AIRD & BERLIS LLP

Barristers and Solicitors

Scott Stoll
Direct: 416.865.4703
E-mail:sstoll@airdberlis.com

July 6, 2010

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

RE: Northgate Minerals Corporation
Application for Leave to Construct Transmission Line
Board File No. EB-2010-0150

We are counsel to Northgate Minerals Corporation regarding the Leave to Construct Application, Board File Number EB-2010-0150 (the "**Application**").

We are writing in response to the Temagami First Nation / Teme-Augama Anishnabi ("**Temagami**") letter dated June 29, 2010, (the **"Letter"**) addressed to Mr. Howard Wetston, Chair of the Ontario Energy Board ("**OEB**"). For your convenience, a copy of the Letter is attached hereto as **Tab "A**".

Northgate wishes to provide you with information which speaks directly to the Letter, and in particular the facts which dispute much of its content. Specifically, Northgate disagrees with the reference to: (i) the statement that Temagami just learned of the Application yesterday (as it is factually incorrect); (ii) that there has been a failure by the Board to fulfill any obligation to consult with Temagami regarding the Application; and (iii) no issue that is to be determined by the Board has been expressly addressed in the Letter.

For the reasons set out herein, Northgate is of the view that the Crown's duty to consult has been satisfied and there is no issue raised in the Letter that warrants granting a 30 day delay.

1. Background

Northgate is redeveloping the Young-Davidson Mine (the "**Mine**") which is located northwest of the Town of Matachewan. The Mine operated for a number of years and then ceased operations. The Mine is currently served by the 44kV system and has a load of approximately 3MW. Northgate applied for leave to construct approximately 7 kilometres of 115kV transmission line (the "**Project**") to extend from a Hydro One Networks Inc. ("**Hydro One**") decommissioned line. Hydro One is replacing approximately 47km of the decommissioned 115kV transmission line (the "**Hydro One Work**") to connect the Project. The Project is located within an old right-of-way that had been used to serve the mine during prior operations.

Hydro One completed an environmental assessment in respect of the Hydro One Work and Northgate completed an environmental assessment for the Project. Temagami was consulted regarding Northgate's plans to redevelop the Mine. Further, Temagami was engaged as part of the environmental review for the Project. Excerpts from the Environmental Study Report prepared by AMEC on behalf of Northgate are included at **Tab "B"**. As part of the environmental assessment process, Temagami was provided with a copy of the (i) Notice of Commencement; (ii) Notice of Public Information Centre #2; and (iii) a draft copy of the Environmental Study Report on December 18, 2009. Temagami was invited, and provided with the opportunity, to provide any comments or express any concerns they had with respect to the Project. However, Temagami did not make any submissions or attend any of the public information centres regarding the Project. Temagami was silent about the Project.

Later, Chief Ayotte was provided with a copy of the Notice of Completion and the final copy of the environmental report on February 1, 2010. Again, no comments were received from Temagami.

On April 9, 2010, as part of this proceeding, the Notice of Application was served upon Temagami. A copy of the confirmation of service is provided at **Tab "C"**. This was included in the Affidavit of Service of Carol Thomas dated April 22, 2010 which forms part of the record of this Application. The delivery was signed for as being received.

On April 9, 2010 the Notice of Application was published in the Northern News and the Timmins Daily Press. The French version of the Notice of Application was published in the Kirkland Lake Northern News on April 9, 2010 and "Les Nouvelles" (Timmins) on April 14, 2010. This information was filed with the Board as part of the affidavit of service of Carol Thomas dated April 22, 2010.

A copy of the Application was published on the Internet on the Northgate website.

On April 18, 2010 Northgate received a letter from Temagami requesting continued dialogue. Upon receiving this letter, Northgate and Temagami met on several occasions to discuss the Mine and the Project and any concerns Temagami may have. As part of this process, Northgate was advised by Temagami of concerns they had primarily with respect to testing and water quality issues related to the Mine. In working with the Ministry of Mines, Northern Development and Forestry, the concerns identified were adequately addressed or accommodated as part of the Closure Plan approval, which was received on June 29, 2010. No issues or concerns were identified with respect to the Project itself.

On June 11, 2010 Northgate makes its submissions in respect of this Application, closing the evidentiary record. The submissions include a reference to the agreement with the Matachewan First Nation (**"MFN")** and that Northgate had been meeting with Temagami, and others, to discuss the Young-Davidson Mine since 2006. A copy of the consultation log with Temagami is provided at **Tab "D"**. Temagami engaged on other aspects of the Mine but had not participated in the environmental review of the Project nor, prior to June 29, 2010, had it participated in this proceeding.

Northgate has entered into an agreement with the MFN, who have asserted that the Mine and its associated transmission lines are located within their traditional territories. MFN's reserve lands are located within 10 km of the Project. Through this agreement, the MFN provided their support for the project as a whole.

Specific to the Application now before the Board, Temagami was provided with all relevant information with respect to the Application and was invited to provide any comments or concerns they may have. Subject to the Letter which identified concerns unrelated to the Project and which have been adequately addressed elsewhere, Temagami chose not to participate in the environmental assessment or the Application.

2. The Duty to Consult

As the Board is aware, the duty to consult with First Nations arises where the government is to make a decision that may impact a right or a claimed right of such First Nation. Government decisions will not have the same potential impact, nor are all potentially impacted rights the same, so the nature of the obligation to consult changes. The Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511, 2004 SCC 73, see **Tab "E"**, described the duty to consult as follows:

> The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. 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 people with respect to the interests at stake.

Further, the obligation to consult does not create an obligation to agree, nor does it give the First Nation a veto over the Project. Therefore, the mere fact that a First Nation does not agree with a decision does not mean there was a failure to consult. Further, the First Nation has an obligation to make its concerns known – it cannot refuse or fail to engage nor can it frustrate the consultation process – the duty of good faith in consultation is placed on all parties.

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (Delgamuukw, supra, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

3. The Nature of the Duty

The nature of the duty is dependent upon the nature of the decision to be made by the Board and the nature of the impact and the potential claim of Temagami. The Board's considerations in this Application are limited by section 96 of the *Ontario Energy Board Act, 1998* (the **"OEB Act"**) to the interests of consumers with respect to price, reliability and quality of service. The Project is acceptable from each of these criteria, price, reliability and quality of service. While not an issue in this proceeding, the transmission line will have minimal potential environmental impacts. No issues were raised by Temagami during the environmental review. The Project is proposed in a previous electricity transmission corridor so there is little chance of any incremental impact. The Project is located approximately 110 km from the Settlement Area agreed to by Temagami and lies at the very edge of its asserted claim. For each of these reasons, Northgate submits the duty to consult is relatively low and that it has been fulfilled through providing notice to Temagami.

(a) OEB's Discretion is limited by the OEB Act

The Application seeks leave to construct an 115kV transmission line to supply the Young-Davidson Mine Project. The Board, in considering such an application, is obligated to undertake the analysis based upon section 96 of the OEB Act, reproduced below:

> 96(1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.
>
> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.

The Board does not possess the jurisdiction to consider the environmental aspects of the Project as part of this Application. Nor does the Board consider archeological or other issues not related to the items specifically identified by the OEB Act. These other issues would be, and were, properly considered in other venues such as the environmental assessment process. Northgate provided the comments received on the environmental review in response to Board Staff I.R. #7.

Finally, the Board's focus is on the transmission line, not on the use to which the electricity is put by the customer. The Divisional Court, in *Power Workers Union, Canadian Union of Public Employees, Local 1000 v. Ontario Energy Board*, 2006 CanLII 25267 (ON S.C.D.C.) see **Tab "F"**, considered the Board's authority in the context of a leave to construct (where the Board's considerations are broader) and the Board's jurisdiction is limited to those issues pertaining to the pipeline. Therefore, the Board's considerations in a section 92 application are limited to the transmission line.

(b) The Potential Impact of the Decision

Northgate submits there is a very low, if any, potential impact to any aboriginal or treaty rights of the Temagami. First, the Letter fails to articulate a specific right or how the Project may affect that right, and the Project is located at the far north edge of the claimed area, a significant distance from the settlement area. Second, the Project is planned for an existing right-of-way that parallels an existing highway (and in some areas an existing power line) and travels through the Town of Matachewan. Northgate submits the proper consideration of the impact is limited to the issues before the Board, the impact on the

price, reliability and quality of service. However, Northgate submits that even a broader consideration leads to the conclusion that the potential impact, if any, is minor.

With respect to the asserted rights of Temagami, the Supreme Court of Canada determined that they had no aboriginal rights to claim title to the claimed area in the *Bear Island Decision* [1991] S.C.J.No. 61. Their reserve lands are located far south of the Project, approximately 110 km, and any treaty land entitlement claim does not entitle a First Nation to select the location of any lands which may be granted, especially lands that are subject to third party rights. (See: **Platinex v Kitchenuhmaykoosib Inninuwug First Nation** [2007] O.J. No.1841) (see **Tab "I"**)

A review of the website of the Ministry of Aboriginal Affairs (Ontario) includes a map showing the claimed area and the settlement area. A copy of the Ministry of Aboriginal Affairs summary of the framework agreement with the Temagami is provided at **Tab "G"**. From the map it is clear the Project is at the extreme north end of the potential claim, a significant distance from the settlement area. Moreover, MFN, who reside adjacent to the Project, have acknowledged this area to be their exclusive traditional territory. Therefore, Northgate submits that the area in question, while within the area of the Temagami asserted claim, is not an area of central importance to Temagami.

The route of the Project has been provided in the evidence. Further, there were proposals that would have traversed a greater length through Temagami claimed territory. Northgate chose a route that was within the prior existing right-of-way of the transmission line that served the prior mine. This would limit the potential impact, in general, of the transmission line. The route parallels an existing highway and will have a temporary minor potential impact during construction and even less potential impact thereafter. Because of the prior existing right-of-way, the area of construction has already been disturbed.

It should be noted that even when additional routes were considered that traversed a greater and undisturbed area within the area of claim of the Temagami, no issues or concerns were voiced.

As part of the environmental assessment the potential for archeological significance was reviewed. It was noted that the location falls within the traditional area of the MFN. The MFN and Northgate completed a traditional knowledge investigation. The MFN confirmed there were no traditional knowledge conflicts with the Project. Temagami was aware of the process and did not raise any issues.

In light of the foregoing, Northgate submits that any duty to consult would fall at the low end of the spectrum, which Northgate respectfully submits has been adequately addressed through the evidence of consultation tendered with the Application. If one only considers the very narrow issues before the Board, the duty to consult is lower still. Neither the Independent Electricity System Operator, Hydro One Networks Inc., nor any other intervenor, has raised any technical issue which remains outstanding. A System Impact

Assessment (Exhibit B, Tab 2, Schedule 6) and a Customer Impact Assessment (Response to Board Staff I.R. #6) were both completed and the Project is acceptable from a technical perspective. Further, the Project is acceptable from its potential impact on the price, reliability and quality of service of electricity.

4. The Obligation to Engage

The timing of the Letter is somewhat shocking given the late stage of the Project application process. The obligation to engage was considered by the court in British Columbia in Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management), 2003 BCSC 1422 (CanLII), see **Tab "H"**, and the following excerpt is illustrative.

> [103] The Heiltsuk take the position they have not been consulted at all with respect to the issuance of the licences and that any meetings held between the Heiltsuk and the Province or between Heiltsuk and Omega do not constitute consultation.
>
> [104] In *Ryan et al. v. Fort St. James Forest District (District Manager),* Smithers Registry, No. 7855 (BCSC) aff'd (1994), 40 B.C.A.C. 91, Macdonald J. dealt with the issue of whether the Gitksan could argue that there had not been adequate consultation when they had refused to participate in the process:
>
> ¶ 23 I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the Forest Act itself and the fiduciary obligations toward Native Indians discussed in Delgamuukw, establish that right beyond question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.
>
> ¶ 26 I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.
>
> [105] A similar finding was made in *Halfway River First Nation v. BC (Ministry of Forests)*, 1999 BCCA 470 (CanLII), 1999 BCCA 470. On a review of the consultation which took place in that case, Mr. Justice Finch held:
>
> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information

> provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.
>
> …
>
> [114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government. Any accommodation must be done in good faith and honour. When dealing with generalized claims over vast areas, the court held that accommodation was much broader than a simple matter of determining whether licences had been fairly allocated. (Delgamuukw, ¶ 165, 202, 203)
>
> …
>
> [118] In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute".

Northgate submits there is a duty on the part of the First Nation to engage in the consultation process. The evidence is clear that Temagami was aware of the Project; even the Letter acknowledges that point. Moreover, any assessment of consultation must take into consideration all efforts to consult in relation to the project as a whole. During this process, any concerns identified, while not touching on the Project, were adequately addressed. Temagami was made aware of the environmental assessment relating specifically to the Project but did not raise any issues or concerns during the environmental review regarding the Project. It is submitted that Temagami either chose not to engage in the process, or did not engage as there were no concerns with respect to impacts on their asserted rights. Further, as part of this proceeding, Temagami was served a copy of the Notice of Application, and there were several publications of the Notice of Application. Still Temagami did nothing with respect to the Project until June 29th, 2010. To the extent there is any failure, it is a failure on the part of Temagami to engage.

Conclusion

Northgate has satisfied the requirements for the granting of leave to construct and where such requirements have been fulfilled, the Board is required under section 96 of the OEB Act to grant leave to construct the Project. Temagami has been repeatedly contacted in regards to the Project and Application. Temagami failed to come forward with any concerns until the last second, which concerns are not related to the matters before the Board. Despite knowledge, and participating actively in other aspects of Northgate's Mine, Temagami remained silent. Such silence is not consistent with the good faith obligation to engage during consultation.

Finally, Temagami has raised no concern directly related to the Project and the issues before the Board. Any technical issues regarding the Project have been adequately dealt with through the System Impact Assessment, the Customer Impact Assessment and this Application. Environmental issues are considered in the environmental assessment process, which is not being considered by the Board. Even there, no issues were raised by Temagami. Any concerns that arose during the consultation process with respect to potential impacts associated with the Mine generally, either as conducted by Northgate or the Ministry of Mines, Northern Development and Forestry have been adequately addressed, as evidenced by the approval of the Closure plan.

The Board should proceed to issue a decision on the Application and should deny the request of Temagami for a 30 day extension period.

All of which is respectfully submitted.

Yours truly,

AIRD & BERLIS LLP

Original signed by,

Scott Stoll

SAS:ct
Attachments

cc Intervenors in EB-2010-0150
cc Chief Roxane Ayotte, Temagami First Nation
cc Chief John McKenzie, Teme-Augama Anishnabal
cc Chris Bentley, Minister of Aboriginal Affairs
cc Doug Carr, Assistant Deputy Ministry and Secretary for Aboriginal Affairs

6925984.1

TAB A

TEMAGAMI FIRST NATION

BEAR ISLAND
LAKE TEMAGAMI, ONTARIO P0H 1CO
TEL 705.237.8943
FAX 705.237.8959

June 29, 2010

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Toronto, Ontario
M4P 1E4

To: Howard I Wetston, Q.C. Chair/CEO OEB

Re: Northgate Minerals *Leave to Construct* Transmission Facilities application, Young-Davidson Power Project: Transmission line from Matachewan Junction to the Young-Davison Project Site, Cairo township, District of Temiskaming, *Traditional Territory of the Teme-Augama Anishnabai*.

The Temagami First Nation (TFN) and Teme-Augama Anishnabai (TAA) were aware that Northgate Minerals would eventually need to apply for this *Leave to Construct Transmission Facilities* as a part of their proposed mining project.
However, it came to our attention only yesterday (due to a citizen's search of your website), that Northgate had assembled and submitted an application to the Ontario Energy Board.
In this submission, it is implied in section 28 of their application (below) that the TFN/TAA is on board with the commencement of this project, it should be clear that at present, this is ***not*** the case.

*** First Nations Consultation**

28. As part of this proceeding Northgate provided notice of this Application to the Matachewan First Nation ("**MFN**"), the Temagami First Nation and the Metis Nation of Ontario. Northgate indicated that it had commenced discussions with the MFN in 2006 and had negotiated an agreement with the MFN.

* From Application titled: "NORTHGATE MINERALS CORPORATION LEAVE TO CONSTRUCT JUNE 11, 2010"

After reviewing of our files, it is clear that we have no evidence that a notice of this application to the Ontario Energy Board was ever received by the TFN or the TAA, notwithstanding our

current involvement in direct discussions with the company regarding the Young-Davison Project.

While our internal dialogue has identified significant and material concerns about the Northgate Application, until quite recently, due to capacity considerations, our ability to engage appropriate environmental and technical consultants so that we may more fully appreciate certain aspects of the proposed project did not exist. Such engagement is vital and necessary to ensure that we are able to exercise due diligence on the matter, in relation to our aboriginal and treaty rights, and to enable us offer an informed and reasonable comment.

The OEB, as the representative agency of the Crown regarding these applicable impacts on our Traditional Territory (N'Daki Menan), is obligated to ensure that we have been consulted on this matter in a respectful and meaningful way. We have not been contacted by your department regarding this matter, so plainly, this duty has not even begun to be fulfilled.

We must insist that the board not take any steps with this Application until we have had a reasonable period to present informed comments regarding the application. In addition, we require that we be engaged and consulted directly by the OEB in advance of us making a written submission.

Therefore, it is imperative that the OEB provide a 30 day extension before rendering a decision on this application. We will complete a comprehensive submission for the Board's consideration by July 30, 2010.

The Supreme Court of Canada has recognized N'Daki Menan (Our Homeland) as the Traditional Territory of the Teme-Augama Anishnabai. This project is within our Traditional Territory and as such, we ***must*** be consulted in a reasonable and meaningful way.

We await your response.

Miigwetch.

