to have engaged a consultant, if necessary, to provide technical advice, and, at least at a preliminary level, to determine if the FHC and EEM Plans sufficiently mitigated any adverse impact, or were deficient, in the context of the NCC's claimed land and resource use.

[212] As stated in *Halfway River First Nation*:

> [161] There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: *see Ryan v. Fort St. James Forest District (District Manager)* (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.); affirmed (1994), 40 B.C.A.C. 91 (B.C. C.A.).

[213] By not making at least some effort to assess the FHC and EEM Plans, either by way of the offered meetings with Nalcor or DFO or by utilizing its own resources to instruct and retain a consultant to provide preliminary advice, the NCC has failed to provide any evidence both that there was a failure to adequately consult and a resultant adverse impact on its rights and title.

[214] For these reasons, I am not satisfied that a lack of funding at Phase 5 precluded meaningful consultation.

(e) *Lack of Meaningful Consultation and Bad Faith*

[215] The NCC also submits that there was an absence of good faith and meaningful consultation at Phase 5 as demonstrated by an internal DFO memorandum and the delayed response of DFO to the NCC's comments on the JRP Report and the *Regulatory Phase Protocol*.

[216] The referenced memorandum is dated February 5, 2013. It was prepared for the DFO Regional Director General, NL Region, addresses the status of Aboriginal consultations for Phase 5, and was updated on February 21, 2013. The updated memorandum states that comments received in response to the proposed *Regulatory Phase Protocol* "predictably" indicated that some Aboriginal groups still had concerns about the EA that they felt had not been addressed and that "close the loop" letters were being prepared in response:

> "Close the loop" letters will be sent prior to sending the finalized regulatory phase consultation protocol. DFO expects to send the letters and protocol to Aboriginal groups by the end of February 2013 and commence consultation immediately afterwards.

[217] During the hearing before me, the NCC advised that it no longer asserted that these memorandums were indicative of bad faith. They did, however, indicate a lack of meaningful consultation.

[218] When seen in the context of the document in whole, this reference is not, in my view, indicative of bad faith or condoning perfunctory responses to Aboriginal concerns. Rather, the phrase is used in the context of the preparation of future communications to Aboriginal groups to address their outstanding concerns.

[219] More troublesome is Canada's delay in responding to the NCC. The NCC received Canada's reply to their November 9, 2011 comments on the JRP Report and their August 8, 2012 comments on the draft *Regulatory Phase Protocol* on June 28, 2013. The NCC submits that this appears to be the "close the loop" letter and came a year and a half after its comments on the JRP Report were submitted, almost a year after its comments on the draft *Regulatory Phase Protocol* were submitted and only days before the Authorization was issued. The NCC submits that waiting until the last moment, days before issuing the Authorization, to send a letter which responds to, but does not address, concerns raised in the consultation process is not meaningful and good faith consultation.

[220] However, in my view, Canada's June 28, 2013 letter cannot be viewed in isolation. As noted above, the NCC's comments on the JRP Report were wide ranging. They alleged that the JRP discriminated against the NCC, that it did not live up to its TOR, that it failed to consider alternatives to the Project, that there was a lack of candor on the part of Nalcor and other matters. The letter made few comments that concerned specific issues raised and Recommendations made by the JRP. Thus, while Canada certainly did not respond to it in a timely manner, given that the comments were made in Phase 4 while a response was not provided up until Phase 5, viewed in context, I am not convinced that the delay amounted to a lack of good faith or meaningful consultation.

[221] As to the NCC's August 9, 2012 email responding to the draft *Regulatory Phase Protocol*, as noted above, this did not provide substantive comments on the proposed protocol. Further, by letter of February 21, 2013, Canada advised that comments not directly relating to the

protocol would be addressed in a follow-up letter to follow shortly and that comments on the protocol had been fully and fairly considered and were reflected in the final version of the protocol, which was provided with that letter.

[222] In that regard, in its June 28, 2013 letter, DFO specifically addressed the NCC's view that a clear definition of the Project and the footprint had not been provided, advising that both were defined during the EA. As to the NCC's concern that more emphasis should be placed on Aboriginal Traditional Knowledge and that a protocol be put in place to share/review the NCC's Aboriginal Traditional Knowledge, DFO responded as follows:

> DFO and other federal authorities developed, in collaboration with aboriginal groups, a protocol for consulting with aboriginal groups during the regulatory phase of the Project. This protocol provides the opportunity for meetings, at which Aboriginal groups could share Aboriginal traditional knowledge with regulatory authorities for review and consideration in the issuance of permits or approvals. DFO offered such meetings to the NCC on February 28, 2013 for the authorizations being prepared for the Muskrat Falls site, and will offer meetings similarly for any future authorizations for the Project.
>
> Prior to submitting a Fish Habitat Compensation Plan, as well as an Environmental Effects Monitoring Plan, to DFO, Nalcor Energy (Nalcor) as a proponent may also offer to meet with Aboriginal groups. At that time, groups can share traditional knowledge with Nalcor so that it can be incorporated into the plans prior to submission.

[223] Given the delay in receiving this letter and its proximity to the issuance of the Authorization on July 9, 2013, the NCC's submission that this was not meaningful consultation is not without merit. However, when the letter is viewed together with other correspondence between Canada and the NCC, and well as the opportunities in Phase 5 to relay their Aboriginal

Traditional Knowledge, I cannot conclude that this constitutes a breach of the duty to consult or a lack of meaningful consultation.

[224] For example, on April 15, 2013, the NCC sent DFO a letter citing its concerns with, among other things, the protocol for Phase 5, its lack of resources for consultation during this Phase and its need to have more time for review.

[225] DFO responded soon after, on May 31, 2013. It noted that it gave full and fair consideration to the comments provided on the draft *Regulatory Phase Protocol*, including those of the NCC; that by Canada's letter of February 28, 2013, the NCC had been offered an opportunity to request a meeting with DFO to discuss the FHC and EEM Plans prior to the submission of comments, but that such a request had not been made; and its view that Nalcor had provided the NCC an opportunity to meet with Nalcor to discuss the FHC Plan, but such a meeting did not take place, and Canada's obligations had, therefore, been fulfilled in that regard. The letter also responded to the NCC's view that JRP Recommendations 6.7 and 6.9 had not been addressed.