Chief Roxane Ayotte, Temagami First Nation

Chief John McKenzie, Teme-Augama Anishnabai

cc Northgate Minerals
cc Chris Bentley: Minister of Aboriginal Affairs
cc Doug Carr: Assistant Deputy Minister and Secretary for Aboriginal Affairs

TAB B

Northgate Minerals Corporation
Young Davidson Project

amec

YOUNG-DAVIDSON POWER PROJECT: TRANSMISSION LINE FROM MATACHEWAN JUNCTION TO THE YOUNG-DAVIDSON PROJECT SITE

ENVIRONMENTAL STUDY REPORT

Prepared on behalf of:

Northgate Minerals Corporation
Young-Davidson Project
259 Matheson Street
Matachewan, Ontario
P0K 1M0

Prepared by:

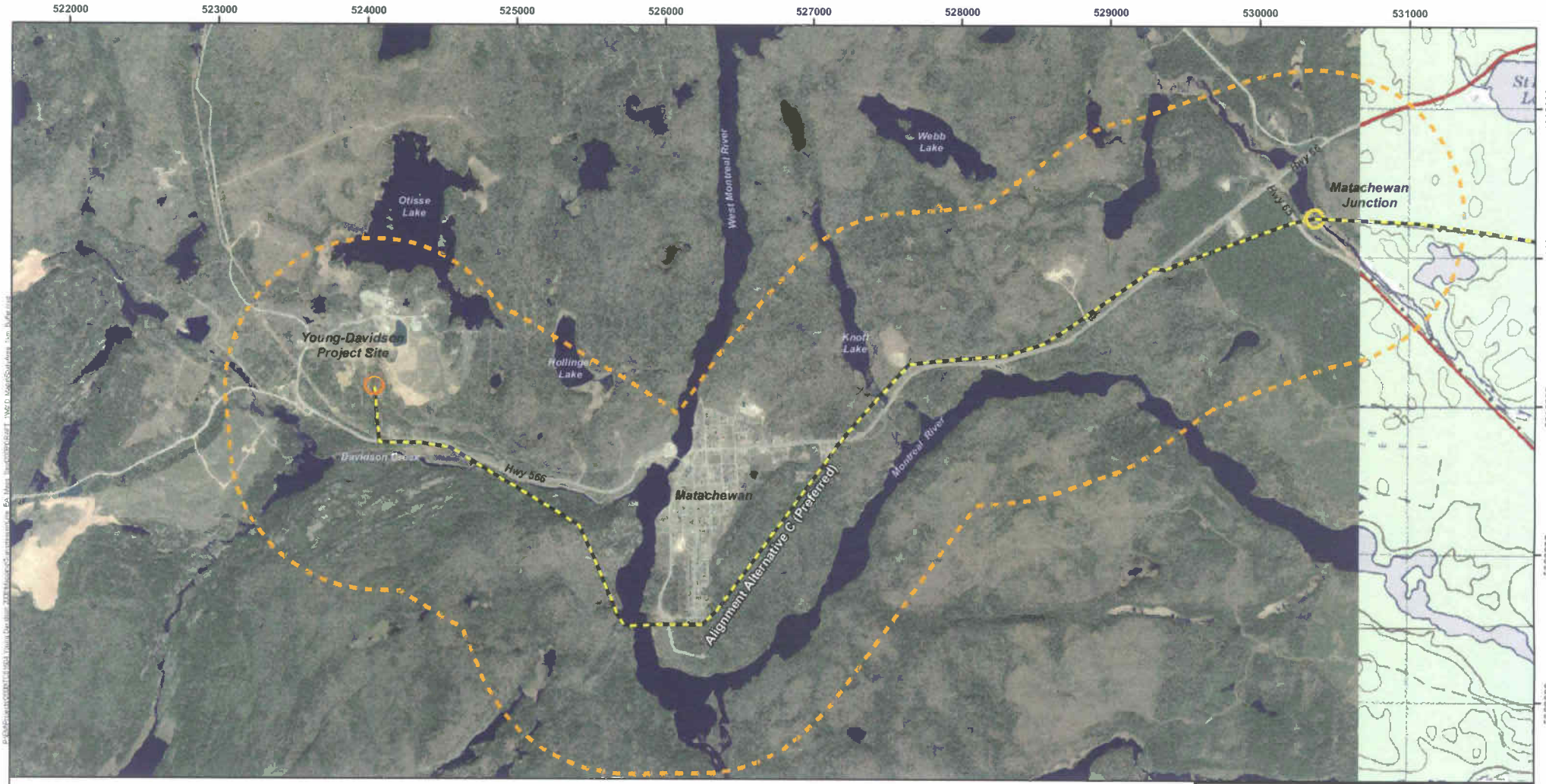
AMEC Earth & Environmental,
a division of AMEC Americas Limited
160 Traders Blvd East, Suite 110
Mississauga, Ontario, L4Z 3K7

January 2010
TC81504

6.13 Cultural Heritage and Archaeology

The Matachewan area has a lengthy and significant history and pre-contact history dating from 7,000 BC to the present day. Several archaeological sites have been registered in the area but none along the proposed transmission line routing (WHR 2008; Figure 7).

The transmission line ROW falls is located within the traditional territories of the MFN. Traditional knowledge investigations were completed by the MFN with the support of Northgate, and the property of the MFN. The MFN has reviewed the overall proposed layout of the site and locations of infrastructure and confirm there are no traditional knowledge conflicts with Northgate's proposal.



LEGEND

Approximate Transmission Line Start and End Points

- Start Point
- End Point
- Alignment Alternative C - Preferred Alternative (approximately 8.3 km)
- Study Area - Alignment Alternative C 1 km Buffer

0 0.5 1 2 3 4 Kilometres

Datum: NAD83
Projection: UTM Zone 17N

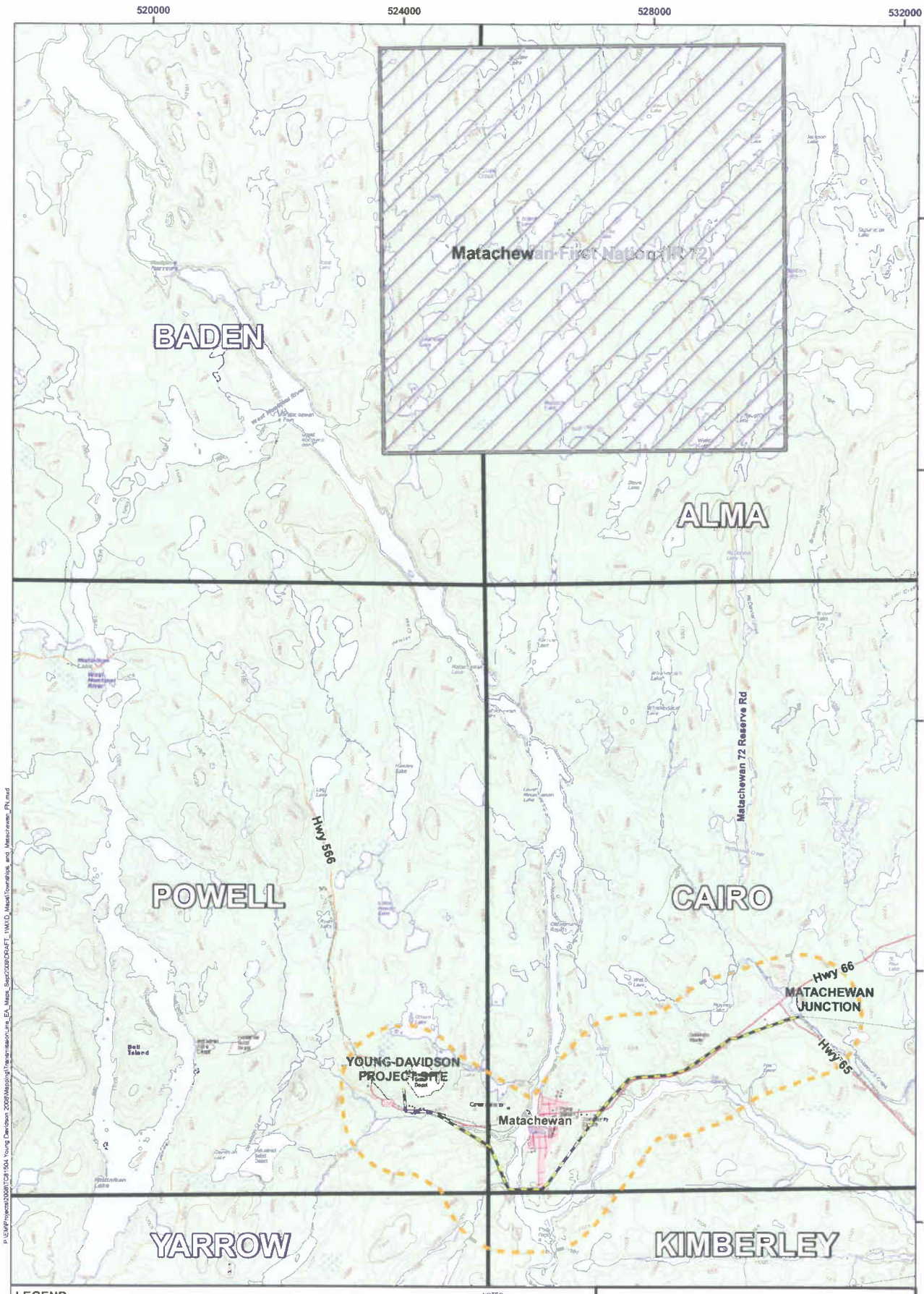
N W E S

Northgate Minerals Corporation amec

YOUNG-DAVIDSON PROJECT

Study Area

SCALE: 1:25,000	DATE: October 2009
PROJECT No: TC81504	FIGURE: 4



LEGEND

- Matachewan First Nation (IR 72)
- Township Boundaries (Labeled with Township Name)
- Study Area
- Proposed Young-Davidson Transmission Line

NOTES:
Topographic DRG maps extracted from Geographic / National Resources Canada
Township Boundaries extracted from MNDM ClaimMaps administration boundaries

0 1 2 4 6 Kilometres
Datum: NAD83

N W E

Northgate Minerals Corporation amec

YOUNG-DAVIDSON PROJECT

Township Boundaries and Location of Matachewan First Nation

SCALE: 1:56,500	DATE: October 2009
PROJECT No: TC81504	FIGURE: 5

LEGEND

Approximate Transmission Line Start and End Points

- Start Point
- End Point
- Study Area - Alignment Alternative C 1 km Buffer
- Alignment Alternative C - Preferred Alternative (approximately 8.3 km)
- Contours - 10 m interval
- General Flow Direction based on Contours and Stream Network

0 0.5 1 2 3 4 Kilometres

Datum: NAD83
Projection: UTM Zone 17N

NOTES:
- Watercourse and topographic contour information extracted from the Ontario Digital Geographic Database (ODGD)

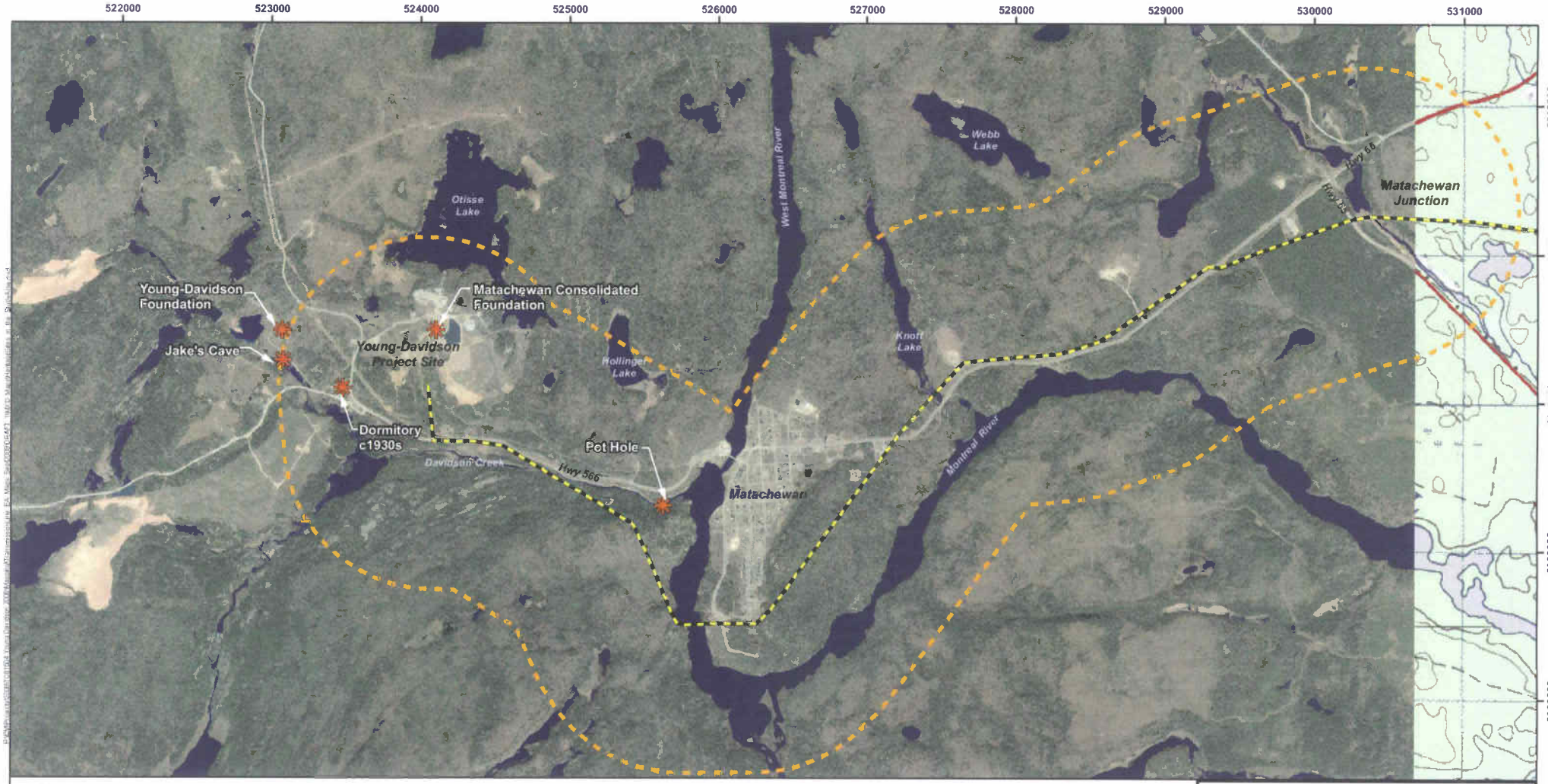
N W E S

Northgate Minerals Corporation amec

YOUNG-DAVIDSON PROJECT

Hydrologic Network

SCALE: 1:25,000	DATE: October 2009
PROJECT No: TC81504	FIGURE: 6



LEGEND

- Heritage Site
- Alignment Alternative C - Preferred Alternative (approximately 8.3 km)
- Study Area - Alignment Alternative C 1 km Buffer

0 0.5 1 2 3 4 Kilometres

NOTES
- Heritage Sites derived from: Woodland Heritage Resources Ltd (WHR 2008). Archaeological and Cultural Heritage Assessment, Northgate Minerals Corporation, Young-Davidson Project At Matachewan, Ontario (May, 2008). Prepared for Northgate Minerals Corporation.

Datum: NAD83
Projection: UTM Zone 17N

N W E S

Northgate Minerals Corporation amec

YOUNG-DAVIDSON PROJECT

Heritage Sites in the Study Area

SCALE: 1:25,000	DATE: October 2009
PROJECT No: TC81504	FIGURE: 7

7.0 Consultation

7.1 Government Agencies

The Class EA process requires Northgate to consult with interested parties and members of the public during the study. Federal and Provincial Government agencies, municipalities and external agencies, stakeholders and potentially affected property owners were consulted as part of this and other related studies. Copies of the contact list and relevant correspondence are attached to this report in Appendix A.

The following lists the contacts that were notified specific to this EA process:

- Federal Government Agencies
  - Transport Canada
  - Fisheries and Oceans Canada
- Provincial Government Agencies
  - Ministry of the Environment (MOE)
  - Ministry of Natural Resources (MNR)
  - Ministry of Transportation (MTO)
  - Ministry of Northern Development, Mines and Forestry (MNDMF)
  - Ministry of Culture
  - Ministry of Labour
  - Ministry of Tourism
- Municipalities
  - Matachewan Town Council
  - Elk Lake
  - Kirkland Lake Town Council
- First Nations/Aboriginal
  - MFN
  - Métis Nation of Ontario
  - Temagami First Nation
- Others
  - Hydro One
  - Nearby land owners

7.2 Public Consultation

The public consultation program is designed to involve stakeholders early in the study, to identify concerns and to provide opportunities for input regarding the proposed alternatives. Consultation methods include meetings, telephone conversations, e-mails, mailed information, public notices and open houses, where local residents and other interested parties are provided the opportunity to review planning and project information.

Northgate has maintained ongoing communication with the residents of the community of Matachewan, the Matachewan First Nation and nearby local communities since 2006 and during the advancement of the project. In addition, there was considerable local consultation by the previous property owner prior to and throughout the EA process in the mid-1990s. As a result, there is a moderately high level of understanding by Matachewan and other nearby residents of the Young-Davidson Project and related facilities, including the YDPP.

Northgate's first public open house for the overall Young-Davidson Project was held in May 2006. It introduced Northgate to the Matachewan community and provided information regarding on site activities. A second open house was held in Matachewan in July 2006. The information presented at the second open house placed an emphasis on the advanced exploration program. The same information was provided in a community open house held at the Matachewan First Nation in November 2006.

A public open house was held on May 3 2008 in the Matachewan Community Hall in Matachewan. The information presented provided an update of the project including potential project development scenarios; environmental baseline collection initiatives; and an overview of required environmental approvals and public consultation opportunities.

This was followed by a public open house held on August 25 2008, to provide additional details regarding the project plans, including provision of power to the site. The open house was an informal drop-in style session where representatives of the Project Team were available to discuss the study and answer questions.

An additional public open house was held on December 8 2009 in the Matachewan Community Hall in Matachewan. The information presented provided information regarding the proposed YDPP and this ESR; as well as an update of the Young-Davidson Project and other environmental approvals and public consultation opportunities.

Posters provided further information regarding the YDPP and are attached in Appendix A. A list of the comments related to the YDPP from the open houses are provided in Appendix A.

Notices regarding the open house were published in the Northern News as follows:

- August 20, 2008;
- August 22, 2008;
- November 23 2009; and
- December 7 2009

The same notices were posted at Matachewan Town Office and mailed to Matachewan residents. Copies of the advertisements / postings are provided in Appendix A.

A Notice of Commencement related to the YDPP was published in the Northern News on November 23, 2009 (Appendix A).