[226] And, as described above, on January 16, 2013, Nalcor hosted a public information session in Happy Valley - Goose Bay to present its draft FHC and EEM Plans and gather input from interested stakeholders. A letter was sent, prior to the event, notifying the NCC of the session and offering to meet with the NCC. However, the NCC did not respond to that opportunity.

[227] And, on February 28, 2013, DFO sent a letter to the NCC, asking for input on Nalcor's FHC and EEM Plans. In accordance with the *Regulatory Phase Protocol*, it notified the NCC that it could request a meeting with DFO to discuss the documents within the first 10 days of receiving the Plans and that such a meeting must be held within the 45 day review period. The NCC did not request such a meeting until the period had passed at which time, by way of its April 15, 2013 letter, it also challenged the consultation process as set out in the *Regulatory Phase Protocol*.

[228] Thus, while Canada could certainly have acted with greater expediency in addressing some of the NCC's concerns, considering the above, I am not convinced the delay in response indicates a lack of good faith or that Canada did not adequately or meaningfully consult with the NCC during Phase 5. The consultation process must be reasonable, not perfect (*Ekuanitshit FC* at para 131).

[229] In my view, the *Regulatory Phase Protocol* clearly identified how the consultation process for Phase 5 would proceed. DFO provided the NCC with a draft of the proposed protocol for its comment. Although the NCC did respond, its comments were not responsive to the proposed process. DFO proceeded in accordance with the finalized *Regulatory Phase Protocol*, which had been revised in response to other comments received with respect to the draft document. And, as set out above, DFO addressed three issues raised by the NCC, albeit not to its satisfaction.

[230] The NCC also submits that a lack of good faith and meaningful consultation is demonstrated by Canada's imposition of the *Regulatory Phase Protocol* on it, without incorporating the NCC's feedback, and that it received the final form of the protocol midway through the process, after much of Nalcor's work on the FHC and EEM Plans was complete.

[231] In my view, this submission lacks merit. As set out above, Canada provided the draft *Regulatory Phase Protocol* to the NCC for comment in July 9, 2012 and sought comments within 14 days. On August 8, 2012, the NCC responded but did not provide substantive comments on the protocol. Canada provided the final form of the *Regulatory Phase Protocol* on February 21, 2013. Canada then proceeded in accordance with the process set out in the *Regulatory Phase Protocol*. It is true that by its letter of April 15, 2013, after it had been provided with the draft FHC and EEM Plans for review, the NCC then asserted that the *Regulatory Phase Protocol* was unacceptable to it. However, this does not support a view that the protocol was forced upon it. Further, it is clear from the record that the Plans required much background work and were being developed long before the commencement of Phase 5, the purpose of which was to review and comment on the completed draft Plans. Accordingly, the fact that work on these Plans had been done prior to the drafts being provided to the NCC pursuant to the *Regulatory Phase Protocol* is not indicative of a lack of good faith or failure of Canada's duty to consult.

[232] In my view, viewed in context, the Phase 5 consultation process was adequate, if not perfect, and Canada satisfied its duty to consult.

Issue 4: Was the decision to issue the Authorization reasonable?

The NCC's Position

[233] The NCC submits that the JRP process was relied upon heavily by Canada in fulfilling its consultation obligations. The JRP Recommendations were one of the main measures for mitigating the impacts of the Project and, therefore, an important accommodation measure. As such, a failure to follow the JRP Recommendations is a failure of accommodation.

[234] In particular, Nalcor was not required to follow Recommendation 6.7 and to carry out a comprehensive review of downstream effects prior to impoundment, with third party expert review, and a discussion workshop involving Aboriginal groups. As a result, the downstream effects of the Project have never been properly studied, and there remains a substantial risk of serious downstream effects, including methylmercury contamination of fish, seals, birds and humans.

[235] Although Canada accepted the intent of Recommendation 6.7, the required actions of baseline sampling and monitoring, which are directed at identifying problems in the future as they arise, is different than carrying out a comprehensive review prior to impoundment, which is directed toward identifying problems before they start. As a consequence, the NCC argues that baseline sampling and monitoring fulfils Recommendation 6.9, the development of an aquatic monitoring program, but not Recommendation 6.7.

[236] This is compounded by the fact that the JRP recommended full clearing of the reservoir, yet Nalcor has only been required to conduct partial clearing. This necessarily results in higher levels of methylmercury contamination, the impact of which has not been appreciated by the Minister.

[237] The NCC submits that while the Minister was not bound by the JRP Recommendations, given the importance that Canada placed on the JRP process in fulfilling its duty to consult obligations, they should not be taken lightly. Here the Minister is departing from the Recommendations without explicitly acknowledging that she is doing so, without providing reasons for doing so and in a manner that creates an elevated risk of methylmercury contamination. The decision to issue the Authorization is, for these reasons, unreasonable.

[238] The NCC also submits that, with respect to the FHC Plan, the Minster ignored the science available to her, including that of DFO scientists, regarding the lack of effectiveness of DFO's fish habitat compensation programs in actually reaching "no net loss" of fish habitat, as recognized by the JRP. Because DFO provided no information on the measures being taken to improve the effectiveness of the program it was, in effect, knowingly adopting an ineffective mitigation measure. Accordingly, the decision to issue the Authorization was not reasonable.

Canada's Position

[239] Canada takes the view that the NCC's primary allegation is that the Authorization is unreasonable because the monitoring and mitigation measures required by the Authorization are unlikely to be effective. Canada submits that this is an impermissible attack on the science

underpinning the Authorization and is contrary to the principle that the Court is not to be turned into an "academy of science". The Court's role is to determine whether the Authorization rests on a reasonable basis, and not whether its measures will be effective (*Ekuanitshit FC* at para 94). The standard of review is reasonableness and considerable deference is owed regarding the effectiveness of the plans (*Grand Riverkeeper* at paras 27-39). Canada also asserts that the NCC's argument is an unacceptable collateral attack on the Order-in-Council.

[240] Further, that all of the JRP Recommendations noted by the NCC were implemented, although Recommendations 4.5 and 6.7 were not implemented precisely as recommended by the JRP. Regardless, the Authorization conditions concerning baseline sampling, monitoring and habitat compensation are reasonable.

Nalcor's Position

[241] Nalcor conducted its analysis in this regard in the context of considering whether the Minister's decision to issue the Authorization constituted an abuse of discretion as a failure to consider a relevant ground. Nalcor submits that where legislation is silent as to the factors that an administrative decision-maker must take into consideration, as is the situation here, the decision-maker has the discretion to determine the appropriate factors (Guy Regimbald, *Canadian Administrative Law*, 1st ed (Markham: LexisNexis Canada, 2008 at pp 190); *Electric Power & Telephone Act (PEI)*, Re (1994), 109 DLR (4th) 300 at para 15).

[242] Nalcor submits that the RAs and the Governor-in-Council were required to consider the JRP Report and carry out their ss 37 and 37.1 duties. Canada's Response accepted, accepted

with modifications or rejected the Recommendations. This was approved by the Governor-in-Council, which mandated what Recommendations and mitigation measures were required. The NCC did not seek judicial review of Canada's Response. In the exercise of her discretion the Minister is guided by the *Fisheries Act*, Canada's Response and the *CEAA*. This means that she was required to follow the direction contained in the JRP Report. In the event of conflict, the Order-in-Council and the *CEAA* prevail.

[243] There was no obligation on the Minister to implement Recommendation 4.5. The factors for consideration were within her discretion and she reasonably excluded reservoir clearing as a requirement. A direction to fully clear the Muskrat Falls reservoir is also *ultra vires* the Minister, as it would encroach on the jurisdiction over forestry of the Province. Further, Nalcor considered the question of reservoir clearing and is proceeding with "partial clearing". In Nalcor's view, there is a negligible difference in predicted methylmercury levels between full and partial clearing. It also took into consideration other factors such as safety, logistics, fish habitat, greenhouse gas emissions and economics.

[244] As to Recommendation 6.7, the requirements of Canada's Response have been incorporated into the FHC and EEM Plans and, therefore, the Authorization. There is also no evidence to support the NCC's argument that the Minister is adopting a fish habitat compensation program that she knows will not be effective. Canada's Response to Recommendation 6.6 required Nalcor to develop and implement a compensation plan that will include a multi-year habitat monitoring strategy with thresholds identified for further action and,

if required, reporting processes and adaptive management measures. Nalcor asserts that it must adjust the FHC Plan, if necessary, to ensure effectiveness.

Analysis

(a) *Recommendations 6.7 and 4.5*

[245] The NCC asserts that by declining to implement Recommendation 6.7, the downstream effects on the Project have not been properly studied. This creates a risk with regard to downstream methylmercury contamination. The EEM and FHC Plans, as conditions of the Authorization, do not remedy this defect and, therefore, the NCC's concerns were not accommodated. This is compounded by the failure to implement full clearing as per Recommendation 6.5. In *Nunatsiavut*, I described in detail Recommendation 6.7, primarily in the context of methylmercury bioaccumulation. The NCC's position results in a similar analysis.

[246] Chapter 6 of the JRP Report, Aquatic Environment, addressed a number of issues including methylmercury in the reservoirs and downstream. As to the fate of mercury in the reservoirs, the JRP set out the views of Nalcor and the participants. Nalcor included a description of how reservoir formation leads to the release of methylmercury into the aquatic environment. Specifically, that when soils in reservoir areas are flooded, bacterial breakdown of the vegetation causes methylation, a chemical process that converts inorganic mercury in the soils to methylmercury, a more toxic form. Methylmercury then enters the aquatic ecosystem accumulating in aquatic animals mostly when they feed on organisms with elevated mercury. The concentration of methylmercury increases upward through the food chain (referred to as

bioaccumulation) resulting in higher concentrations in predatory fish, in animals such as otters or seals that eat fish, and potentially in humans. Typically, as shown in experience from other reservoirs in boreal regions, mercury levels in fish peak 5 to 16 years after flooding and then gradually decrease to background levels over 30 or more years. Nalcor's modeling predicted that mercury concentrations would peak within 5 years after flooding, declining to baseline levels within 35 years.

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

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

on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

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

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

[251] Nalcor stated that a more extensive assessment of the cumulative effects of mercury levels associated with the Churchill Falls hydro-electric project was not necessary. Nalcor acknowledged some uncertainties associated with its modelling and the state of knowledge about bioaccumulation and the fate of mercury in the ecosystem that limited its ability to make

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

[252] As to other participants, the JRP noted that they had raised concerns about the exclusion of Goose Bay and Lake Melville from the assessment area, changes to erosion and deposition downstream, mercury accumulation, including entrainment effects, in fish and seals, and changes to ice formation. DFO said that Nalcor had provided insufficient rationale for its decision to exclude Goose Bay and Lake Melville.

[253] The JRP noted that DFO had released a research paper showing that mercury effects from the Churchill Falls project could be seen in several estuarine species (rainbow smelt, tomcod, sea trout) in the waters of Lake Melville over 300 kilometres away from the Smallwood Reservoir. DFO expressed concern about the absence of downstream sampling of primary producers and macrobenthos because of their potential to bioaccumulate mercury. DFO therefore recommended that Nalcor develop a comprehensive program to monitor spatial and temporal changes in mercury in fish within the reservoirs and downstream including at Goose Bay

following reservoir creation. The frequency and timing of sampling should support a clear assessment of the magnitude and timing of these changes, and inform determinations of risks to human health and implementation of related fisheries management measures. More baseline data should be collected on mercury levels in estuarine fish downstream of Muskrat Falls and in Goose Bay in advance of inundation.

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

> The Panel concludes that Nalcor's assertion that there would be no measurable effect on levels of mercury in Goose Bay and Lake Melville has not been substantiated. Evidence of a long distance effect from the Churchill Falls project in estuarine species clearly indicate that mercury effects can cross from freshwater to saline environments, in spite of Nalcor's assertions to the contrary. The Panel also concludes that Nalcor did not carry out a full assessment of the fate of mercury in the downstream environment, including the potential pathways that could lead to mercury bioaccumulation in seals and the potential for cumulative effects of the Project together with other sources of mercury in the environment. Because Nalcor did not acknowledge the risk that seals could be exposed to mercury from the Project, it did not address whether elevated mercury would represent any threat to seal health or reproduction.
>
> The significance of the potential for downstream mercury effects on Aboriginal and non-Aboriginal land and resource use, and on human health and communities is discussed in Chapters 8, 9, and 13.