7.3 Aboriginal Groups

The MFN is the closest first nation community in proximity to the Young-Davidson Project site, located an approximate distance of 14 km north-northeast from the community of Matachewan. As a component of project development initiatives, Northgate is actively carrying out discussions with representatives of MFN on all issues related to current and future site activities. These discussions have been ongoing since 2006. An Environmental Joint Management Committee was struck with members of the MFN and representatives of Northgate in October 2008. The Committee has been meeting nearly monthly since its inception and discusses environmental approvals and related documents. The MFN reviewed a final draft of this report and their letter is attached in Appendix A.

Northgate has also engaged with the Métis Nation of Ontario (MNO) since September 2008. On-going discussions are carried out with representatives of the MNO on environmental related matters.

Information on the Young-Davidson Project has been forwarded to the Temagami First Nation starting in 2006 along with an open offer to discuss the project with community members. On-going communications include environmental approvals and related documents for their review and comments.

TAB C

CANADA POST / POSTES CANADA

Tracking Number

79386435685

Please note that this is the most up-to-date information available in our system. Our telephone agents have access to the same information presented here.

Track Status

Product Type: Registered Mail

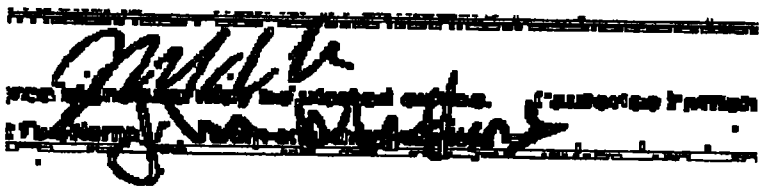
Date	Time	Location	Description	Retail Location	Signatory Name
2010/04/09	AM	BEAR ISLAND	Item successfully delivered		

Track History

Date	Time	Location	Description	Retail Location	Signatory Name
2010/04/09	AM	BEAR ISLAND	Item successfully delivered		
2010/04/09	00:00		Signature image recorded for Online viewing		I/I
2010/04/01	16:36	TORONTO	Item accepted at the Post Office		

Shipping Options and Features for this Item

Signature Required



R **Registered** / **Recommandé**
Domestic / **Régime intérieur**

CANADA POST / POSTES CANADA

To / **Destinataire**

Temagami First Nation
Attention: Chief Alexander J. Paul
Bear Island Post Office
Temagami, ON P9H 1C0

FOR DELIVERY CONFIRMATION / POUR CONFIRMER LA LIVRAISON
1 888 550-6333
www.canadapost.ca
www.postescanada.ca

Postal Code / Code postal

Declared Value / Valeur déclarée $

Item No. / N° de l'article
79 386 435 685

CUSTOMER RECEIPT / REÇU DU CLIENT

33-096-594 (98-10)

TAB D

Northgate Minerals Corporation
Young Davidson Project

Summary of Young Davidson Project Communications
Temagami First Nation

Ref.	Date	Location	Purpose	In Attendance	Materials Presented or Discussed
	24-Aug-06	Bear Island	Introduction	Alex Paul, John McKenzie Council &	NGX Project Overview, Gord Yule NMDM,
	29-Aug-06	E-mail	Email from Chris Rockingham	TFN	Email to Vicki Grant to offer to make Community presentation
	18-Mar-08	Correspondance	Letter received from TFN on March 27, 2008	Ken Stowe	Letter outlined demands for Exploration Agreement, funding of $40,000 and contracting to TFN of all studies short of a Feasibility Study
	28-Mar-08	Correspondance	Letter to TFN	To TFN	Acknowledge receipt of March 18 letter
	08-May-08	Correspondance	Letter received from TFN	Northgate	Letter refers to Memorandum of Understanding with Matachewan First Nation, demand for funding and requests a more adequate response to letter of March 27
	09-May-08	Phone Call	Left Message with Vicki Grant of TFN	Northgate	Chris Rockingham left a message with Vicki Grant for the Chief. No return phone call
	12-May-08	Phone call	Received Call from Vicki Grant of TFN	Northgate	Chris Rockingham offered a site visit for May 15 to introduce project, request that offer is in writing
	21-May-08	Correspondance	Letter to TFN	TFN	Response to TFN letter of May 8, confirm offer of site visit
	13-Jun-08	Correspondance	Letter received from TFN	Northgate	Disappointed with NGX response, "documentation on their rights and title", questions NGX good faith with MFN and TFN, claim to have visited site in 2007 (No record of this at Security log)
	24-Jun-08	Phone call	Chris Rockingham called TFN	TFN Chief Gary Potts	Long conversation about how to move forward
	08-Jul-08	Phone call	Chris Rockingham left message	TFN Chief Gary Potts	message left with Virginia Grant for Gary Potts
	18-Aug-09	Written Correspondance to TFN	Sent letter and Project Summary to Temagami First Nation	Chief Roxanne Ayotte, Chris Rockingham	Provided a copy of the Project Summary for the Young Davidson Project to the new Chief of Temagami First Nation with accompanying letter extending an invitation to meet and present the project to the community.
	20-Aug-09	Phone Call	Left message with the Chief and Council of Temagami First Nation	Chris Rockingham	Requested to speak to the new chief, Roxane Ayotte
	28-Aug-09	Written Correspondance to TFN	Sent letter and copies of applications to Temagami First Nation	TFN Chief and Council	Provided copies of the Permit to Take Water application and the Certificate of Approval amendment application (for the YD Pit Dewatering) to the Chief and Council of the Temagami First Nation
	28-Aug-09	Phone Call	Left message with the Chief and Council of Temagami First Nation	Chris Rockingham	Follow up to the Project Summary
	28-Aug-09	Phone Call	Received message from Temagami First Nation	Interim Chief Gary Potts	Chris Rockingham received message (from Interim Chief G. Potts) in response to his inquiry. Due to an election appeal and hearing, the Temagami First Nation cannot respond to any letters until this has been resolved. No timelines was indicated by Chief G. Potts as to the resolution of the appeals and their interim inability to make decisions because it is under court order
	14-Sep-09	Correspondance to TFN	Letter to TFN with Draft application for CofA Air and Noise	TFN Chief and Council	Provided draft copy of the application for the Certificate of Approval for Air and Noise to the Temagami First Nation Chief Gary Potts
	16-Sep-09	Correspondance	Letter from MOE to TFN regarding CofA Amendment for the YD Pit Dewatering	MOE, TFN	Letter requesting comments from the Temagami First Nation regarding the application for the CofA Amendment for the YD Pit Dewatering
	21-Sep-09	Email Correspondance	Email from MOE regarding TFN consultation for CofA Industrial Sewage for the YD Pit Dewatering	MOE, TFN	Mr. Randy Chin of the MOE has discussed the CofA amendment with Chieff Potts of the TFN and the water quality impact to the Montreal River. Chief Potts has indicated that his concerns were satisfied with the CofA requirements for monitoring.

Northgate Minerals Corporation
Young Davidson Project

Summary of Young Davidson Project Communications
Temagami First Nation

Ref.	Date	Location	Purpose	In Attendance	Materials Presented or Discussed
	20-Oct-09	Written Correspondance to TFN	Letter to TFN with Final Copy of Application for CofA Air and Noise	TFN Chief and Council	Chris Rockingham sent letter to follow-up with the Certificate of Approval for Air and Noise application along with final version of application. Also extended the invitation to meet with TFN
	20-Nov-09	Written Correspondance to TFN	Letter to TFN with draft copy of the TESR	TFN Chief and Council	Provided letter and draft copy of the Transportation Environmental Study Report to Chief Gary Potts. Also extended the invitation to meet with TFN
	24-Nov-09	Phone Call	Follow up with the Temagami First Nation	Chris Rockingham	Chris R spoke with TFN secretary Virginia who informed Chris that Gary Potts was still the Chief and the Elders are working through to resolve the appeals
	01-Dec-09	Written Correspondance to TFN	letter to TFN for Notice of Commencement	TFN Chief and Council	Mailed letter to Chief Gary Potts on the Notice of Commencement for the Temporary and Permanent Power Supply to inform that Environmental studies are being intiated.
	18-Dec-09	Written Correspondance to TFN	Letter to TFN with draft copy of the ESR and ERR	TFN Chief and Council	Mailed to Chief Gary Potts letter and draft copies of the Environmental Study Report (ESR) for the Transmission line Construction Environmental Assessment and the Environmental Review Report (ERR) for the Diesel Power Generation Environmental Assessment.
	22-Dec-09	Written Correspondance to TFN	Letter to TFN with Draft copy of AE Closure Plan amendment	TFN Chief and Council	Mailed to Chief Potts a letter and a draft copy of the amendment to the Advanced Exploration Closure Plan.
	07-Jan-10	Phone Call	Follow up with Temagami First Nation	Chris Rockingham	Chris talked with the newly appointed Chief Roxanne Ayotte. He reitirated the invitation to come up for a site visit. He also provided Nancy Duquet-Harvey contact information for any questions. Chief Ayotte informed Chris that they will be holding joint committee meetings with the two First Nations (TAA and TFN)
	15-Jan-10	Written Correspondance to TFN	Letter to TFN with Final Draft Copy of the Closure Plan	TFN Chief and Council	Letter to Chief Roxanne Ayotte with draft copy of the closure plan
	01-Feb-10	Written Correspondance to TFN	Notice of Completion to TFN with final copy of documents	TFN Chief and Council	Provided notice of completion and final copy of the ESR and ERR, temporary and permanent power supply Class Environmental Asssessments
	10-Mar-10	Written Correspondance to TFN	Notice of Completion to TFN with final copy of documents	TFN Chief and Council	Provided to Chief Roxanne Ayotte of the Temagami First Nation, the Notice of Completion with a copy oof the final document of the Transportation Environmental Study Report
	26-Mar-10	Written Correspondance to TFN	Provided copy of the Closure Plan	TFN Chief and Council	Provided to Chief Roxanne Ayotte copy of the Closure Plan
	26-Mar-10	Written Correspondance to TFN	Provided draft copy of Application	TFN Chief and Council	Provided to Chief Roxanne Ayotte a copy of the draft application for the Certificate of Approval for Industrial Sewage Amendment with an offer to provide a presentation on the document
	08-Apr-10	Correspondance	Provided draft copy of Application	TFN	Provided to Chief Roxanne Ayotte draft copies of the Forest Resource License and Work Permits for the Camp Road and the Plant Site Off Lease Tree Clearing Applications
	18-Apr-10	Email Correspondance	Received letter dated April 16 from Victoria Grant of the Temagami First Nation	Chris Rockingham	letter requests that Northgate continue dialogue with the Temagami First Nation regarding the Young Davidson Project

Northgate Minerals Corporation
Young Davidson Project

Summary of Young Davidson Project Communications
Temagami First Nation

Ref.	Date	Location	Purpose	In Attendance	Materials Presented or Discussed
	19-Apr-10	Toronto	Temagami Community Fundraiser	Northgate, Temagami First Nation and Teme-Augama Anishnabai.	Northgate Minerals supported the fundraiser through the purchase of table. Four representatives attended the event. The event is a collaborative effort between the Temagami First Nation, the community members of Temagami as well as the cottagers association. During the event, Chris Rockingham and Andrew Cormier met with Chief Roxanne Ayotte and Chief John Mackenzie to invite the two groups to the site for a visit of the project. The invitation was accepted and the date of the meeting will be coordinated through Victoria Grant and Chris Rockingham.
	26-Apr-10	Email Correspondance	Received letter dated April 16 from Victoria Grant of the Temagami First Nation (letter probably written 22-23)	Chris Rockingham	On behalf of Chief Ayotte and McKenzie, TFN/TAA has confirmed that they accept the site visit. This site visit is meant as a preliminary meeting to share information.
	26-Apr-10	Email Correspondance	Sent letter to Victoria Grant	TFN/TAA	Chris Rockingham acknowledged receipt of letters dated April 16 and April 16(22?) and to thank Victoria for arranging the Northgate meeting with Chiefs Ayotte and McKenzie on April 19, 2010. Chris will contact Victoria on April 28 to arrange the logistics of the site visit.
	09-May-10	Phone	Confirm logistics and expenses for site visit	Victoria Grant & Chris Rockingham	Northgate to pay honorariums, mileage and meal expenses in line with HRSDC guidelines
	12-May-10	Matachewan	Site visit, presentations and Underground tour, an all day event	Chiefs Ayotte, McKenzie, Band Manager, Councillors, Elders and community members, 17 in total, along with MNDM&F (CBS, AP and PL)	Project overview (41 page Power Point) hard copy, Q&A, Underground and surface tours of project
	14-May-10	Letter	Confirmation of Follow up actions agreed upon on May 12,	Chiefs Ayotte, McKenzie, Band Manager, Cindy Blancer-Smith, Andrew Persad	Letter by Chris Rockingham summarizing what we agreed upon on May 12
	17-May-10	Phone	Confirm Bear Island visit by NGX and MNDM&F, Closure Plan budget discussion	Victoria Grant & Chris Rockingham	
	18-May-10	Phone	Confirm itinerary for May 20 Bear Island meetings	Chief Ayotte & Chris Rockingham	
	20-May-10	Bear Island	Initiate Closure Plan review and budget consideration, informal community meetings, and plan future meetings	Chiefs Ayotte, McKenzie, Victoria Grant, Andrew Persad, Nancy Duquet-Harvey, Chris Rockingham & ~30 Band members	Closure Plan summary presentation, numerous informal discussion at lunchtime meet and greet, Budget of ~ $29,000 approved by NGX Closure Plan Review
	21-May-10	Phone	follow up on fax received	Woodrow Becker & Chris Rockingham	Fax alleging fraud in the Bear Island land claim, follow up phone call to better undersand the context and history
	26-May-10	Bear Island	Review of Closure Plan	David Laronde, Nancy Duquet Harvey and CR	Closure Plan review with David (Maria Story scheduled to attend but cancelled)
	May 26- June 6		Closure Plan review	David Laronde and Maria Story	Closure Plan
	03-Jun-10	Matachewan	Site tour by 12 additional TFN members	Tour cancelled by TFN (vehicle problems)	
	06-Jun-10	Bear Island	Community Presentation by David Laronde, Northgate and MNDM&F	Community members, Chiefs and Council and Alex Ker, Stone Circle Consulting	Review of Closure Plan by David Laronde and Maria Story, Q&A

Northgate Minerals Corporation
Young Davidson Project

Summary of Young Davidson Project Communications
Temagami First Nation

Ref.	Date	Location	Purpose	In Attendance	Materials Presented or Discussed
	07-Jun-10	Bear Island	Initiate discussion re MOU	TFN MOU Committee, Alex Ker of Stonecircle and NGX (AC, NDH and CR)	Targetted MOU by end of June, meeting dates set
	08-Jun-10	Letter	Letter from TFN re Water review by Maria Story	Victoria Grant & Chris Rockingham	List of questions raised by Maria Story in her review of Closure Plan
	09-Jun-10	North Bay	Meeting re Closure Plan Impacts on TFN/TAA	Chief Ayotte, seven members of MOU Negotiating Committee, Maria Story and Northgate staff (AC, NDH & CR)	NGX addressed water issues and how to resolve the questions, Overview of Impacts of YD on TFN and how they will respond to MNDM&F
	10-Jun-10	Matachewan	Review of Water Issues	Maria Story and one associate meeting with NDH	Site tour and review of water data base in order to clarify and resolve questions raised
	11-Jun-10	Email Correspondance	Water Quality data	Maria Story & NDH	Provided an electronic version of the surface water and groundwater quality data in an excel format
	14-Jun-10	Matachewan	Site tour by MOU Committee members	Site Tour cancelled by TFN	
	17-Jun-10	Email Correspondance	Meeting minutes of June 10 TFN Visit	Maria Story, NDH	Provided Maria Story with draft minutes for her review summarizing the June 10th visit along with points of discussions
	21-Jun-10	Correspondance	Provide draft application	TFN	Provided to Chief Roxanne Ayotte a draft application for the Category 12 Aggregate Permit to establish a quarry in the proposed Tailings Impoundment area.
	21-Jun-10	Correspondance	Provide draft application	TFN	Provided to Chief Roxanne a draft application for a Forest Resource License for harvesting trees to allow for the development of the Young-Davidson Site
	21-Jun-10	Correspondance	Received from MNDMF report from TFN	MNDMF	Northgate received from Andrew Persad, MNDMF a report from Story Environmental Inc, entitled" Review of the Young-Davidson Closure Plan and Associated Baseline Studies"
	25-Jun-10	Correspondance	Provided updated minutes of June 12 meeting	Maria Story & NDH	Provided update minutes of the meeting of June 10 to Maria Story to incorporate her comments and field sheets for Groundwater collection

TAB E

Haida Nation *v.* British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia *Appellants*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements *Interveners*

Indexed as: Haida Nation *v.* British Columbia (Minister of Forests)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

on appeal from the court of appeal for british columbia

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the

petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might

adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. 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 people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject

to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; **referred to:** *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

Statutes and Regulations Cited

Constitution Act, 1867, s. 109.

Constitution Act, 1982, s. 35.

Forest Act, R.S.B.C. 1996, c. 157.

Forestry Revitalization Act, S.B.C. 2003, c. 17.

Authors Cited

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "accommodate", "accommodation".

Hunter, John J. L. "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction". Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.

Isaac, Thomas, and Anthony Knox. "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49.

Lawrence, Sonia, and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252.

New Zealand. Ministry of Justice. *A Guide for Consultation with Mäori.* Wellington: The Ministry, 1997.

APPEALS from a judgment of the British Columbia Court of Appeal, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147, with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the appellants the Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia.

John J. L. Hunter, Q.C., and *K. Michael Stephens*, for the appellant Weyerhaeuser Company Limited.

Louise Mandell, Q.C., Michael Jackson, Q.C., Terri-Lynn Williams-Davidson, Gidfahl Gudsllaay and *Cheryl Y. Sharvit*, for the respondents.

Mitchell R. Taylor and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

E. Ria Tzimas and *Mark Crow*, for the intervener the Attorney General of Ontario.

Pierre-Christian Labeau, for the intervener the Attorney General of Quebec.

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, Q.C., and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind and *Kurt Sandstrom*, for the intervener the Attorney General of Alberta.

Gregory J. McDade, Q.C., and *John R. Rich*, for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band.

Allan Donovan, for the intervener the Haisla Nation.