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

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

RECOMMENDATION 6.7 Assessment of downstream effects

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

- identifying all possible pathways for mercury throughout the food web, and incorporating lessons learned from the Churchill Falls project;

- baseline mercury data collection in water, sediments and biota, (revised modelling taking into account additional pathways, and particularly mercury accumulation in the benthos) to predict the fate of mercury in the downstream environment;

- quantification of the likely changes to the estuarine environment associated with reduction of sediment and nutrient inputs and temperature changes; and

- identification of any additional mitigation or adaptive management measures.

The results of this assessment should be reviewed by Fisheries and Oceans Canada and by an independent third-party expert or experts, and the revised predictions and review comments discussed at a forum to include participation by Aboriginal groups and stakeholders, in order to provide advice to Fisheries and Oceans Canada on next steps.

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

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

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

the uncertainty about the success of the mitigation measures. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report.

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

> 6.7 Response:
>
> The Government of Canada agrees with the intent of this recommendation and notes it is directed to Fisheries and Oceans Canada.
>
> As a condition of a subsection 35(2) authorization under the *Fisheries Act*, and prior to impoundment, Fisheries and Oceans Canada will require Nalcor to collect additional baseline data on bioaccumulation of methyl mercury in fish and on fish habitat downstream of Muskrat Falls.
>
> Fisheries and Oceans Canada will require Nalcor to conduct a comprehensive multi-year program to monitor and report on bioaccumulation of methyl mercury in fish (including seals) within the reservoirs and downstream, including the Goose Bay/Lake Melville area. Fisheries and Oceans Canada will also require that Nalcor carry out multi-year post-project monitoring and reporting downstream into Lake Melville on a variety of parameters including nutrients, primary production, fish habitat utilization and sediment transport in order to assess changes to downstream fish habitat.

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

year program to monitor and report on bioaccumulation of methylmercury in fish and seals within the reservoir and downstream into Lake Melville.

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

> 6. The Proponent shall undertake an Environmental Effects Monitoring Program as outlined in the "Lower Churchill Hydroelectric Generation Project - Aquatic Environmental Effects Monitoring Program - Muskrat Falls" (EEM Plan), dated February 2013, to monitor and verify the predicted impact of the proposed development from a fish and fish habitat perspective including project related downstream effects, methylmercury bioaccumulation in fish and fish entrainment as the Muskrat Falls facility by:
>
> …
>
> 6.3 Methylmercury bioaccumulation shall be monitored annually to determine levels in resident fish species, including seals, both within the reservoir and downstream as per established monitoring schedule, to record and report peak level and subsequent decline to background levels.
>
> 6.4 Information collected from the baseline and post-project surveys to compare and verify predictions if project impact to fish and fish habitat is to be reported by:
>
> > 6.4.1 Providing a comprehensive annual report summarizing all aspects associated with the EEM Program (including baseline data collection) to DFO by March 31. This will include on-going baseline monitoring up to an including 2016, as well as post-project monitoring for a period of no less than twenty (20) years from 2018 through and including 2037
> >
> > 6.4.2 Providing a comprehensive EEM Program review report summarizing all aspects associated with the post-Project EEM Program to DFO by March 31 of every fifth (5th) year, commencing in 2023. This will facilitate adjustments as needed, and as approved by DFO.
>
> …

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

[262] The EEM Plan study area for mercury sampling includes the Muskrat Falls reservoir and downstream out to Goose Bay/Lake Melville. Sampling is to occur on an annual basis until the visible peak and decline in concentration is observed. Further analysis will be conducted at that point, and additional monitoring will occur "with an efficient schedule".

[263] The EEM Plan states that baseline total mercury concentrations in fish have been collected over a 13 year period (since 1999) and that actual concentration at the time of inundation may be different. Therefore, additional fish samples would be collected and analysed for mercury body burden during pre-inundation in order to continue collection of mercury concentrations and as much data as possible from each fish. A graph shows the mean mercury concentrations that have been measured in the mainstream below Muskrat Falls for nine types of

fish to date, while another shows mean mercury concentrations measured in Goose Bay and Lake Melville for eleven types of fish. Similar information concerning seals is provided.

[264] As noted above, Canada's Response does not fully adopt Recommendation 6.7. The NCC does not suggest that Canada is bound to accept recommendations made by the JRP as part of the EA process. However, in my view, as the purpose of the EA process and the JRP Report is to identify environmental impacts and to inform Canada's Response, the JRP's Recommendations cannot simply be ignored or rejected without reasons. To do so would be to entirely undermine the EA process and its use by Canada to fulfil its consultation obligations.

[265] Here, however, Recommendation 6.7 was not ignored or rejected in whole. Rather, the intent of the Recommendation was accepted to the extent that the uncertainty identified by the JRP was acknowledged and addressed, although not in the manner recommended by the JRP. Canada's Response explained that ensuring commitments made by Nalcor and the provincial government were carried out would minimize the negative effects of the Project *and reduce the risks associated with the uncertainty about the success of the mitigation measures*. Further, that the anticipated significant energy, economic, socio-economic and environmental benefits outweighed the significant adverse environmental effects as identified in the JRP Report.

[266] In this regard, the JRP did not identify the NCC as being at risk of a significant adverse effect if consumption advisories were required. But, even if it had, Canada's Response acknowledged the concerns and balanced the competing interests explaining why it arrived at its conclusion (*Haida* at para 45; *Taku River* at para 2). While Canada's Response could,

undoubtedly, have provided a more in-depth explanation as to why it accepted the intent of Recommendation 6.7, but not its adoption in whole, its rationale is apparent from the record. In the context of this judicial review of the issuance of the Authorization, this is relevant as it pertains to the underlying consultation and rationale supporting Canada's Response and the Course of Action Decision, which, in turn, led to the issuance of the Authorization and its conditions.

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

[268] The consultation process demonstrates that Canada was fully informed of the views of Aboriginal groups to the extent of the downstream assessment that was required. However, it is apparent that it did not agree with those views. The May 31, 2013 letter from DFO to the NCC responded to this issue in the context of Phase 5. DFO explained that with respect to Recommendation 6.7, per Canada's Response, Nalcor would be required to collect additional baseline data on methylmercury accumulation in fish and on fish habitat downstream of Muskrat

Falls in advance of impoundment. The EEM Plan provided for review of the detailed information that Nalcor will collect.

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

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

(b) *Reservoir Clearing – Recommendation 4.5*

[271] The JRP addressed reservoir preparation both in Chapter 4, Project Need and Alternatives, and Chapter 6, Aquatic Environment of its report.

[272] In Chapter 4, the JRP described Nalcor's submissions on the environmental, technical and economic reasoning for three clearing scenarios: no clearing, full clearing or partial clearing. It also described the participants' views. This included NRC's view that the methods Nalcor had used to model the fate of mercury in the environment after reservoir clearing were appropriate; however, that the EIS did not indicate whether Nalcor had considered the effectiveness of partial clearing. Nor had Nalcor assessed removing the organic layer of soil or selective clearing of brush or other organics to reduce methylmercury production. Based on new information from experimental lakes, NRC recommended the removal of trees, brush and possibly soils in the drawdown zone river between high and low water levels, as research indicated that this area would be the greatest contributor of methylmercury, thus supporting Nalcor's scenario of partial clearing. The NCC does not appear to have made any submissions on this issue.

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

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

> The Panel also notes, as further discussed in Chapter 5, the more trees cleared, the more benefits accrue in terms of reducing methylmercury accumulation and greenhouse gas emissions, though gains may be small. The Panel also notes that National

> Resources Canada recommended that Nalcor study the removal of soils in the drawdown area to reduce the production of methylmercury in flooded terrain. This is discussed in Chapter 6.

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

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

[277] NRC pointed out that development of knowledge about the methylmercury problems associated with reservoir creation was still at an early stage and that mitigation to date had been largely confined to consumption advisories (which the Panel addressed in Chapter 13). Recent research had shown that the most effective mitigation may be removal of vegetation and the upper soil layer in what would become the drawdown area of the new reservoir. NRC therefore recommended that Nalcor consider large scale removal of mercury and carbon-rich soils within

this area, the so-called "bathtub ring", to mitigate methylmercury production, acknowledging that this form of mitigation had so far only been conducted at a smaller experimental scale.

[278] The JRP concluded that:

> The Panel notes that Natural Resources Canada challenged the notion that mercury mobilization is an inevitable consequence of hydro power development and consumption advisories are adequate as the only response. The benefits of carrying out pre-inundation mitigation such as more extensive clearing of vegetation or soils would need to be evaluated in the context of effects of the predicted mercury levels on fish-eating wildlife (Chapter 7), the use of renewable resources (Chapter 8) and human health (Chapter 13). Similarly, the significance of the cumulative effect of another period of methylmercury contamination on the lower Churchill system, following the effects of the Churchill Falls project, should be evaluated in the context of human health and the use of renewable resources.
>
> …
>
> The Panel accepts that selective soil removal around the reservoir rim is not yet proven as mitigation but observes that this approach appears to have merit, especially if the clearing can be confined to the reservoir rim. The Panel also notes that the type of preparation required for this mitigation might be complementary with the riparian and fish habitat measures that Nalcor would already be undertaking.
>
> The Panel concludes that consumption advisories transfer part of the cost of generating hydroelectricity to local populations and it is therefore important to find better approaches to reducing methylmercury in reservoirs. Therefore the Panel believes that Natural Resources Canada should move ahead with testing the mitigative approach of removing soil in the drawdown zone, including determining how to avoid or minimize environmental impacts, and ways to make beneficial use of the materials removed.

[279] With respect to Recommendation 4.5, the JRP concluded that it was both technically and economically feasible to carry out "full clearing" for the Muskrat Falls reservoir and made the following recommendation:

> **RECOMMENDATION 4.5 Full clearing of the Muskrat Falls reservoir**
>
> The Panel recommends that, if the Project is approved, Nalcor be required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls reservoir.

[280] Canada's Response stated the following:

> Recommendation 4.5: Full clearing of the Muskrat Falls reservoir
>
> The Panel recommends that, if the Project is approved, Nalcor be required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls reservoir.
>
> Response: The Government of Canada notes that this recommendation is directed to the operations of Nalcor as regulated by the Province of Newfoundland and Labrador. The Government of Canada will work with the appropriate parties as required.

[281] The NCC submits, in essence, that when issuing the Authorization the Minister ignored the impact that the approach taken by Canada's Response to Recommendation 4.5 would have on methylmercury levels and resultant impacts.

[282] The Bennett Affidavit attaches a copy of the Province's response which was filed on the same date as Canada's Response. It states:

> *Recommendation 4.5* – Full clearing of the Muskrat Falls reservoir
>
> The Panel recommends that, if the Project is approved, Nalcor is required to apply its 'full clearing' reservoir preparation option to the Muskrat Falls Reservoir.
>
> *Response:*
>
> The Government of Newfoundland and Labrador agrees with the principle of maximizing the utilization of the forest resource. With limited opportunities to use the resource, and the likely insignificant reductions in mercury levels associated with full versus partial clearing, the Government supports partial harvesting of the flood zone. If an economic opportunity to use the resource materializes, consideration will be given to harvesting additional fibre.

[283] The Finn Affidavit states that it is Mr. Finn's "understanding that Nalcor is in the process of removing a significant portion of the trees in the Muskrat Falls reservoir area". However, the basis of his understanding is not stated, nor is any explanation offered as to what a "significant portion of the trees" might mean in the context of full or partial clearing.

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

explicitly addressed, rather than simply disposed of on the basis that clear cutting was within Provincial jurisdiction.