Hugh M. G. Braker,Q .C., Anja Brown,A rthur C. Pape and *Jean Teillet*, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and

the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the

Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this

framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer

to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81,

the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> . . . "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty

claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow*, *supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery . . ., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty

to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. *When the Duty to Consult and Accommodate Arises*

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal

claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no

legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow*, *supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)" (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if

appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*,

supra, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-

based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, 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. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) provides insight (at pp. 21 and 31):

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . .
>
> . . .
>
> . . . genuine consultation means a process that involves . . .:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

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.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making

decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

E. *Do Third Parties Owe a Duty to Consult and Accommodate?*

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and

resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from

the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The*

Queen (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling*, *supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

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.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a

right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has

utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

> (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
>
> (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of

Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting

permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with

the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

> [O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits. . . . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting . . ." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Department of Justice, Edmonton.

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

TAB F

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, E. MACDONALD & CAMERON JJ.

B E T W E E N:	
POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS	*Andrew K. Lokan*, for the Appellant, Power Workers Union, CUPE Local 1000 *Paul H. Manning*, for the Appellant, Society of Energy Professionals
Appellants	
- and -	*M. Philip Tunley*, for the Respondent, Ontario Energy Board *Gordon Cameron*, for the Respondent, Union Gas Limited
ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP	*Patrick Moran & Jennifer Teskey*, for the Respondent, Greenfield Energy Centre Limited Partnership *Michael D. Schafler*, for the Intervenor, Enbridge Gas Distribution Inc.
Respondents	
	HEARD: June 6 & 7, 2006

BY THE COURT:

NATURE OF PROCEEDING

[1] The appellants appeal from two decisions of the Ontario Energy Board, dated November 7, 2005 and January 6, 2006. The Board allowed applications for leave to construct a gas pipeline to the proposed Greenfield Energy Centre near Sarnia, Ontario.

[2] The applications were made to the Board, pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 ("*OEBA*").

[3] The appellants are the Power Workers' Union ("PWU") and the Society of Energy Professionals ("SEP"). The appellants are labour unions whose members are employed at a number of coal-fired generating stations, including the Lambton Generating Station ("Lambton").

[4] The two decisions appealed from may be summarized as follows:

- **Decision on the Merits – January 6, 2006**: The Board granted leave to construct the gas pipeline to the Greenfield Energy Centre ("GEC") to two applicants who had filed competing applications to the Board. These successful applicants are the respondents in the case at bar: Green Field Energy Centre Limited Partnership ("GEC LP") and Union Gas Ltd. ("Union Gas").

- **Motion Decision – November 7, 2005**: The Board excluded certain "pre-filed" evidence sought to be adduced by the appellant SEP.

[5] Section 96 of the *OEBA* directs the Board to make an order granting leave to construct a work where the Board is of the opinion that the construction "of the proposed work is in the public interest". The central issue to be determined on this appeal is whether the Board properly limited the scope of its jurisdiction under this section. The Board chose to limit its public interest consideration to the *effects of the actual pipeline construction*; it declined to consider the *effects of the GEC itself*, including the closing of the Lambton coal-fired plant.

BACKGROUND

The Greenfield Energy Centre ("GEC")

[6] In June, 2005, GEC LP entered into a twenty-year, standard Clean Energy Supply contract with the Ontario Power Authority to construct, operate, and supply electricity to Ontario's power grid from the GEC.

[7] The GEC is a proposed 1,005 MW gas-fired generating station to be located in Courtright, south of Sarnia. The GEC is intended to replace the 1975 MW coal-fired Lambton under the provincial government's coal replacement plan. The GEC is to be located about three km. south of Lambton.

The Applications to Construct the Pipeline

[8] GEC LP filed an application with the Board, pursuant to s. 90 of the *OEBA*, on July 20, 2005, for leave to construct a natural gas pipeline for the GEC:

Leave to construct hydrocarbon line

90. (1) No person shall construct a hydrocarbon line without first obtaining from the Board an order granting leave to construct the hydrocarbon line if . . .

(c) any part of the proposed hydrocarbon line,

(i) uses pipe that has a nominal pipe size of 12 inches or more, and

(ii) has an operating pressure of 2,000 kilopascals or more; or

. . .

[9] The pipeline proposed by GEC LP would by-pass the distribution system of Union Gas, which holds the municipal franchise and certificate rights to distribute natural gas in the area. On August 30, 2005, Union Gas also filed an application to build a pipeline to serve the GEC. Its proposed pipeline would connect the GEC directly to Union Gas' Courtright Station.

[10] With respect to the competition between GEC LP and Union Gas, the issue was whether Union Gas was entitled to a monopoly on the supply of gas pursuant to its franchise and Board jurisprudence, or if the GEC LP should be permitted to construct its own by-pass gas pipeline.

[11] The Board's "Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario" ("Guidelines") required GEC LP and Union Gas to file an environment review report. The respondents complied with this requirement.

[12] The Board heard the applications in a combined proceeding. The PWU and the SEP were granted intervenor status in the proceeding before the Board. The SEP and the PWU sought to make submissions on the effects of the GEC itself, including air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic and environmental impacts consequent on the closure of Lambton.

The Application by the PWU and the SEP to the Ministry of the Environment

[13] The PWU and the SEP also requested on July 8, 2005 that the GEC construction be elevated to a full environmental assessment under the *Environmental Protection Act*. The Minister of Environment denied that request on November 18, 2005. The Minister's position was that the GEC qualifies for an exemption from the *Environmental Assessment Act* under the

Electricity Projects Regulation, O. Reg. 116/01. This decision is the subject of a separate pending judicial review application before the Divisional Court.

The Motion to Exclude Evidence

[14] Prior to the hearing before the Board, the SEP filed documents relating to the need for the pipeline, the impact upon consumers, and environmental matters. By Notice of Motion dated October 5, 2005, GEC LP moved for an order excluding the documents. The Board heard submissions from the SEP, the PWU, Union Gas and GEC LP. In the Motion Decision dated November 7, 2005, the Board excluded three of the documents. It stated:

> In deciding whether to grant leave to construct, the Board must determine whether the pipeline itself is in the public interest, not whether facilities connected to it will be in the public interest... In considering the leave to construct application, it is not within the Board's jurisdiction to determine whether the generating station is in the public interest. (p. 6)

[15] In accepting certain of the SEP's materials as relevant to the issue of cumulative effects of the pipeline, the Board stated that "it remains an open question as to the appropriate use and weight to be accorded to this material during the hearing"

The Decision on the Merits

[16] The hearing took place over nine days. The Board was required to consider the following provision of the *OEBA*:

> **Order allowing work to be carried out**
>
> 96. (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

[17] The Board found that the public interest would not be well served if GEC LP's application for a pipeline were denied, since it is in the public interest for gas customers to have access to the services they require. As GEC LP could not currently access adequate services from Union Gas, it was in the public interest to allow GEC LP to pursue those services directly through the option of bypassing Union Gas. None of the parties had established that Union Gas or its customers would suffer direct harm due to the approval of GEC LP's application.

[18] The Board approved the competing applications of both GEC LP and Union Gas. However, Union Gas was approved on the condition that it obtain the GEC as a customer.

[19] On the issue of the "need" for the proposed pipelines, the Board concluded that should the GEC proceed, the pipeline would clearly be needed in order to supply natural gas.

[20] The Board found that the GEC's (as opposed to the pipeline's) environmental effects that were raised by the SEP and the PWU could not be tied back to some effect of pipeline construction. The Board determined that such effects were not within the realm of "cumulative effects" as contemplated in the Guidelines. The Board stated:

> To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. (p. 10)

[21] It stated further that it had no jurisdiction to consider the arguments of the intervenors:

> ... the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not the Ontario Energy Board. (p. 17)

COURT'S JURISDICTION

[22] The Divisional Court has jurisdiction to hear this appeal, pursuant to s. 33 of the *Ontario Energy Board Act, 1998*, s.O. 1998, c. 15, Sched. B:

> 33.(1) An appeal lies to the Divisional Court from,
>
> (a) an order of the Board;
>
> . . .
>
> (2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the order or rule or the issuance of the code.

STANDARD OF REVIEW

[23] The parties disagree on the applicable standard of review. Under the pragmatic and functional approach espoused in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the court is required to examine the following factors in determining the appropriate standard of review:

> **Privative Clause:** The *OEBA* does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.

Expertise: As per this Court in *Consumers' Gas Co. v. Ontario Energy Board*, [2001] O.J. No. 5024, the Board has a "high level of expertise" on issues such as economic forecasting and the viability of a monopolistic utility. The *OEBA* provides the Board with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.

Purpose of the *OEBA*: The objectives of the *OEBA* with respect to gas are listed in s. 2. These objectives are policy-laden and require specialized knowledge of the industry, which suggests deference is owed where the Board is required to engage these objectives:

> **Board objectives, gas**
>
> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.
>
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.

Nature of the Problem: The appellants and the intervenor agree that the issue is a question of law: what is the scope of the Board's jurisdiction under the public interest test in s. 96 of the *OEBA*? Some of the respondents characterize the issue

as one of the Board's discretionary decision-making powers to determine what considerations are relevant to its assessment.

Conclusions: In our view, the standard of patent unreasonableness is not appropriate in light of the Supreme Court of Canada's comments in *Voice Construction Ltd. v. Construction General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, where Major J. described the "rare" circumstances in which the patent unreasonableness standard is to apply, at para. 18:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.

The issue is essentially a question of law, requiring a determination of the scope of the Board's jurisdiction. This requires a consideration of the proper interpretation of the jurisdiction-conferring provisions in the statute and the appropriate level of deference to be accorded to other decision-makers that may have concurrent jurisdiction over certain issues. In my view, these are issues of law on which the court has more expertise than the Board. Absent a privative clause and in light of the express appeal right on questions of law and jurisdiction, the appropriate standard is correctness.

KEY ISSUES

1. Did the Board err in concluding it had no jurisdiction to assess the environmental and socio-economic effects of the end use of natural gas?

2. Did the Board err in excluding some of the SEP's evidence?

TWO COMPETING PIPELINE APPLICATIONS

[24] The appellants were granted intervenor status under s. 96 of the *OEBA*. The Board is directed to make an order granting leave to construct a work where the Board is of the opinion that the construction of "the proposed work is in the public interest".

[25] The Board has published guidelines outlining many of the matters it may take into consideration, such as cumulative effect and social consequences of implementing each route site or alternative. The guidelines for pipelines deal mainly with physical environmental effect.

[26] The Board in its decision also considered the physical effect of another pipeline, the placement and building of the GEC in a relatively small area.

THE JURISPRUDENCE

[27] The appellants rely on *Sumas Energy 2 Inc. v. Canada (National Energy Board)*, [2005] F.C.J. No. 1895 (C.A.) for authority that the Board should consider the end use of the gas. The factual issue in that case is substantially different in that the power plant was to be built in the U.S. No Canadian authority would have reviewed the plant. Here, of course, the Ministry of the Environment gave its approval and by correspondence with the appellants, dealt with the concerns raised by them.

[28] The National Energy Board ("NEB") is expressly permitted to "have regard to all considerations which appear to it to be relevant".

[29] The OEB does not have such broad authority. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 may be distinguished again on the broader powers of the NEB.

[30] *Nakina Twp. v. Canadian National Railway* 1986 F.C.J. 426 (F.C.A.), cited by the appellants, found the Commission had improperly limited its jurisdiction by failing to consider the public interest when considering the effect of a run through.

[31] In this case, the OEB has refused to consider the effects of a project outside the applications before the Board. Cases such as *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C.S. No. 18 (C.A.) and *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* 1999 F.C.S. No. 1515 (C.A.) are not helpful as they rely upon a comprehensive scheme for assessing the environmental impacts of projects under federal jurisdiction.

[32] The federal scheme as well includes an initial (scoping) under s. 15 and detailed instructions under s. 16. These sections allow a broader jurisdiction under the federal legislation.

ANALYSIS

[33] When dealing with the competing pipeline applications did the Board apply the wrong test? It confirmed a need by finding a long-term demand for the facility and the natural gas. It refused to consider whether or not the end use, power generation, is required by the province. In doing so, it found such a decision was a question for the government of the day.

[34] It concluded as well that the construction of the pipeline would not have an adverse impact on Union Gas' consumers.

[35] To accept the task as suggested by the appellants, including the effects of the closure of the Lambton coal-fired plant, would have set the Board upon a complex and virtually limitless task.

[36] The term "public interest" is confined to a consideration of the specific project, in this case, the pipeline.

[37] The Supreme Court in *ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 was dealing with a case of broader jurisdiction from a "public interest" mandate and stated, at para. 49:

> As in any statutory interpretation exercise, when determining the powers of an administrative body, courts need to examine the context that colours the words and the legislative scheme. The ultimate goal is to discover the clear intent of the legislature and the true purpose of the statute while preserving the harmony, coherence and consistency of the legislative scheme.

[38] It is conceded that there is no statutory requirement to be met for the closure of the Lambton plant.

[39] While one can have sympathy with the question of possible job losses, it was, in our view, not improper for the Board, to limit its jurisdiction to the questions before it. As well, it accepted or deferred to the policy role of the government and ruling of the Ministry of the Environment on the assessment of the plant. The appeals are dismissed.

[40] The appeal as to the refusal of the Board to accept the evidence relating to matters it found beyond its jurisdiction is dismissed as the evidence was not relevant to the issue dealt with by the Board.

[41] Costs are payable at $17,500 each to Union Gas and Greenfield Energy Centre Limited Partnership payable by the appellants. The amount was agreed to by counsel. No costs are sought by the Intervenor or the Board.

MEEHAN J.

MACDONALD J.

CAMERON J.

Released: 20060724

COURT FILE NO.: 484/05
DATE: 20060724

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MEEHAN, MACDONALD & CAMERON JJ.

B E T W E E N:

POWER WORKERS UNION, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1000 and SOCIETY OF ENERGY PROFESSIONALS

Appellants

- and -

ONTARIO ENERGY BOARD, UNION GAS LIMITED and GREENFIELD ENERGY CENTRE LIMITED PARTNERSHIP

Respondents

JUDGMENT

BY THE COURT

Released: 20060724

TAB G

Framework Agreement Among the Temagami First Nation, the Teme-Augama Anishnabai and Ontario Regarding the Temagami Claim

The signing of a framework agreement between the parties to the negotiation often marks the beginning of formal land claim negotiations. The Temagami First Nation (TFN) and the Teme-Augama Anishnabai (TAA) and Ontario signed such a framework agreement on June 21, 2000 in relation to the Temagami land claim negotiations. The framework agreement sets out the process, general parameters and timeframe for negotiations to settle the claim; this fact sheet provides a detailed summary.

1. Lands

Ontario, the TFN and the TAA (the parties) have agreed to negotiate two different categories of land, "Settlement Lands" and "Traditional Family Lands".

The Settlement Lands will comprise not more than 112 square miles and will be located from within the 149 square miles of unpatented land set aside for this purpose by the Ministry of Natural Resources in 1996. The remainder of the 149 square miles will continue to be managed by the Ministry of Natural Resources in accordance with the Temagami Land Use Plan.

In addition to the Settlement Lands, the parties will negotiate the provision to the TFN and TAA of a limited number of parcels of land for the use of the traditional families that make up the Temagami Aboriginal community. These traditional family lands, which will amount to no more than three square miles in total, will be available for TFN and TAA family groups to conduct activities that reflect their culture and values. They may be located anywhere within n'Daki Menan, the traditional homeland of the Temagami Aboriginal people.

The parties will have to reach agreement on a number of issues before negotiations on the Settlement Lands and the Traditional Family Lands can be concluded, including:

- how the TFN and TAA will hold the Settlement Lands and the Traditional Family Lands; i.e., as a reserve or as private property;
- how existing non-Aboriginal interests potentially affected by the provision of the Settlement Lands and Traditional Family Lands to the TFN and TAA will be addressed;
- how the TFN and TAA will address taxation issues arising from the provision of the Settlement

Lands and the Traditional Family Lands;

that uses to be made of the Settlement Lands and the Traditional Family Lands will be determined in accordance with a co-operative approach to land use planning among the TFN, TAA, Ontario and local municipalities;

whether, by agreement of the parties, other lands will be substituted for some of the Settlement Lands in order to foster economic development opportunities for the TFN and TAA, and how to balance the quality and quantity of lands exchanged; and

that the parties will agree on boundary adjustments to be made to the Settlement Lands to address technical errors that were made when they were originally mapped out.

2. Financial Compensation

The parties will negotiate an amount of financial compensation to be paid by Ontario to the TFN and TAA. The amount of this compensation will be generally consistent with the understandings reached by the parties concerning this matter in previous negotiations, adjusted to reflect any contingencies the parties may agree are relevant.

3. Economic Development, Land Use, and Resource Management

Economic Development

The final settlement will include measures to promote the economic development of the Temagami Aboriginal community. Such measures may include:

access to unallocated resources, such as development lots;

the operation, by the TFN and TAA, of Ontario programs that may be appropriately directed to them; and

mechanisms to identify new or ongoing economic development opportunities and partnerships with both the public and private sectors.

Financial and other contributions to the settlement of the land claim may be directed for use in pursuing economic development initiatives.

Compatible Land Use

The final settlement will provide for mechanisms to promote a cooperative approach to land use planning among the TFN, TAA, Ontario and local municipalities. The intention of the parties in establishing such mechanisms is to ensure that each is kept apprised of actual or intended uses of the lands, and that the planning directions, including environmental and cultural concerns, of any of the parties are not adversely affected by such land uses.

Consultation and Co-ordination

The final settlement will include a number of measures to ensure that there is adequate consultation and co-ordination among the parties regarding land use and resource planning. These measures will:

determine which land and resource management activities and dispositions are significant;

provide for notification and consultation among the TFN, TAA, Ontario, local municipalities and

others about significant proposed land and resource management activities and dispositions within n'Daki Menan;

address the concerns and reconcile the interests of the TFN, TAA and Ontario and other interested parties in relation to significant proposed land and resource management activities and dispositions within n'Daki Menan;

co-ordinate, as necessary, TFN, TAA, Ontario and municipal processes concerning land use, resource management and economic development, and facilitate the identification and discussion of issues arising in these areas on an ongoing basis.

To the extent possible, existing administrative structures and relationships will form the basis of the processes described above.