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

(c) *Effectiveness of the FHC Plan*

[286] The NCC submits that the Minister ignored science that was available to her, including two research papers published by DFO scientists, regarding the lack of effectiveness of DFO's fish compensation programs in actually reaching no net loss of fish (Todd Affidavit, at para 69). Therefore, she knowingly adopted a program that is unlikely to be effective rendering her decision unreasonable.

[287] The JRP dealt with fish habitat loss, alteration and compensation in Chapter 6 of its report. The JRP outlined Nalcor's view, being that the key policy guiding its assessment of effects on fish and fish habitat was DFO's "no net loss" principle for the management of fish habitat. Nalcor, in collaboration with DFO, had developed a methodology specific to the lower Churchill River to calculate current and future habitat losses for all of the fish species present in the assessment area. Nalcor referenced the EIS, which showed the amount of fish habitat that

would potentially be destroyed or altered by the Project as determined by DFO, and the direct footprint of the Gull Island and Muskrat Falls generating facilities which would destroy 26.03 and 7.30 hectares, respectively. Nalcor stated that this loss would be offset by creation of new habitat both by incidental means (reservoir creation) and through the construction of physical compensation works. Nalcor concluded that its compensation and mitigation strategies would go a long way towards achieving DFO's no net loss objective and would provide sufficient habitat for each life cycle of every fish species found in the Project area. Therefore, no significant adverse effects for fish and fish habitat were expected. Nalcor set out its proposed mitigation and monitoring measures which included preparing fish habitat compensation plans, considering habitat enhancement sites outside the flood zone to compensate for potentially ineffective physical compensative works after impoundment, the carrying out of long-term monitoring and adaptive management of compensation works to ensure no net loss and collection of additional data.

[288] DFO generally concurred with Nalcor's description of long-term effects the Project would have on fish habitat and indicated that Nalcor's compensation strategy was acceptable in principle, with details to be provided in its forthcoming compensation plan. DFO noted that Nalcor had made significant long-term commitments to comprehensive habitat monitoring in the reservoirs and that it expected this monitoring to adequately confirm predictions of fish habitat utilization. DFO did, however, identify uncertainties about how long it would take water quality in the reservoirs to stabilize and how fish populations would adapt to those changes. DFO therefore recommended the collection of more pre-inundation baseline data on fish and fish habitat in advance of construction.

[289] Various participants expressed concerns about fish and fish habitat compensation. However, as will be discussed further below, the NCC was not one of these. Referring to several reports, Grand Riverkeeper Labrador criticized the success of compensation works in mitigating habitat loss caused by large projects and suggested that neither DFO nor EC had adequately fulfilled their obligations regarding monitoring and enforcement with respect to large scale compensation initiatives under the *Fisheries Act*.

[290] Amongst other findings, the JRP acknowledged that if Nalcor's proposed compensation strategy was successful, it would eventually likely address most of the habitat needs of resident species. Further, that DFO had tentatively endorsed the strategy and had reported success with smaller compensation works, however, that detailed evidence was not provided in support of this. Nor did Nalcor provide evidence of success or lessons learned from similar large scale hydro-electric projects.

[291] More specifically:

> The Panel heard evidence that Fisheries and Oceans Canada has not been able to demonstrate substantive progress in achieving its mandate of no net habitat loss and that fish habitat compensation projects across the country, when examined closely, often do not reproduce successful or equivalent habitat to that which was lost. Regional staff from Fisheries and Oceans Canada stated that their experience in Newfoundland and Labrador was different and that compensation projects in the province have been effective but did not present detailed information to support these statements.
>
> **RECOMMENDATION 6.6 Fish habitat compensation**
>
> The Panel recommends that, if the Project is approved, Fisheries and Oceans Canada require Nalcor to:
>
> - prepared a detailed fish habitat compensation plan in consultation with stakeholders and Aboriginal groups that

> addresses to the extent possible the likely interactions between species and life stages, including predator-prey relationships and also the potential to replace tributary-type habitats;
>
> - prepare a habitat monitoring plan including thresholds for further action and identified adaptive management measures;
> - implement the proposed plan, documenting the process;
> - evaluate the extent to which new, stable habitat has been created, its use and productivity; and
> - apply any lessons learned from implementing the Muskrat Falls compensation plan to the proposed Gull Island compensation works.
>
> If, after all feasible adaptive management measures have been applied, Fisheries and Oceans Canada determines that there has been a significant shortfall in the amount of habitat successfully created and maintained, compared to the original proposal, Nalcor should be required to compensate by carrying out habitat compensation works in other watersheds in Labrador. Preference should be given to remediation and enhancement on areas adversely affected by the Churchill Falls project.

[292] The JRP went on to state that while it recognized the comprehensive nature of Nalcor's compensation plan, it concluded that there was considerable risk that compensation measures would not be as effective as needed for the reasons it set out, including that the Project would create a heavy dependency on the success of an ambitious habitat compensation plan.

[293] The JRP made a significance determination in the next section of its report dealing with effects on fish assemblage. Specifically, that because of uncertainty about the effects on fish and fish populations caused by the number and scale of changes in the aquatic environment as a result of reservoir creation, the uncertainty about the effectiveness of habitat compensation, and the risk that at least some of the fish habitat lost would not be effectively re-created, the Project

would result in a potentially irreversible, significant adverse environmental effect to fish habitat and the final fish assemblage in both reservoirs.

[294] Several things arise from this. First, the JRP clearly considered the issue of the effectiveness of habitat compensation. It recognized the uncertainty and addressed this in its report. In other words, this issue was addressed in the course of the JRP process.

[295] Secondly, the NCC, by way of the Todd Affidavit, in making its assertion that the Minister ignored the science that was available to her, references two research papers published by DFO scientists regarding the lack of effectiveness of DFO fish habitat compensation programs in actually achieving no net loss of habitat, which reports are Exhibits to that affidavit.

[296] However, the Finn Affidavit points out that the second of the two papers was actually discussed, along with another study by the same authors on the topic of fish habitat compensation programs, with DFO participation, during the JRP aquatic environmental session hearings held on March 15-16, 2011. The Finn Affidavit also notes that the NCC did not make submissions at that session. Further, that the two papers were known to DFO and were part of a large body of knowledge, along with the JRP's findings and recommendations, which were considered and formed the scientific foundations for the FHC Plan, which was attached as a condition of the Authorization. Mr. Finn also deposes that he was satisfied that the FHC Plan was sound and addressed concerns like those raised in the two papers and, therefore, recommended that the Regional Director General issue the Authorization.