4. The Negotiation Process

Federal Government Involvement - Reserve Land

The parties have agreed that, soon after this framework agreement is signed by the parties, the TFN will formally invite the Department of Indian Affairs and Northern Development to join discussions aimed at determining the size and location of any reserve which may be established within the Settlement Lands.

Federal Government Involvement - Settlement Discussions

The parties have agreed that, soon after this framework agreement is signed by the parties, the TFN will take appropriate measures to seek the involvement of the federal government as a party to the settlement discussions.

Public Involvement

The parties have agreed that, throughout the course of the settlement discussions, Ontario will consult with the affected public about matters related to the settlement of the claim. Where appropriate, public consultation activities will be undertaken by the TFN, TAA and Ontario on a co-operative basis.

Interim Measures

The parties have agreed that, for the duration of the settlement discussions, certain interim measures will be put in place with regard to land use and resource management issues. Specifically, Ontario will:

maintain the status of the lands set aside by the Ministry of Natural Resources in 1996;

notify the TFN and TAA of any proposed land use or resource management activities or undertakings within n'Daki Menan which may have a significant impact upon the social or biological environment or the settlement discussions; and

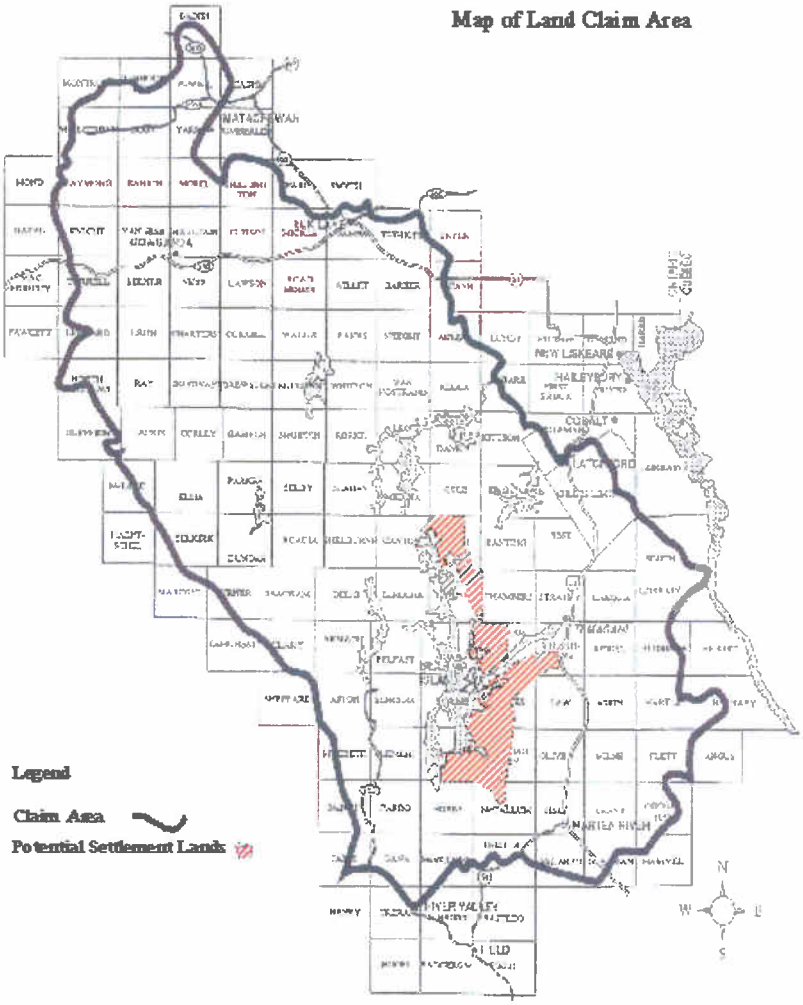
ask the proponent of the proposed land use or resource management activity or undertaking to consult with the TFN and TAA concerning the proposed activity or undertaking.

If the parties agree that existing processes are not adequate to resolve significant concerns of the TFN or TAA related to a proposed land use or resource management activity, the parties will use their best efforts to resolve the issue informally at the negotiating table, with the assistance of the facilitator.

Time Frame

The parties intend to work toward completing and having the negotiators initial the text of a proposed settlement agreement within 30 (thirty) months following the date of signing of the framework agreement.

Map of Land Claim Area



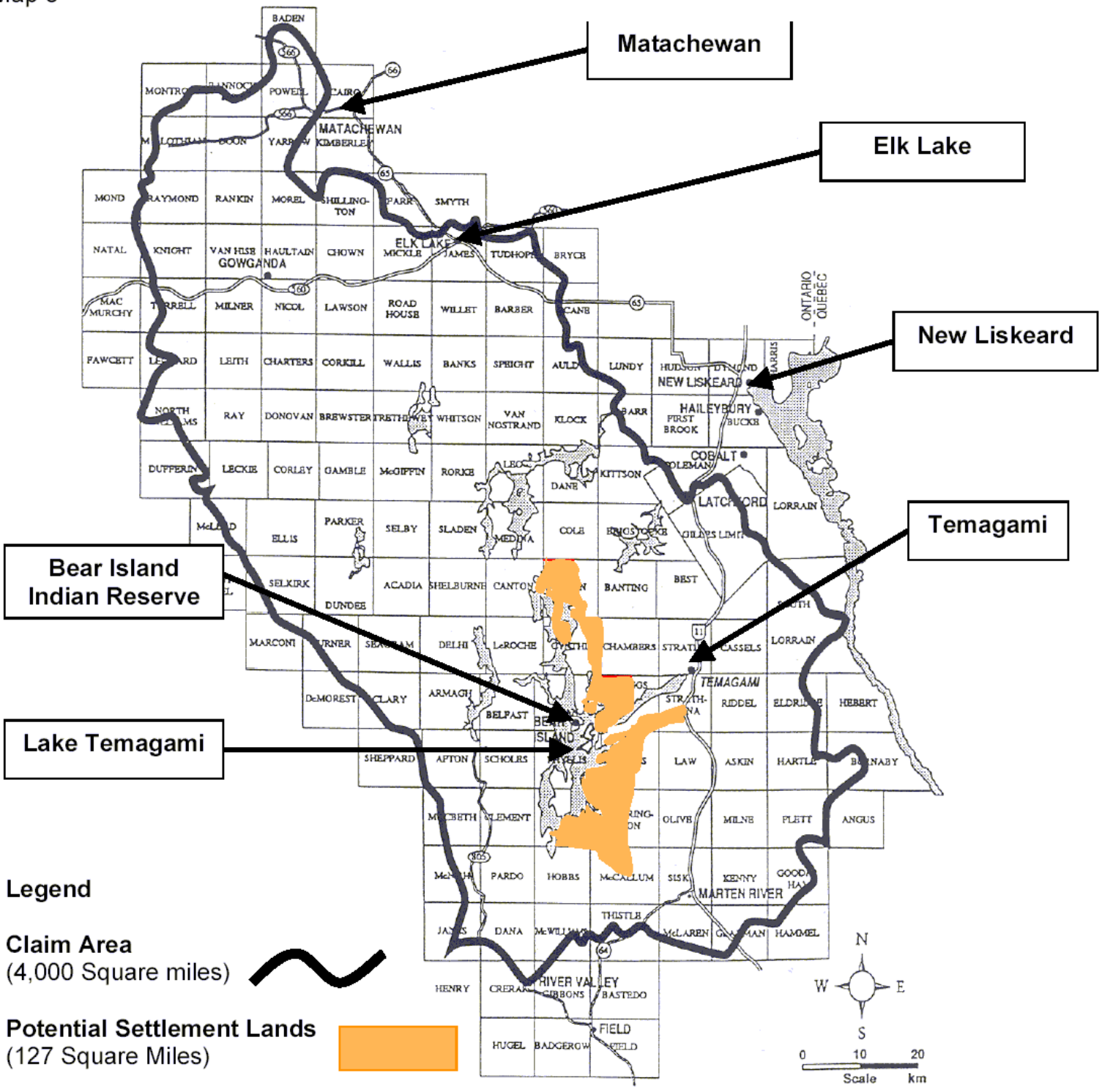
For Additional Information, Questions, and Concerns

Temagami Information Line 1-888-456-3430
For the Temagami Newsletter or if you do not wish to receive further information on this matter call 1-888-456-3430

Write: Ontario Negotiating Team
c/o Doug Carr, Chief Negotiator
720 Bay Street, 4th Floor
Toronto, ON M5G 2K1
Email: doug.carr@ontario.ca

Temagami Land Claim Area and Proposed Settlement Lands

Map 3



TAB H

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management),*** 2003 BCSC 1422

Date: 20030918
Docket: 03 0746
Registry: Victoria

Between:

Heiltsuk Tribal Council and Heiltsuk Hemas Society, on their own behalf and on behalf of all other members of the Heiltsuk Nation

Petitioners

And

Her Majesty the Queen in Right of British Columbia as represented by the Minister of Sustainable Resource Management, Land and Water British Columbia Inc., The Deputy Comptroller of Water Rights, The Regional Water Manager (Cariboo Region) and Omega Salmon Group Ltd.

Respondents

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Petitioners	E.P. Murphy and A. McCue
Counsel for Respondent, Minister of Sustainable Resource Management and Land and Water British Columbia Inc.	K.E. Gillese and E.K. Christie
Counsel for Respondent, Omega Salmon Group Ltd.	C.F. Willms and K.G. O'Callaghan
Date and Place of Hearing:	June 16-20, 2003 and June 23-26, 2003 Victoria, B.C.

[1] The petitioners apply pursuant to ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241, to set aside the decisions of the Minister of Sustainable Resource Management (the Minister), the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia (LWBC)(collectively, the decision makers) with respect to:

- Conditional water licence 116890 for Martin Lake dated December 19, 2001 (the Martin Lake water licence 2001) and the replacement licence no. 117538 dated August 29, 2002 (the Martin Lake water licence 2002);

- A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002 (the hatchery licence of occupation);

- A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002 (the dock and pipe licence of occupation); and

- Conditional water licence 116629 for Link River, dated November 18, 2002 (the Link River water licence).

(collectively, the licences)

[2] The licences were issued to Omega Salmon Group Ltd. (Omega) and, together with other licences issued to it, allow Omega to operate a land based fish hatchery in Ocean Falls, B.C.

[3] The Heiltsuk claim aboriginal rights and title to a large area of land encompassing approximately 33,735 square kilometres. The land being claimed includes the 8.83 hectares or .08 square kilometres granted to Omega under the hatchery licence of occupation and the dock and pipe licence of occupation.

[4] The land is described in the two licences as:

> That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Industrial Licence:
> Those unalienated and unencumbered portions of District Lots 31 and 104; together with unsurveyed foreshore or land covered by water being part of the bed of Link River, all within Range 3 Coast District, containing 5.88 hectares more or less, Except for those parts of the land that, on the January 15, 2002 Date, consisted of highways (as defined in the *Highway Act*) and land covered by water;
>
> And
>
> That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Utility Licence:
> That part of District Lot 847, together with unsurveyed foreshore or land covered by water being part of the bed of Cousins Inlet, Range 3, Cost District, containing 2.95 hectares, more or less,

> Except for those parts of the land that, on October 1, 2002, consisted of highways (as defined by the *Highway Act*).
>
> (hereinafter the "land")

[5] Much of the land impacted by the hatchery licence of occupation and the dock and pipe licence of occupation is filled land created prior to the construction of a pulp mill which was operated in Ocean Falls in the 1900s.

[6] The Heiltsuk also claim aboriginal title and rights to the water in their claimed territory and as a result take the position that they were owed a duty of consultation prior to the issuance of both the Martin Lake water licences and the Link Lake water licence.

[7] The Martin Lake water licence 2002 allows Omega to divert up to 100 cubic feet per second of water from Martin Lake to Link Lake. The Link Lake water licence authorizes the diversion of up to 200 cubic feet per second of water from the Link River to the hatchery. The water which is diverted will pass through the hatchery and then be discharged to Cousins Inlet. If not diverted the water will spill over the existing dam into Cousins Inlet.

[8] The Heiltsuk are seeking the following orders and declarations:

- A declaration that the decision makers had a duty to consult with and accommodate the Heiltsuk's interests and concerns before issuing the licences and that the decision makers breached their duties.

- A declaration that Omega had a duty to consult with and accommodate the interests and concerns of the Heiltsuk and that Omega breached that duty.

- A declaration that the licences issued by the decision makers are of no force and effect and an order quashing and setting aside the licences.

- An order in the nature of a prohibition barring the issuance of any approvals, permits or other authorizations relating to the proposed Atlantic salmon hatchery development;

- An interim or interlocutory injunction prohibiting Omega from operating the hatchery until either a final disposition of the proceedings or order of the court.

[9] Both the petitioners and Omega object to portions of the affidavit material which has been filed. I agree with both the petitioners and Omega that many statements in the affidavits are irrelevant or inadmissible hearsay, opinion or

argument. I am not going to deal with each objection raised, however I have disregarded the statements which are objectionable. In reaching my conclusions, I have relied on direct evidence and the oral histories contained in the affidavit material.

[10] The issues to be determined are:

- Have the Heiltsuk established a *prima facie* claim of aboriginal title or rights in respect of the lands and waters covered by the licences?

- Have the Heiltsuk established a *prima facie* infringement of the aboriginal title or rights which they claim?

- Was a duty of consultation and accommodation owed to the Heiltsuk by the decisions makers before they made their decisions to issue the licences and, if so, did they fulfill those duties?

- Was a duty of consultation and accommodation owed by Omega to the Heiltsuk and, if so, did Omega fulfill its duty?

- Is this an appropriate case for the court to exercise judicial review?

- If there were breaches of duty by the decisions makers or Omega what are the appropriate remedies?

CHRONOLOGY REGARDING ISSUANCE OF LICENCES

[11] Omega began the application process in September 2001.

[12] The Heiltsuk became aware of a proposed salmon hatchery to be located at Ocean Falls in November 2001. Following the meeting at which they were advised by LWBC of the proposed salmon hatchery the Heiltsuk met with Omega in November 2001.

[13] On December 17, 2001 Mr. Williams, the Aquaculture Manager at LWBC, sent an email to the Heiltsuk in response to an inquiry from the Heiltsuk as to why there had been no referral regarding the proposed Omega hatchery. He advised the Heiltsuk that Omega had applied for a licence of occupation to construct a fish hatchery on the old industrial lands in Ocean Falls. He further advised that the Province was not sending out any referrals as the land was Crown granted in the past and had been developed. As well, the land was mainly filled foreshore and that, following the Aboriginal Consultation Guidelines, referrals were not required. However, Mr. Williams was aware that the Heiltsuk had at that

point had one meeting and another planned with Omega. Omega had been told to document any feedback from the Heiltsuk in the meetings and provide it to LWBC. Mr. Williams further advised that the Martin Lake water licence 2001 was being assigned to Omega.

[14] An Aboriginal Interest Assessment Report was prepared December 19, 2001 by LWBC and a copy was provided to the Heiltsuk.

[15] The Martin Lake water licence 2001 was issued to Omega on December 19, 2001. The licence had originally been granted to Pacific Mills Ltd., who ran a pulp and paper mill on the site, in 1929. The Martin Lake water licence 2002 was issued to Omega on August 29, 2002 relocating the diversion. At the time the Martin Lake water licence 2002 was issued a report was prepared which stated that no referral was required as this was a minor modification to an existing licence.

[16] A letter was sent to Heiltsuk by LWBC regarding the decision not to consult on December 24, 2001 with an invitation to discuss the Aboriginal Interest Assessment report. The letter explained why a referral had not been made and advised the Heiltsuk that they would be kept apprised as the review process continued.

[17] The explanations given as to why the Province did not feel it was necessary to refer the issue to the Heiltsuk were:

- The site had been privately owned for nearly 80 years;
- The core areas of the town and millsite had been extensively disturbed and developed;
- The nature of the land use over that time effectively precluded the exercise of any aboriginal traditional uses;
- A significant portion of the application area was filled foreshore, i.e. land which did not exist prior to the development of the mill and town;
- There were extensive areas of relatively undisturbed vacant Crown land in the area surrounding Ocean Falls;
- Impacts which occurred were at the time of the original development of the site and any aboriginal issues associated with past activity on the land could not be resolved through consultation about the current land use proposal.

[18] Heiltsuk representatives visited another hatchery with Omega in December 2001. Following the meeting Omega advised the Heiltsuk that it wanted to continue an ongoing dialog with the Heiltsuk people.

[19] On January 7, 2001 a letter was sent by the Heiltsuk to LWBC expressing disappointment that there would be no referral and requesting that the Province reconsider its position.

[20] The Heiltsuk attended an open house at Bella Bella with Omega on January 9, 2002 where the Heiltsuk expressed their concerns. The Heiltsuk advised that they did not consider the meeting to be consultation.

[21] On January 11, 2002 Omega sent a letter to Heiltsuk expressing a willingness to work with the Heiltsuk and enter into a partnership with the Heiltsuk.

[22] On January 16, 2002 LWBC sent a letter to the Heiltsuk expressing that although there had been no referral, staff had communicated with members of the Heiltsuk regarding the proposed project and an information package was sent. LWBC advised the Heiltsuk it had requested Omega meet with the Heiltsuk, and understood that Omega had expressed a willingness to enter into a commercial arrangement with the

Heiltsuk. LWBC made an offer to assist the Heiltsuk in preparing an application for other lands in the vicinity which could be utilized for the Heiltsuk proposed salmon enhancement facility and in exploring potential opportunities to maximize the benefits from the Omega hatchery. As well, the Heiltsuk were advised that the provincial agencies responsible would ensure that the hatchery was in compliance with all regulatory requirements relating to the Heiltsuk's concerns about the potential for the introduction of diseases or chemical effluent into the marine environment and the escape of Atlantic salmon.

[23] Memos were sent by Omega to the Heiltsuk providing information on January 15 and 16, 2002 which responded to concerns expressed by the Heiltsuk.

[24] The hatchery licence of occupation was issued to Omega on January 15, 2002.

[25] LWBC sent a referral package to the Heiltsuk on April 10, 2002 with respect to the dock and pipe licence of occupation.

[26] On May 7, 2002 the Heiltsuk sent a letter expressing concerns regarding effluent, clean up of the contaminated site and Atlantic salmon escapes. As well, the Heiltsuk expressed

concern that the dock and pipe licence of occupation and project as a whole would impact the Heiltsuk's ability to site a village and a wild salmon enhancement facility in Ocean Falls.