[297] The NCC acknowledges that it made no representations on this issue during the JRP process but states that this was because it was not participating at that time "due to ongoing litigation".

[298] In my view, the time to raise these concerns was during the JRP process (*Katlodeeche* at paras 119, 164-165). The NCC was well aware that the JRP was the primary mechanism by which it could raise concerns of this nature. It elected not to participate, as it was entitled to do, but that election came with a risk. Further, there is no evidence that after its injunction was denied, that the NCC then tried to raise this concern with the JRP or DFO. Nor was this issue raised as a concern when the NCC sought judicial review of the JRP Report, which was denied by this Court on December 20, 2012 (*Grand Riverkeeper*). The Finn Affidavit states that the subject two reports were, in fact, never raised by the NCC as matters that DFO or the Agency should consider prior to the filing of the Todd Affidavit. As stated in *Katlodeeche*:

> [164] The "fracking" concern has never been raised by KFN in the past and has been raised for the first time before me as a part of this application. It can hardly be said that the Crown has failed to consult with KFN on an issue that KFN has not indicated as a concern until now. As Paramount points out, fracking was expressly contemplated as a completion technique within the scope of EA03-005, and was addressed in the context of the environmental assessment. Chief Fabian conceded in cross-examination that he was aware that the cumulative effects of the Project were considered under EA03-005. Yet he is raising fracking before the Court for the first time. KFN has also been repeatedly asked to state its concerns about the Project, but has not mentioned fracking.
>
> [165] As regards the Aquatic Effects Monitoring, I believe KFN is well aware of the weakness of its case in this regard, and has attempted to bolster its position by raising additional concerns for the first time in this application. The proper venue for raising new concerns is not this application. There is no evidence before me that KFN will not be able to raise and have considered any new concerns with the Crown as the Project evolves, or indeed that

> concerns such as "fracking" have not already been addressed as part of the EA process. This approach by KFN of raising new concerns before me that were not brought forward during the many opportunities KFN has had to raise them, and when they could have been properly considered and addressed by qualified personnel prior to the issuance of the Type A Water Licence, cannot undermine the reasonableness of the Minister's decision to approve the Type A Water Licence on the basis of the whole record before him.

[299] By failing to raise this issue until this application for judicial review, the NCC is, in effect, attempting to frustrate the consultation process (*Halfway River First Nation* at paras 160-161).

[300] As stated in *Katlodeeche*:

> [104] While consultation is a duty of the Crown, there is also a corresponding duty on the part of Aboriginal groups to participate in good faith in reasonable consultation opportunities. There is a reciprocal obligation on Aboriginal groups to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" (*Mikisew Cree*, above, paragraph 65).

[301] Further, by way of the Authorization, DFO required compliance with the FHC Plan and included conditions pertaining to it. Significantly, these conditions include that if, at any time, Nalcor becomes aware that compensatory habitat is not completed and/or functioning according to the criteria set out in the Authorization and the FHC Plan, it must carry out any works which are necessary to ensure the compensatory habitat is completed and/or functioning as required by the Authorization (Condition 4.5), and, relating to the monitoring and reporting of compensatory habitat (Condition 5), including implementation of an adaptive management process to monitor

post-project predictions and to undertake adaptive measures should unanticipated changes occur (Condition 5.4).

[302] Accordingly, even if the fish habitat compensatory measures are not as effective as predicted, Nalcor is still required by the Authorization to take any necessary further actions to ensure full compliance.

[303] And, finally, as stated in *Ekuanitshit FC*, in the context of a challenge to Canada's Response to the Project:

> … It is important to reiterate that it is not this Court's role to decide whether or not the Nalcor and MHI's analyses are correct and to reassess the weight to be assigned to one study over another, but rather to determine whether the federal government's decision rests on a reasonable basis. As Justice Sexton reasoned in *Inverhuron & District Ratepayers' Assn.*, above:
>
> > The environmental assessment process is already a long and arduous one, both for proponents and opponents of a project. To turn the reviewing Court into an "academy of science" - to use a phrase coined by my colleague Strayer J. (as he then was) in *Vancouver Island Peace Society v. Canada* [12] - would be both inefficient and contrary to the scheme of the Act (*Inverhuron*, above, at para 36).

[304] This was restated in *Grand Riverkeeper* at para 41:

> [41] The Federal Court of Appeal noted in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (Fed. C.A.) at para 40 that a reasonableness review requires merely that the Court be able to perceive a rational basis for the Panel's conclusions. This Court elaborated on the point in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, [2008] F.C.J. No. 324 (F.C.) (*Pembina*), stating that "deference to expertise is based on the cogent

> articulation of the rationale [*sic*] basis for conclusions reached" (para 75). This view is consistent with *Dunsmuir*, above, in which the Supreme Court held that reasonableness is concerned "mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (at para 47).

[305] In this case, the JRP process canvassed the issue of the effectiveness of fish habitat compensation programs, identified the uncertainties arising and made recommendations which were implemented by the FHC Plan and the conditions of the Authorization. There is no doubt that the duty to consult can be satisfied through consultation that takes place within the regulatory process (*Taku River* at para 40; *Little Salmon* at para 39; *Ekuanitshit FCA* at para 99; *Katlodeeche* at para 97) and I am satisfied that the duty to consult was met, that the Authorization reflects a reasonable accommodation and that the Minister's decision to issue it was informed and reasonable.

[306] And, as stated in *Malcolm*, the role of the Court in the context of decisions of this nature is not to reweigh the factors and come to its own conclusion. Provided the decision is one that a Minister could reasonably make, deference requires that it be respected (at para 73).

(d) *Miscellaneous Issue*

(i) Impoundment

[307] The Russell Affidavit also asserts that DFO did not require Nalcor to carry out reservoir impoundment according to the schedule recommended by the JRP, which could result in damage

to fish during the spawning cycle. However, the Finn Affidavit states that the Authorization is consistent with Recommendation 6.1 as it includes a condition specifically requiring reservoir impoundment to be carried out between mid-July and the end of September. I note that Canada's Response accepted Recommendation 6.1 and that the Authorization to be issued would require Nalcor to carry out impoundment within the time frame recommended by the JRP, being mid-July to the end of September. In that regard, the Authorization as issued is valid from June 15, 2013 to December 31, 2017 and full reservoir impoundment is limited to July 15 to September 30 within that period, this would appear to be in compliance with Recommendation 6.1.

(ii) Treatment of Innu

[308] Finally, the NCC also submits that it was not treated in the same manner as the Innu by Nalcor and DFO and that DFO's treatment of the Innu, as the Aboriginal group most directly affected by the Project, is an error of law that undermines the validity of the consultations. I see little merit in that submission. The issue in this matter is concerned with the adequacy of consultation by Canada with the NCC in Phase 5 in the context of the NCC's affected title and interests. That question is fact based, specific to the NCC, and is concerned with the Authorization and its conditions, in particular, the FHC and EEM Plans, and the Minister's decision to issue the Authorization. And, in any event, the *Regulatory Phase Protocol*, the consultation process, applied to all Aboriginal groups.

Conclusion

[309] The duty to consult and accommodate does not mean that Aboriginal groups possess a veto over government decision-making. The Crown may proceed to make decisions even if an Aboriginal group opposes them, as long as the consultation process and accommodations are fair, reasonable and consistent with the honour of the Crown (*Adams Lake* at para 100).

[310] In this case, the duty to consult fell between the low and mid-range of the spectrum. Canada, consistent with the *Consultation Framework*, proposed the *Regulatory Phase Protocol* for Phase 5 of the Project. DFO met with the NCC to discuss the regulatory permitting to follow by way of the *Fisheries Act* Authorization. DFO also provided the NCC with the draft *Regulatory Phase Protocol* and sought the NCC's comments on that consultation process. The NCC did respond, outside the requested 14 day period, but did not provide substantive comments, instead seeking a definition of the Project footprint, a matter that had been addressed at the beginning of the five phase consultation process, and a separate protocol to share the NCC's Aboriginal Traditional Knowledge, which the NCC stated should be emphasized.

[311] DFO provided the draft FHC and EEM Plans to the NCC in accordance with the *Regulatory Phase Protocol*. However, rather than comment on the Plans, the NCC challenged the protocol process, took issue with alleged non-compliance with the JRP Recommendations, a lack of funding for Phase 5 and other matters. DFO responded to each of those concerns.

[312] In my view, the process set out in the *Regulatory Phase Protocol* was adequate to meet Canada's duty to consult, was reasonable and was followed by DFO. While DFO's response may have been less than perfect, perfection is not required so long as reasonable efforts have been made to consult and accommodate and if the result is within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law, there will be no basis to intervene (*Ka'a'Gee Tu #2* at para 90-92; *Haida* at para 42). While the NCC is not satisfied with many of Canada's responses, as discussed above, the Minister's decision to issue the Authorization was, ultimately, reasonable.

[313] As to the adequacy of consultation governing the NCC's Aboriginal Traditional Knowledge and current land and resource use, I am not convinced that insufficient funding or consultation opportunities in Phases 1-4 of the consultation process precluded the NCC from gathering and presenting this information. The JRP process was the primary mechanism addressing these issues. Additionally, further, albeit limited, funding was provided in Phase 4 to address issues arising from the JRP Report, which would have included the NCC's position that its Aboriginal Traditional Knowledge and land and resource use had not been adequately addressed. Because the consultation process was an ongoing one, the Minister was entitled to consider the prior consultation when deciding to issue the Authorization.

[314] Funding was not provided in Phase 5. This was unfortunate as it may have limited the ability of Aboriginal groups, including the NCC, to retain third party consultants, if necessary, to assist them in determining if the Authorization, in particular, the FHC and EEM Plans, adequately mitigated any adverse impacts to their effected title and interest. However, the NCC

was aware of the consultation process effected by the *Regulatory Phase Protocol* and was also afforded the opportunity to meet with both Nalcor and DFO to discuss the Plans but declined to do so. The NCC also did not utilize any of its own resources in this regard. As a result, it has not established either a failure of the duty to consult or an adverse impact resulting from it.

[315] As to the compliance with Recommendations 6.7 and 4.5 of the JRP Report, Canada was satisfied that Nalcor's modeling and data gathering served to provide a sufficient predictive basis against which future monitoring could be compared when combined with the further baseline sampling and monitoring required by the EEM Plan. That is, Canada was satisfied that the uncertainty and risk pertaining to methylmercury bioaccumulation could be managed by way of the monitoring programs. Accordingly, the Minister's decision to issue the Authorization on that basis, and without requiring full clearing, was informed and reasonable and does not demonstrate a failure of accommodation.

[316] Finally, the NCC's allegation that the Minister ignored available science and knowingly adopted a fish habitat compensation plan that was unlikely to be effective, rendering her decision unreasonable, is not sustainable. First, because the JRP dealt with the issue, recognized the uncertainty and made recommendations in that regard which are reflected in the Authorization. Secondly, because the NCC failed to raise this as a concern at any point in the consultation process. Raising such an issue for the first time at judicial review of the final phase of a lengthy consultation process and asking that the Court reweigh the scientific evidence is not the role of the Court nor an appropriate manner in which to deal with the issue.

[317] For the above reasons, it is my view that the duty to consult was met and that the Minister's decision to issue the Authorization was reasonable.

[318] Accordingly, this application for judicial review is denied.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The Attorney General of Canada and Nalcor shall have their costs in the amount of $1,250.00 per party.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1339-13
STYLE OF CAUSE:	NUNATUKAVUT COMMUNITY COUNCIL INC AND TODD RUSSELL, ON THEIR OWN BEHALVES AND ON BEHALF OF THE MEMBERS OF NUNATUKAVUT COMMUNITY COUNCIL INC v THE ATTORNEY GENERAL OF CANADA AND NALCOR ENERGY
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	FEBRUARY 2, 3, 4, 2015
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	AUGUST 18, 2015

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