[27] A meeting was held on May 30, 2002 between representatives of the Heiltsuk, Omega and the Province where details of the project were discussed and the time line for approvals and construction of the project was provided to the Heiltsuk.

[28] Omega sent a follow up letter and information package to the Heiltsuk on June 11, 2002 addressing concerns raised by the Heiltsuk.

[29] Omega sent a letter and video to the Heiltsuk showing various underwater and foreshore video clips from Omega's habitat survey on June 21, 2002 in response to some of the questions raised by the Heiltsuk.

[30] The Dock and Pipe licence of occupation was issued to Omega on October 1, 2002.

[31] A referral package was sent by LWBC to the Heiltsuk on August 28, 2002 regarding the Link River water licence.

[32] The Heiltsuk responded to the referral on October 15, 2002 outlining their aboriginal claims to Ocean Falls.

[33] A Report for ***Water Act*** decision was prepared November 15, 2002.

[34] On November 18, 2002 a letter was sent to the Heiltsuk attaching a copy of the Link River water licence issued to Omega on November 18, 2002.

DUTY OF CONSULTATION

[35] In the cases dealing with the issue of consultation the courts have considered the factual context, including:

- whether there is a general right to occupy lands or whether there is a right to engage in an activity;
- whether there is or has been an infringement; and
- if there is or has been an infringement, whether there is any justification for the infringement.

[36] It is in the final stage of the analysis, i.e., whether there is any justification for the infringement, that the courts have considered whether the Crown has met its fiduciary and constitutional duty of consultation and whether

there has been an attempt to accommodate the First Nations. ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, ¶ 64 - 72 and ¶ 81 - 82, ***R. v. Adams***, [1996] 3 S.C.R. 101, ¶ 46 and 51 - 52.

[37] In ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, Lamer C.J. discussed the issue of consultation in the context of the justification of an infringement of aboriginal title and stated at ¶ 168:

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: ***Guerin***. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal rights.

[38] In ***Haida Nation v. British Columbia (Minister of Forests)*** 2002 BCCA 147 ***(Haida No. 1)***, Lambert J.A. recognized

a three stage analysis in determining whether the Crown has breached its duty to consult consisting of:

1. consideration of whether aboriginal title or rights have been established on a balance of probabilities and a decision regarding the nature and scope of the title and rights;

2. determination of whether the particular title or rights have been infringed by a specific action; and

3. a consideration of whether the Crown has discharged its onus to show justification, including whether it has fulfilled its obligation to consult.

(¶ 46)

[39] Lambert J.A. acknowledged that although both the consultation and the infringement are likely to precede the determination of the aboriginal rights and title, that when determining if there has been a breach of duty the Court must first look at whether the First Nation has proved the title and then whether there has been an infringement of the right. Once those elements are established the onus shifts to the Crown to establish that there was justification for the

infringement both before and at the time the infringement occurred. (¶ 46)

[40] In ***Haida No. 1*** the Court of Appeal held that due to the circumstances surrounding the Minister's consent to the transfer of tenure from MacMillan Bloedel to Weyerhaeuser, the Minister had a legally enforceable duty to consult with respect to the transfer. The main issue in ***Haida No. 1*** was whether any consultation had taken place in the face of a good *prima facie* case of infringement of aboriginal rights to red cedar.

[41] In ***TransCanada Pipelines Ltd. v. Beardmore (Township)*** (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), the Court held that it was only after a First Nation has established an infringement of an existing aboriginal or treaty right that the duty of the Crown to consult with the First Nation was a factor for the Court to consider in the justificatory phase of the proceeding. Borins J.A. stated at ¶ 120:

> As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the ***Constitution Act, 1982***. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

[42] In ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*** 2002 BCCA 59, it was argued that aboriginal right or title had to be established before there was duty to consult with the aboriginal peoples. In rejecting the argument, Rowles J.A. held that while the onus of proving a *prima facie* infringement of an aboriginal right or title is on the group challenging the legislation (or in this case the decisions of the statutory decision makers), it did not follow that until there was court ruling the right did not exist. (¶ 183)

[43] In ***Taku***, the court accepted as findings of fact that the proposed road would impose serious impacts on the resources used by the Tinglit, that the Tinglits were not adequately prepared to handle the predicted impacts and that there was no plausible mitigation or compensation possible. The project had not been commenced and it was found that the proposed road would have a profound impact on the Tinglit's aboriginal way of life and their ability to sustain it. The Tinglit's were willing to participate in the environmental review process to have their needs accommodated but the project approval certificate had been issued without their concerns being met. (¶ 132 and 202)

[44] In the circumstances, the court felt it was appropriate to dismiss the appeal of the order quashing the certificate and remit the matter to the Ministers to consider afresh the issuance of the project approval certificate. In her dissent, Southin J.A. referred to the fact that the right to be consulted is not a right of veto and was of the view that to remit the matter back to the Ministers would prolong the agony for both the proponent of the project and the Tinglit. (¶ 100 and 101)

[45] Although the Court in ***Haida No. 1*** agreed that the requirement to consult could arise prior to the aboriginal right or title having been established in court proceedings, and that the Crown and Weyerhaeuser were in breach of an enforceable duty to consult and to seek accommodation with the Haida, it did not necessarily follow that the replacement of the licence was invalid. The Court was not prepared to make a finding regarding the validity, invalidity or partial validity of the transfer of the licence but was of the view that it was a matter that could be more readily determined after the extent of the infringement of title and rights had been determined. (¶ 58 and 59)

[46] Lambert J.A. stated that the courts have considerable discretion in shaping the appropriate remedy in a

judicial review proceeding before the final determination of the title and rights of the aboriginal people and that the aim of the remedy should be to protect the parties pending the final determination of the nature and scope of title and rights. At the time of the final determination of rights and title the issues of the nature and extent of the infringement and the issue of justification could be dealt with. (¶ 53 and 54)

HAVE THE HEILTSUK ESTABLISHED A *PRIMA FACIE* CLAIM OF ABORIGINAL TITLE OR RIGHTS IN RESPECT OF THE LANDS AND WATERS COVERED BY THE LICENCE?

[47] The Heiltsuk advance claims based on aboriginal rights and title that have not yet been judicially determined. I am of the view that in interim proceedings of this type, I am not in a position to do more than make preliminary general assessments of the strength of the *prima facie* claims and potential infringement.

[48] I agree with Tysoe J.'s comment in ***Gitxsan and other First Nations v. British Columbia (Minister of Forests)***, 2002 BCSC 1701 that the Court should avoid making detailed evidentiary findings on affidavit material unless it is essential to do so. Critical findings of admissibility or assessing the weight to be given to oral histories should be

left to the trial judge responsible for making the final determinations of the claims of rights or title. (¶ 70)

[49] The Heiltsuk's evidence is that they have been engaged in treaty negotiations with the Province regarding their land claim since 1981 when they filed a Statement of Comprehensive Aboriginal Rights Claim. In 1993, the Heiltsuk filed a Statement of Intent with the B.C. Treaty Commission and were accepted into treaty negotiations with the Provincial and Federal government. Throughout that time, the Heiltsuk have continuously asserted title over the land, including the area described in the licences.

[50] As well, the Heiltsuk have established an aboriginal right to harvest herring spawn on kelp. ***R. v. Gladstone***, [1996] 2 S.C.R. 723.

[51] The Heiltsuk argue that based on the affidavit material they have a strong or good *prima facie* claim of aboriginal rights or title with respect to their territory including Ocean Falls.

[52] Given that I am of the view it is not appropriate for me to assess the weight to be given to the oral history or make findings of admissibility on the basis of the affidavit material, I have accepted the evidence contained in the oral

histories at face value for the purpose of determining if the Heiltsuk have a *prima facie* claim of aboriginal rights and title to Ocean Falls.

[53] The evidence contained in the affidavit material regarding the oral history is that one of the main winter villages of the Heiltsuk was located at Ocean Falls. The Heiltsuk moved away around the time the pulp mill was constructed in 1909. Approximately 300 - 400 Heiltsuk lived in Ocean Falls prior to industrialization in the early 1900s. The area was a good village site in the winter because it was sheltered from the winds and open waters of the outer coast. Link Lake provided fresh water and Cousins Inlet provided seafood including halibut, ling cod, rock cod, spring salmon, crabs, prawns and herring. The evidence is that the Heiltsuk were forced to relocate from the area when the pulp mill was built.

[54] Although the Heiltsuk assert that the village of Tuxvnaq or Duxwana'ka was located in Ocean Falls prior to the establishment of the pulp mill, there is also evidence that in the early 1900s there may have only been one First Nations individual living at Ocean Falls. The survey map prepared at the time of the original Crown grant in 1901 shows one Indian house near the tide flats with an Indian trail leading to it.

[55] There is little direct evidence and no documentary evidence of a forced relocation of the Heiltsuk at the time the pulp mill was constructed. There is no evidence in support of a forced relocation in the Bella Bella story, a book which was referred to by both the Heiltsuk and the Crown. As well, there has been no mention of a forced relocation in the materials filed by the Heiltsuk in the treaty negotiations.

[56] "... [C]laims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim." ***Mitchell v. M.R.N.***, [2001] S.C.R. 911 at ¶ 51.

[57] Chief Justice McLachlin was clear that ***Mitchell*** did not impose upon aboriginal claimants the requirement of producing indisputable or conclusive evidence from pre-contact times. However, she observed that there was a "distinction between sensitively applying evidentiary principles and straining those principles beyond reason". In ***Gladstone***, for example, the recognition of an aboriginal right to engage in trading herring roe on kelp was based on an indisputable historical and anthropological record corroborated by written documentation. The Court in ***Gladstone*** concluded that there

was clear evidence from which it could be inferred that the Heiltsuk were involved in trading herring roe on kelp prior to contact. (¶ 52)

[58] I am of the view that there is insufficient evidence before me to make a finding that the Heiltsuk were forcibly removed from Ocean Falls and I decline to make any finding in that regard.

[59] There is evidence that another First Nation, the Nuxalk Nation, asserts that Ocean Falls, including the land impacted by the licences, is within its territorial boundaries. The Nuxalk have put the Heiltsuk, Omega and the Crown on notice of their claim. The Nuxalk oppose the construction of the hatchery and have advised both Omega and the Crown that they will not permit salmon aquaculture in their territory.

[60] Although the petitioners argue that I should ignore the claims of the Nuxalk, I am of the view that making any findings regarding the Heiltsuk claim of rights and title which could potentially impact the overlapping claim of the Nuxalk in this proceeding is inappropriate.

[61] As set out in ***Delmaguukw***, there are a number of criteria that must be satisfied by the group asserting

aboriginal title including exclusive occupancy at the time of sovereignty:

> Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.
>
> (¶ 155)

[62] Although Lamer C.J. recognizes the possibility of a finding of joint title shared between two or more aboriginal nations, which would involve the right to exclude others except with whom possession is shared, no claim to joint title has been asserted by the Heiltsuk and the Nuxalk are not represented on this application. It is not possible therefore to assess the relative strengths of the two competing claims to the land or what impact the two claims have on each other.

[63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good *prima facie* case of aboriginal title.

[64] However, the oral history of the Heiltsuk, which I accept at face value for the purpose of this application, is

that the area of Ocean Falls was used as a winter village and the Heiltsuk have fished in the area. I find, therefore, that the Heiltsuk have a strong *prima facie* case of aboriginal rights to fish in the area and to non-exclusive use of the land. The Heiltsuk's *prima facie* claim for aboriginal rights does not require exclusivity.

HAVE THE HEILTSUK SHOWN AN INFRINGEMENT OF AN ABORIGINAL RIGHT?

[65] The Heiltsuk take the position that the licences infringe their claims for aboriginal rights to the land impacted by the licences.

[66] In ***Gladstone***, the Court refers to the ***Sparrow*** test for determining whether the government has infringed aboriginal rights which involves:

- asking whether the legislation, or in this case the decisions to grant the licences, has the effect of interfering with an existing aboriginal right; and

- determining whether the interference was unreasonable, imposed undue hardship, or denied the right to the holders of their preferred means of exercising the right.

[67] Even if the answer to one of the questions is no, that does not prevent the court from finding that a right has been infringed, rather it will be a factor for the court to consider in determining whether there has been a *prima facie* infringement. The onus of proving a *prima facie* infringement of rights lies on the Heiltsuk, i.e., the challengers of the decisions. ***Gladstone***, ¶ 39 and 43.

[68] Because aboriginal rights are not absolute and do not exist in a vacuum, claimants must assert both a right and the infringement of the right. ***Cheslatta Carrier Nation v. British Columbia***, 2000 BCCA 539, ¶ 18 and 19, ***Delgamuukw***, ¶ 160, 162 and 165.

[69] In ***Cheslatta***, the Court of Appeal referred to ***R. v. Nikal*** [1996], 1 S.C.R. 1013 for the proposition that aboriginal rights are like all other rights recognized by our legal system. The rights which are exercised by either a group or individual involve the balancing of those rights with the recognized interests of others. Any declaration regarding an aboriginal right would not be absolute in that it may be subject to infringement or restriction by government where such infringement is not unreasonable and can be justified. (¶ 18 and 19)

[70] The Heiltsuk have raised concerns that the issuances of the licences adversely affect their fishing rights and their non exclusive use of the land.

[71] They say the *prima facie* infringements regarding their right to the use of the land are:

- the hatchery licence of occupation allowing Omega to operate a hatchery is not their chosen use of the land;
- that it will prevent them from utilizing the area as a village site in the future;
- that the diversion of water will result in an inadequate amount of water for the future village;
- the hatchery will impact the availability of electricity to service a village; and
- the Heiltsuk do not support Atlantic salmon aquaculture, and take the position that their right to self government is irreparably harmed by the imposition of the hatchery in a territory over which they have asserted a claim.

[72] The Heiltsuk say the *prima facie* infringements regarding their fishing rights are:

- That the discharge from the factory into Cousins Inlet will cause pollution and disease thereby impacting the Heiltsuk fishing rights in the area;

- The construction of the facility has potentially caused pollution as a result of hazardous wastes, in particular asbestos, which was disturbed during construction; and

- The fish reared in the hatchery may escape from the hatchery, or alternatively, from fish farms outside Heiltsuk claimed waters and enter Heiltsuk claimed waters thereby impacting their fishing rights.

(i) Have the Heiltsuk established a *prima facie* infringement of their right to non exclusive use of the land?

[73] The Heiltsuk argue that this case falls within the cases referred to in ***Delgamuukw*** which may require the full consent of the aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (¶ 168) They argue that the Province's actions authorize aquaculture over Heiltsuk title through the regulation of farmed fish and therefore the Province should have obtained the consent of the Heiltsuk.

[74] I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in

Delgamuukw which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licences is impacting the right of the Heiltsuk to hunt or fish in the area.

[75] There is no evidence that the Heiltsuk will not be able to locate a village there because of the licences of occupation. The hatchery in issue is a land based facility. The licences of occupation over the .08 square kilometres are for 10 years. Most of the land on which the hatchery is located is filled land created prior to the construction of the pulp mill. The site was a contaminated industrial site which has required significant expenditure by Omega to clean up. There is evidence that Omega has removed 700 tons of industrial debris from the site and plans to continue a process of remediation of the site in co-operation with LWBC.

[76] The Heiltsuk have not established that the issuances of the licences have resulted in a *prima facie* infringement to their right to non exclusive use of the land.

[77] There is a large area adjacent to the pulp mill site where the town of Ocean Falls was located which had a population of 4,000 people that could be used as a village

site. The total population has declined to less than 100 since the closure of the pulp mill 20 years ago.

[78] The diversion of water is not new. The original licence to divert water from Martin Lake was issued 70 years ago and there was sufficient water and electricity to service the town of Ocean Falls.

[79] There is no evidence that the issuance of the licences allowing construction and operation of the hatchery will impact the Heiltsuk's ability to pursue their negotiations with the Province regarding their claim of aboriginal title or locate a village there in the event they decide to do so.

[80] As well, there is no evidence that the licences will prevent the Heiltsuk from establishing a wild salmon enhancement facility in the future.

[81] With respect to the Heiltsuk's assertion about self government, there is no evidence to support their position that the hatchery will cause irreparable harm. On the contrary, the evidence is that Omega has cleaned up industrial waste from the site and is committed to continuing rehabilitation of a contaminated site. The licences are of fixed duration.

[82] The right to self govern is, in my view, inextricably bound up in the Heiltsuk's aboriginal claim to title and their right to use the land for their preferred use, i.e., the Heiltsuk want to decide what the land will be used for and the ability to veto uses of the land which do not accord with their philosophy. The Heiltsuk's complaint in this regard is that they are opposed to Atlantic salmon aquaculture and do not want any Atlantic salmon aquaculture in their territory.

[83] The necessary factual basis on which to determine whether the claim for self government has been made out is lacking. As set out above, the Nuxalk Nation is also claiming title to the same area and is not before me on this application. A determination regarding the Heiltsuk's right to self govern in the area would by necessity impact the Nuxalk.

[84] There is no evidence that the construction and operation of the hatchery pursuant to the licences will impact the Heiltsuk's ability to negotiate or establish the right to self govern in the area in the future. There is no evidence that the construction and operation of the hatchery either has or will cause irreparable harm whereby the Heiltsuk will not be able to utilize the land as they choose in the future.

[85] It is not within the ambit of this application to deal with the many difficult issues which would have to be addressed in order to make a determination of the Heiltsuk's right to self government beyond the finding that, in my view, there is no evidence to support the Heiltsuk argument that their asserted right to self govern, i.e., the right of the Heiltsuk to make decisions as to the use of the land in the event that they establish their aboriginal title in the future, has been infringed by the issuance of the licences.

[86] Accordingly, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of their aboriginal rights to non-exclusive use of the land.

(ii) Have the Heiltsuk established a *prima facie* infringement or their aboriginal right to fish?

[87] In ***Nikal*** the Supreme Court of Canada, in the course of finding that the bare requirement for a licence did not constitute an infringement of aboriginal fishing rights, rejected the proposition that any government action which affects or interferes with the exercise of aboriginal rights constitutes a *prima facie* infringement of the right. The Court held that the government must ultimately be able to balance competing interests. (¶ 91-94)

[88] In ***Gladstone***, Lamer C.J. sets out that the threshold requirement for infringement and states that legislation infringes an aboriginal right when it "clearly impinges" upon the rights. (¶ 53 and 151) An infringement has been defined "as any real interference with or diminuation of the right." ***Mikisew Cree First Nation v. Canada***, 2001 FCT 1426 at ¶ 104.

[89] The Heiltsuk argue that their right to fish could be infringed by discharge of deleterious substances or disease into the marine environment during the construction or operation of the hatchery, the diversion of water and the potential impact of escaped Atlantic salmon on the wild native stock.

[90] There is evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

[91] The Minister of Fisheries and Oceans confirmed on August 16, 2002 that "a harmful alteration, disruption, or destruction (HADD) of fish habitat will not occur as a result of the construction and operation of this facility as proposed." The Regional Waste Manager, pursuant to the ***Waste Management Act,*** R.S.B.C. 1996, c. 482 and regulations

confirmed on April 29, 2002 that the hatchery was a regulated site under the ***Land-Based Fin Fish Waste Control Regulation***, B.C. Regulation. 68/94. Neither the Federal Minister of Fisheries nor the Provincial Minister of Water, Land and Air Protection are parties to this petition.

[92] Omega's expert report was provided to the Heiltsuk and he was in attendance at a meeting with the Heiltsuk in May 2002 in Bella Bella to provide information.

[93] The Heiltsuk presented no evidence that the effluent or construction will impact the marine environment in an adverse way thereby impacting the Heiltsuk's fishing rights in the area. Although they have presented evidence that asbestos may have been present on the site, the Heiltsuk have presented no evidence that any asbestos or other deleterious substances leached into the marine environment during construction of the hatchery.

[94] The Heiltsuk have expressed concern regarding the possibility of escape of smolts from the hatchery which could adversely impact the wild Pacific salmon in the area. Omega explained that the discharge pipe will have a triple screening system, as required by Provincial and Federal regulations, in order to prevent the escape of fish from its tanks. The

likelihood of escapes from a land based facility is remote. The screening criteria and requirements to prevent smolts being introduced into the ocean are governed by the terms of the aquaculture licensing tenure, not by the licences in issue in this application. A federal permit is required for the transporting of smolts. The evidence is that the smolts will be removed by boat from the area.

[95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

[96] The Heiltsuk also argue that the diversion of water could possibly infringe their fishing rights in the area. The original Martin Lake water licence was granted over 70 years and there is no evidence that the diversion of water allowed by it has infringed the Heiltsuk's asserted right to fish in the area. There is no evidence that the water diverted pursuant to the Link River water licence infringes the fishing rights in the area. The water, although diverted through the hatchery, eventually flows into Cousins Inlet and as a result there is no impact on the volume of water in the Inlet.

[97] On the evidence before me, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of the aboriginal right to fish in the area of Ocean Falls.

IS THERE A DUTY TO CONSULT AND, IF SO, HAS THERE BEEN CONSULTATION?

[98] The Crown has acknowledged that it has a duty to consult with the Heiltsuk regarding any licences it issues to Omega. This is a change of position from when the initial licence, the Martin Lake water licence 2001, was granted to Omega at which time the Crown took the position that it did not need to consult with the Heiltsuk.

[99] In light of the Crown's concession that it has the duty to consult with the Heiltsuk regarding issuance of the licences, I am granting the order sought by the Heiltsuk that the Crown has a duty to consult with the Heiltsuk regarding the licences.

[100] The Heiltsuk also take the position that Omega owes them a duty of consultation. While not making a formal concession that it owes a duty to consult to the Heiltsuk, Omega has been clear from the commencement of the project that

it is willing to consult with the Heiltsuk and says that it has made attempts to do so.

[101] As set out by Lamer C.J. in ***Delgamuukw,*** the duty to consult can range from a duty to discuss important decisions that will be taken in respect of lands held pursuant to aboriginal title to a requirement for the full consent of the aboriginal nation depending on the circumstances. Consultation must be in good faith and with the intention to substantially address the concerns of the aboriginal people whose lands are in issue. (¶ 168)

[102] The Crown may rely on consultation which it knows is taking place between aboriginal groups and third parties. In ***Kelly Lake Cree Nation v. Ministry of Energy and Mines et al.***, also known as ***Calliou***, [1999] 3 C.N.L.R. 126, (B.C.S.C.), Mr. Justice Taylor dealt with the issue:

> [154] There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing....It is my view that a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must

> take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.

[103] The Heiltsuk take the position they have not been consulted at all with respect to the issuance of the licences and that any meetings held between the Heiltsuk and the Province or between Heiltsuk and Omega do not constitute consultation.

[104] In ***Ryan et al. v. Fort St. James Forest District (District Manager)***, Smithers Registry, No. 7855 (BCSC) aff'd (1994), 40 B.C.A.C. 91, Macdonald J. dealt with the issue of whether the Gitksan could argue that there had not been adequate consultation when they had refused to participate in the process:

> ¶ 23 I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the *Forest Act* itself and the fiduciary obligations toward Native Indians discussed in *Delgamuukw*, establish that right beyond question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.
>
> . . .
>
> ¶ 26 I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail

> themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.

[105] A similar finding was made in ***Halfway River First Nation v. BC (Ministry of Forests)***, 1999 BCCA 470. On a review of the consultation which took place in that case, Mr. Justice Finch held:

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see ***Ryan et al v. Fort St. James Forest District (District Manager)*** (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.
>
> (¶ 161)

[106] Here the evidence is that Omega attempted to meet with and consult with the Heiltsuk:

- Omega met with the Heiltsuk in Bella Bella concerning the proposed hatchery in October 2001 just after it had commenced the application process for the licences.

- Omega met with the Heiltsuk in Campbell River in December 2001.

- Omega requested a meeting with the Heiltsuk in January 2002 and met with them in Bella Bella on January 9, 2002.

- Omega provided information to the Heiltsuk in January 2002 following the meeting in response to questions and concerns raised by the Heiltsuk.

- Omega met with the Heiltsuk in Bella Bella on May 30, 2002 and provided additional information following the meeting.

[107] During the various meetings and correspondence with Omega and the Crown the Heiltsuk have taken the position that they have zero tolerance to Atlantic salmon aquaculture and do not want the hatchery in their claimed territory, i.e., they have asserted a right to veto all Atlantic salmon aquaculture operations in their claimed territory.

[108] The Heiltsuk have remained firm in their position that they are opposed to any type of Atlantic salmon aquaculture in the territory over which they are asserting a claim. I find on the evidence that prior to the petition the Heiltsuk have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery. This is apparent both from the position they have taken

throughout the meetings where they have clearly indicated that they do not consider the meetings to be consultation and from correspondence between counsel in which the Heiltsuk have continued to express the view that no consultation has taken place.

[109] The Heiltsuk have never advised the Crown or Omega of any terms upon which they would be willing to withdraw their opposition to the hatchery. Rather, they have maintained their position of zero tolerance for Atlantic fish farming in their claimed territory, including this hatchery site. It is apparent on the evidence that the Heiltsuk do not want a hatchery on the site; i.e., they want a veto with respect to what use the land can be put.

[110] In oral submissions, counsel for the Heiltsuk attempted to characterize the "zero tolerance" of the Heiltsuk as "zero tolerance to law breaking" in that Heiltsuk law prohibits any activities that damage the environment and the Heiltsuk are of the view that the hatchery has the potential to damage the environment.

[111] However, the Heiltsuk clearly advised the Crown and Omega at the various meetings and in correspondence that the Heiltsuk had zero tolerance for fish farms and this hatchery.

They told Omega in January 2002 that they did not want the hatchery in Ocean Falls. As of January 2003, their stated position that the proposed hatchery was not welcome in Heiltsuk territory had not changed and they advised Omega and the Crown that they were opposed to the hatchery and wanted it removed.

[112] The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

[113] On all of the evidence, it is clear that the Heiltsuk seek a veto over Omega's operations. They "want it removed". While saying they want to consult, their position has reflected an unwillingness to consult.

[114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and

settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government. Any accommodation must be done in good faith and honour. When dealing with generalized claims over vast areas, the court held that accommodation was much broader than a simple matter of determining whether licences had been fairly allocated. (***Delgamuukw***, ¶ 165, 202, 203)

[115] Although the Crown took the position that consultation was not required regarding the initial two licences, the evidence is that the Crown changed its position and attempted to consult with the Heiltsuk prior to the issuance of the dock and pipe licence of occupation and the Link Lake water licence. There is evidence that there are ongoing opportunities for consultation and accommodation with respect to the hatchery.

[116] Additionally, the evidence is that Omega has made and is making ongoing efforts to provide information to the Heiltsuk about the impact of discharge from the hatchery on the marine environment and to consult in relation to the procedures that are in place to prevent escapes from the

hatchery. Omega has expressed a willingness to work with the Heiltsuk to create jobs and establish a wild salmon enhancement facility in the area.

[117] The Heiltsuk have not disclosed their position about the terms they would find acceptable to withdraw their objection to the issuance of the licences to Omega. They have not suggested any terms that should be added to the licences or identified any specific impacts the licences have had on their rights.

[118] In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute". ***Ryan,*** at ¶ 6, 24 and 26.

WHETHER THIS IS AN APPROPRIATE CASE TO EXERCISE JUDICIAL REVIEW AND, IS SO, WHAT ARE THE APPROPRIATE REMEDIES?

[119] The Heiltsuk are seeking to have the licences quashed.

[120] Relief under s. 8(1) of the ***Judicial Review Act*** is discretionary.

[121] In ***Klahoose First Nation v. British Columbia (Minister of Forests)*** (1995), 13 B.C.L.R. (3d) 59 (S.C.), Mackenzie J., as he then was, dismissed an application by a First Nation to quash the Minister's consent to the transfer of a tree licence. The Court assumed, without deciding, that the Minister had acted in breach of a duty to consult, but exercised its discretion to deny the petitioners their remedy under the ***Judicial Review Procedure Act***. Mackenzie J. held that although the Band had lost the opportunity to consult before the Minister gave his consent, the consent was for the transfer of an existing tenure and no additional interests were alienated which could prejudice the Band's aboriginal claims. (p. 65)

[122] In this case, not only is there no evidence that the Heiltsuk's aboriginal claims are prejudiced by the issuance of the licences, but the fact that the Heiltsuk have zero tolerance for Atlantic salmon aquaculture within their claimed territory must also be considered.

[123] Although the Heiltsuk speak to their willingness to consult in regard to the licences which provide the tenures necessary for Omega to operate the hatchery this must be questioned in light of their consistently stated position to the Crown and Omega.

[124] Section 11 of the ***Judicial Review Procedure Act*** provides that an application for judicial review is not barred by the passage of time unless: "(b) the court considers that substantial prejudice and hardship will result to any other person affected by reason of delay."

[125] The Heiltsuk were advised that Omega's plans for construction and operation of the facility were progressing. In addition, information was provided to them about the amount of the planned investment and the timelines for completion of the project. It is clear from the Heiltsuk's evidence that they were aware of the issuance of the hatchery licence of occupation and the lack of consultation as early as mid December 2001. At that time, no significant investment had been made by Omega.

[126] The Heiltsuk chose neither to bring the petition at the time nor to apply for an injunction prior to construction of the facility commencing in late 2002. Rather, they waited 13 months after they were aware that the Crown had determined that no consultation about the initial licences was required. The evidence is that as of March 2003 Omega had invested $9.5 million in cleaning up the site and building the facility. Further losses will be incurred if the facility cannot be operated.

[127] Given my findings that the Heiltsuk have not established that there has been a *prima facie* infringement of their aboriginal rights and that the Crown and Omega have attempted to consult with the Heiltsuk, it is my view this is not an appropriate case to exercise my discretion to either quash the licences or make a prohibition order barring issuance of approvals or licences relating to the hatchery.

[128] I suggest that the parties continue to consult to determine whether the hatchery may adversely affect the Heiltsuk's rights and, if so, seek a workable accommodation with the Heiltsuk through negotiation. Given the expressed desire of Omega to continue to seek agreements with the Heiltsuk, I find that it is not necessary at this time to make an order in that regard.

CONCLUSION

[129] The following orders and declarations are made:

- The decision makers had in December 2001 and continue to have a duty to consult with the Heiltsuk in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Heiltsuk and the short and long term objectives of the Crown and Omega with respect to the licences;

- The decision makers are to provide the Heiltsuk with all relevant information reasonably requested by them;

- The parties are at liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation;

- The relief in the petition to quash the licences and for a prohibition order is adjourned generally;

- The balance of the relief sought in the petition regarding the decision makers, including the application for a declaration that the decision makers breached their duty to consult and accommodate the Heiltsuk interests and concerns is dismissed.

- The application regarding a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk is adjourned generally.

- The balance of the relief sought in the petition with respect to Omega, including,, that it was in breach of its duty to consult, is dismissed.

- As well the application for an interim or interlocutory injunction is dismissed.

[130] Given the divided success on the petition, I order that each party bear its own costs.

"L.B. Gerow, J."
The Honourable Madam Justice L.B. Gerow

TAB I

Case Name:

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation

Between
Platinex Inc., Plaintiff, and
Kitchenuhmaykoosib Inninuwug First Nation, Donny Morris, Jack McKay, Cecilia Begg, Samuel McKay, John Cutfeet, Evelyn Quequish, Darryl Sainnawap, Enus McKay, Eno Chapman, Randy Nanokeesic, Jane Doe, John Doe and Persons Unknown, Defendants
And between
Kitchenuhmaykoosib Inninuwug First Nation, Donny Morris, Jack McKay, Cecilia Begg, Samuel McKay, John Cutfeet, Evelyn Quequish, Darryl Sainnawap, Enus McKay, Eno Chapman, and Randy Nanokeesic, Plaintiffs by Counterclaim, and
Platinex Inc., Defendant by Counterclaim, and
Her Majesty the Queen in Right of Ontario, Third Party

[2007] O.J. No. 1841

29 C.E.L.R. (3d) 116

[2007] 3 C.N.L.R. 181

157 A.C.W.S. (3d) 460

2007 CarswellOnt 2995

Court File Nos. 06-0271 and 06-0271A

Ontario Superior Court of Justice

G.P. Smith J.

Heard: April 2-4, 2007.
Judgment: May 1, 2007.

(189 paras.)

Aboriginal law -- Lands -- Land claims -- Motion by Kitchenuhmaykoosib Inninuwug First Nation (KI) for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI -- Motion dismissed -- Balance of convenience favoured Platinex, which would go out of business if not permitted to conduct proposed drilling -- Aboriginal rights did not automatically

trump competing rights, whether they were government, corporate, or private in nature.

Aboriginal law -- Aboriginal rights -- Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights -- Meaningful consultation -- Motion by Kitchenuhmaykoosib Inninuwug First Nation (KI) for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI -- Motion dismissed -- Balance of convenience favoured Platinex, which would go out of business if not permitted to conduct proposed drilling -- Aboriginal rights did not automatically trump competing rights -- However, court made declaratory order part of which gave KI the right to ongoing consultation.

Constitutional law -- Canadian constitution -- Aboriginal rights -- Motion by Kitchenuhmaykoosib Inninuwug First Nation (KI) for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI -- Motion dismissed -- Balance of convenience favoured Platinex, which would go out of business if not permitted to conduct proposed drilling -- Aboriginal rights did not automatically trump competing rights, whether they were government, corporate, or private in nature.

Civil procedure -- Injunctions -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Motion by Kitchenuhmaykoosib Inninuwug First Nation (KI) for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI -- Motion dismissed -- Balance of convenience favoured Platinex, which would go out of business if not permitted to conduct proposed drilling -- Aboriginal rights did not automatically trump competing rights, whether they were government, corporate, or private in nature.

Environmental law -- Native lands -- Motion by Kitchenuhmaykoosib Inninuwug First Nation for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI -- Motion dismissed -- Balance of convenience favoured Platinex, which would go out of business if not permitted to conduct proposed drilling -- Aboriginal rights did not automatically trump competing rights, whether they were government, corporate, or private in nature.

Motion by Kitchenuhmaykoosib Inninuwug First Nation (KI) for an interlocutory injunction to prevent Platinex Inc. from carrying out test drilling on traditional lands claimed by KI. Platinex was in the business of exploratory drilling, and it sought to drill on land located in Northwestern Ontario. KI was an indigenous Ojibway/Cree First Nation. The proposed drilling was to take place on KI's traditional lands, which encompassed approximately 23,000 square kilometres. While KI was not opposed to the development of its traditional lands, it wanted to be a full partner in any development and to be fully consulted at all times. An incident occurred in February 2006 after Platinex sent a drilling crew to the impugned land and a confrontation occurred with several members of KI. On July 28, 2006, the court made an interim, interim order enjoining Platinex from its exploration program, a condition of which was that KI immediately establish a consultation committee to meet with Platinex representatives. The issue before the court was the continuation of this interim, interim order.

HELD: Motion dismissed. Since July 28, 2006, all parties had made bona fide efforts to consult and accommodate. However, because of fundamental differences regarding the scope of the duty to consult and the parties' legal rights, no agreement had been forthcoming and no consideration had been given to the possibility of Platinex proceeding with its drilling project. The court applied the well established three-step test for granting an interlocutory injunction. There was no issue that there was a serious question to be tried. The court then considered the harm faced by each party. The harm that Platinex would likely suffer if it could not conduct its proposed drilling operation was that it would go out of business. Being out of business was irreparable harm that could not be readily compensated with damages. The harm KI would suffer would relate to a maximum of 80 drill holes, of approximately two

inches in diameter, in 12,080 square acres of wilderness. The evidence of harm to treaty harvesting rights, culture, Aboriginal tradition, and the community was inconclusive. After balancing the respective interests of the parties, the court found that the evidence supported a finding that the balance of convenience favoured Platinex. The court held that although Aboriginal rights deserve the full respect of Canadian society and the judicial system, those rights did not automatically trump competing rights, whether they were government, corporate, or private in nature. Platinex, however, was not to be given carte blanche to proceed with its entire exploration. To facilitate this, the court granted an interim declaratory order to allow the court to stay involved as development progressed. As part of the declaratory order, the court gave KI the right to ongoing consultation; set a deadline for the implementation of a consultation protocol, timetable, and memorandum of understanding; and, set out the supervisory role of the court.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, s. 35, s. 109

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97

Indian Act, R.S.C. 1985, c. I-5

Mining Act, R.S.O. 1990, c. M.14, s. 50

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, s. 14

Rules of Civil Procedure, R.R.O. 1990, Reg. 1994, Rule 40

Rules of Professional Conduct, Rule 4.02

Counsel:

Neal J. Smitheman and *Tracy A. Pratt*, for the Plaintiff.

Bryce Edwards and *Kate Kempton*, for the Defendants other than Jane Doe, John Doe and Persons Unknown.

Francis Thatcher for the Intervenor, Independent First Nation Alliance.

Neal J. Smitheman and *Tracy A. Pratt*, for the Defendant by Counterclaim.

Owen Young and *Ria Tzimas* for the Third Party.

Reasons on Motion

G.P. SMITH J.:--

Overview

1 The motion before the court is for an interlocutory injunction to prevent a mineral exploration company from carrying out test drilling on the traditional lands claimed by an Aboriginal First Nation community.

2 The land is encompassed by the James Bay Treaty (Treaty 9), of which the First Nation is a signatory. The terms of Treaty 9 surrendered the land to the Provincial Crown in return for the grant of reserve land.

3 At issue before me are the competing interests and rights of the parties. On a larger scale, the broader question is the scope of the duties and rights of the Crown, third parties, and First Nations communities when development is proposed on traditional Aboriginal land that has been surrendered pursuant to the terms of a treaty.

4 Viewed from an historical perspective this case is yet another battle in a larger ongoing conflict between two very different cultures. On one side of the battlefield is the non-aboriginal desire to develop the rich resources of the land. On the other side is the Aboriginal perspective that views the land as a sacred legacy given to them by the Creator to manage and protect.

The Nature of the Proceedings to Date

5 On July 28, 2006, I made the following order:

> [138] Subject to the conditions listed below, an interim, interim order shall issue enjoining Platinex and its officers, directors, employees, agents and contractors from engaging in the two-phase exploration program as described in the affidavit of James Trusler and any other activities related thereto on the Big Trout Lake Property for a period of five months from today's date after which time the parties shall re-attend before me to discuss the continuation of this order and the issue of costs.
>
> [139] The grant of this injunction is conditional upon:
>
> 1. KI forthwith releasing to Platinex any property removed by it or its representatives from Platinex's drilling camp located on Big Trout Lake and this property being in reasonable condition failing which counsel may speak to me concerning the issue of damages;
> 2. KI immediately shall set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's Treaty Land Entitlement Claim.

6 On January 26 of this year, a motion was heard to determine what evidence could be heard when deciding whether to make the injunction permanent until trial. At paragraphs 29 and 30 of my Reasons on that motion, released February 2, 2007, I commented:

> [29] The wording of my July order was purposely designed to afford appropriate protection at the time that the order was issued. As mentioned above, given the fluid nature of most situations, the degree of remedial protection and the predictability of future harm may vary depending upon the point in time that the case comes before the court. In other words there are times when the court must adopt a flexible and perhaps

a creative approach commensurate with the situation at hand.

[30] To put this concept in the language of injuctory relief, the balancing of the risks to the applicant and respondent and the assessment of irreparable harm and the balance of convenience may vary depending upon the time at which the matter is heard.

7 That order also extended the interim, interim injunction until this hearing, and granted the provincial Crown (the "**Crown**"), as represented by the Minister of Northern Development and Mines ("**MNDM**"), leave to intervene in the April proceedings.

The Factual Background - The Parties

8 The Plaintiff, Platinex Inc. ("**Platinex**"), is a junior exploration company that was incorporated pursuant to the laws of Ontario on August 12, 1998. It became a publicly traded company on the TSX Venture Exchange in November 2005. Platinex is in the business of exploratory drilling, and is not involved in the mining or development of property.

9 The Defendant, Kitchenuhmaykoosib Inninuwug ("**KI**"), formerly known as Big Trout Lake First Nation, is an indigenous Ojibway/Cree First Nation, and is a Band under the *Indian Act*.[1] KI occupies a reserve on Big Trout Lake, approximately 580 kilometres north of Thunder Bay, Ontario. KI is a signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

10 The Independent First Nations Alliance ("**IFNA**") is an organization of four First Nations in northwestern Ontario (Kitchenuhmaykoosib Inninuwug, Muskrat Dam, Pikangikum, and Whitesand First Nations), whose members have treaty rights under the 1929-30 Adhesion to the James Bay Treaty/Treaty No. 9, Treaty No. 5, and the Lake Superior Robinson-Superior Treaty of 1850. IFNA was added as an intervenor in the motion before the court by order dated March 2, 2007.

11 Platinex holds as its main assets an unencumbered 100% interest in a contiguous group of 221 unpatented mining claims, and an unencumbered 100% interest in 81 mining leases, covering approximately 12,088 acres of the Nemeigusabins Lake arm of Big Trout Lake.

12 Mineral exploration in the vicinity of Big Trout Lake dates back to 1969, when the Canadian Nickel Company ("**CANICO**") conducted an airborne survey and acquired claims in the area. During the 1970s, two other companies, International Minerals and Chemical Corporation and Canadian Occidental Petroleum Limited, were active in the vicinity of Big Trout Lake.

13 Platinex acquired the 81 leases adjoining its claims from CANICO on February 10, 2006. Seventy-one of the claims were due expire on July 4, 2006, unless Platinex conducted certain work on these claims or unless MNDM provided an extension.

14 A number of extensions have been granted to Platinex by the Ontario government ("**Ontario**") since 1999. In February 1999, MNDM granted an Exclusion of Time Order on all of the 221 Platinex claims, providing relief from the requirement to submit assessment work and allowing the claims to remain in good standing until July 17, 2000. On March 30, 2001, a second Exclusion of Time Order was granted by MNDM. On July 11, 2001, MNDM granted a third Exclusion of Time Order, which kept 63 of the claims in good standing until July 17, 2002. A fourth Exclusion of Time Order was granted on July 17, 2003.

15 On June 28, 2006, the Mining and Land Commissioner issued a certificate of pending litigation to Platinex. This effectively preserves Platinex's claims in good standing with MNDM for the duration of

this litigation, without requiring the company to perform any exploration work on them.

16 The Big Trout Lake Property ("**the Property**"), which is the subject of this motion, is located in Northwestern Ontario, approximately 230 kilometres north of Pickle Lake, Ontario and 580 kilometres north of the City of Thunder Bay.

17 The Property covers 19 square kilometres, or 12,088 acres, on the Nemeigusabins arm of Big Trout Lake. It is not situated on the KI reserve, but rather on KI's traditional lands, which encompass approximately 23,000 square kilometres. The KI reserve is located across Big Trout Lake. Accessible only by air in the summer and winter road in the winter, the Property is a vast tract of undeveloped boreal forest.

18 Over the past 7 years, Platinex has engaged in ongoing discussions with members of KI respecting KI's claims on the Property, and Platinex's intended exploration and development of those claims.

19 Platinex maintains that it must begin the drilling of exploratory holes on the property no later than July of this year, failing which it will become bankrupt. It plans to drill 24 to 80 holes in two phases, at six target sites. No precise location has yet been selected for the holes; site selection will be determined by a variety of factors, including magnometer survey interpretation, ground conditions, weather, and sensitivity to KI's cultural and community issues.

20 The company originally began its Phase One exploratory drilling in the winter of 2005/2006. It abandoned the drilling site, prior to undertaking any drilling, in February 2006, after being confronted by representatives of KI who were protesting against any work being performed on the Property.

21 As early as 1999, Platinex knew that KI intended to file a treaty land entitlement claim ("**TLE**"). Platinex was also advised in February 2001 that KI was unilaterally imposing a moratorium on all development until proper consultation had taken place.

22 KI had initially been in favour of Platinex's plans but, after community discussion, declared the moratorium on further development while negotiations and consultation took place.

23 On February 7, 2001, Chief Donny Morris wrote to Simon Baker, one of the principals of Platinex, stating:

> This is to advise you that the Kichenuhmaykoosib Inninuwug are suspending all mineral activities in and around its traditional territories which they have occupied and used since time immemorial. This moratorium is effective as of today's date of February 07, 2001. The reasons for this moratorium are that the fact that Kitchenuhmaykoosib Inninuwug has submitted a Treaty Land Entitlement claim to the Federal Government for consideration in July 2000 and that the area of land under which your company has been conducting mineral exploration activities is covered by the land claim.

24 Exhibit G to the affidavit of Chief Donny Morris is a copy of the Resource Development Protocol developed by KI. That protocol states that its purpose is "to describe the process for consultation with Kitchenuhmaykoosib Inninuwug **prior to** and during development activities on KI lands." (emphasis added)

25 As indicated in its development protocol, KI is not opposed to development on its traditional lands; however, KI wishes to be a full partner in any development, and to be fully consulted at all times. The acceptance of any proposal for development will depend on its merits, and whether the development

respects KI's special connection to the land and its duty, under its own law, to protect the land.

26 The KI Development Protocol sets out the following steps required for an agreement to allow exploration to go forward:

(1) initial discussion with Chief and Council;
(2) discussions with the community;
(3) consultation with individuals affected by the development;
(4) follow-up discussions with the community;
(5) referendum; and
(6) approval in writing.

27 Any decision to allow development on KI traditional lands is a community-based decision, and one that cannot be made solely by the Chief or Band Council.

28 Platinex had several meetings with members of KI, including the Chief, the Band Council, and certain individuals. However, the KI consultation protocol was not followed, nor was a development agreement signed. Chief Morris states at paragraph 32 of his affidavit that:

> [a]t several times in 2004 and 2005, I refused to sign a memorandum of understanding, agreement, or letter of support for Platinex's exploration activities, because the community process was not complete, and because the ongoing consensus was that exploratory drilling should not be permitted.

29 In January 2006, Platinex asked for a meeting with the entire community. KI agreed to the meeting, to allow Platinex to voice its position, and to allow Platinex to hear the concerns of KI band members. After receiving the agenda for the meeting, it became clear to Platinex that it would not be able to change KI's decision regarding the moratorium, and Platinex cancelled the meeting.

30 On or about February 16, 2006, KI became aware that Platinex had sent a drilling team to its camp on Nemeigusabins Lake, and that drilling equipment was to be transported onto the property by winter road.

31 On February 19, 2006, Chief Donny Morris and Deputy Chief Jack McKay attended the Platinex camp to deliver a letter to the drilling crew. In the letter, KI demanded that Platinex cease all exploratory activities.

32 In response to a number of radio announcements made by Chief Morris and others, several members of KI traveled to Platinex's drilling camp to protest against further work being done. There is a significant difference in opinion as to what happened next.

33 Platinex and its representatives state that Chief Morris confronted them in a hostile and threatening fashion, stating that the road was blockaded. They further state that the runway for the airstrip was purposely ploughed by members of KI, and that they were given the impression that the drilling team would have to leave within hours, before the landing strip was completely ploughed under, since that would prevent anyone from leaving the area by plane.

34 Platinex maintains that it was clear to the members of the drilling crew that their safety was in jeopardy, and that the only viable option was for them to leave as quickly as possible. On February 25 and 26, 2006, the entire drilling crew flew out of the area, abandoning the drilling site and leaving much of their equipment behind.

35 KI denies that there was any threat of harm to the drilling crew, and asserts that the protest was conducted in a peaceful fashion.

36 Platinex brought this action for damages and injunctive relief. KI issued a counterclaim seeking its own injunction, and brought a third party claim against Ontario, alleging that the provincial *Mining Act*[2] is unconstitutional.

The Motion Brought by Platinex

37 Platinex brought a motion for an order to, *inter alia*, strike paragraph 3 and exhibit 3 of the affidavit of Phillip Rouse, sworn March 26, 2007. Philip Rouse is a law clerk employed by Bryce Edwards, one of KI's legal counsel.

38 The grounds for that motion were that the affidavit was served in violation of Rule 39 in that it was served after the completion of examinations and without leave of the court and because it offends Rule 4.02 of the Rules of Professional Conduct. Paragraph 3 of the affidavit attaches two documents as exhibit 3. The first document was an email from Bryce Edwards documenting a telephone conversation with a representative of the Specific Claims Branch of the Department of Indian and Northern Affairs. The second document is a fax to Mr. Edwards from Kate Duncan, Indian and Northern Affairs Canada dated March 23, 2007 attaching a report prepared for the Specific Claims Branch.

39 Having reviewed Mr. Rouses's affidavit, I agree with the position taken by Platinex that paragraph 3 and the attached exhibits offend the general rule against hearsay evidence.

40 It would be improper for Mr. Edwards to act as counsel and to rely upon his own affidavit. Likewise, it is improper for Mr. Edwards to communicate that evidence to his law clerk and then rely upon that law clerk's affidavit. Essentially, this would be attempting to do indirectly that which he is prohibited from doing directly.

41 The motion to strike paragraph 3 and exhibit 3 from Philip Rouse's affidavit is granted.

KI's Treaty Land Entitlement Claim and Treaty 9

42 Understanding KI's position requires an understanding of its TLE claim and of Treaty 9.

43 The James Bay Treaty, also known as Treaty 9, was negotiated and signed in 1905 and 1906. KI's predecessor, the Trout Lake Band, adhered to the treaty on July 5, 1929. The land covered by the Treaty includes most of northern Ontario north of the height of land; to James and Hudson Bays in the north; to the boundary of Quebec to the east; and is bordered on the west by Manitoba.

44 The Treaty provides for the surrender to the Crown of Aboriginal title to approximately 90,000 square miles of land, in exchange for certain reserve lands. The surrender of the land extinguished "all rights, titles and privileges", so that KI's rights became treaty rights, and the land became provincial Crown land.

45 The size of the KI reserve was measured to be 85 square miles, which was be based upon a formula of one square mile for a family of five or, for smaller families, 128 acres per person. KI asserts that the area of their reserve was improperly calculated, and that it is entitled to approximately 197 additional square miles.

46 Treaty 9 provides, in part, as follows:

> And whereas, the said commissioners have proceeded to negotiate a treaty with the Ojibeway, Cree and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon, and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for his Majesty the King and His successors for ever, all their rights titles and privileges whatsoever, to the lands included within the following limits, that is to say: That portion or tract of land lying and being in the province of Ontario, bounded on the south by the height of land and the northern boundaries of the territory ceded by the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less. And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.
>
> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families ...

47 In return for a surrender of all rights and title to the land by the Band, the Crown promised to lay aside reserves. Any unfulfilled promise for land can give rise to a treaty land entitlement claim, or TLE.

48 Treaty 9 also promises that the signatories have the right to pursue traditional harvesting rights throughout the surrendered tract of land, including hunting, fishing, and trapping. This right is "subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty", and subject to land that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

49 As early as January 13, 1999, KI had indicated its intention to proceed with its TLE claim to both Platinex and the federal and Ontario governments. The claim is based upon the assertion that it was entitled to a reserve based upon its current population, rather than on the population of its predecessor band in 1929. If successful, this will add approximately 197 square miles to KI's reserve.

50 In June 1967, the Trout Lake Band passed a resolution that divided it into five separate bands. That decision was later amended to create 8 bands, of which KI is one.

51 Both the federal and provincial Crown initially took the position that the entire Trout Lake Band, including the 8 bands more recently created, was entitled to a total land grant of 129 square miles. Notwithstanding this position, both the federal and provincial Crown agreed to grant a further 204.87 square miles for the reserves of the 8 new communities, resulting in a total land grant of 330.87 square miles.

52 By a 1975 Order-in-Council, Ontario formally transferred these reserve lands to the Trout Lake Band. In 1976, the government of Canada issued an Order-in-Council setting aside those same lands as reserves for the band. Both Orders-in-Council specified that two distinct types of land were being transferred: first, 126 square miles was transferred specifically as entitlement land pursuant to Treaty 9; and second, approximately 204.8 square miles was transferred as land in excess of any treaty land entitlement, to meet the economic and social needs of the band. Ontario concedes that KI has an arguable case that the original Trout Lake Band may have had an entitlement to additional reserve land

of between 3.4 and 7.2 square miles over and above the 126 square miles originally allotted to it. This possible entitlement, it submits, has already been addressed by the grant of an additional 204.87 square miles of land.

53 Ontario's position is that the extra 204 square miles was a gift and, although it was not to be considered as treaty entitlement land, it satisfies any outstanding treaty land entitlement. As a result, Ontario views KI's TLE claim as being very weak or non-existent.

54 KI has expressed outrage over this position, viewing it as sharp dealing and an outrageous breach of the integrity, promises, and honour of the Crown. Without honour it argues, there is no possibility of achieving reconciliation through consultation in the absence of good faith. In short, KI asserts that Ontario's rejection of its TLE is proof that an injunction is necessary since Ontario cannot protect that which it denies exists.

55 KI formally filed its TLE claim in May 2000. By letter dated March 15, 2007, the Ontario Secretariat for Aboriginal Affairs ("**OSAA**") declined the claim, on the basis that KI's entitlement to land under Treaty 9 had been satisfied. The federal government has not yet taken any position on the claim, and to date KI has not commenced an application for judicial review of the OSAA decision.

56 KI's claim is not to any specific piece of land, but rather to an area of land to be agreed upon in consultation between KI and both the provincial and federal governments.

57 Although these additional lands have not yet been specifically demarcated, KI asserts that they would necessarily be within KI's traditional territory.

58 The proposed exploration activities by Platinex are within KI's traditional territory, and therefore potentially within the scope of the land claim.

59 KI argues that its land claim is not in issue in the motion before the court, but asks for injunctive relief to protect the basis of the claim. KI's concern is that, if exploration is allowed to proceed, it could have a negative impact on KI's claim by removing that area of land being developed from consideration.

The *Mining Act* and the Mining Sequence

60 The *Mining Act* provides prospectors with the right to enter upon Crown lands to prospect for minerals, and to stake and work claims, without first having to purchase the land.

61 Staking a claim is an initial step that takes place before the exploratory stage, and typically includes the staking process as well as walking the land and gathering rock and soil samples. The holder of a staked claim has the exclusive right to explore for minerals and the right to lease the claim, but no rights or interest in the claim or any right to remove minerals.

62 Section 50 of the *Mining Act* requires that a claim holder perform assessment work in the amount of $400.00 per year to maintain the claim in good standing, failing which the claim is forfeited to the Crown.

63 Land that is subject to a mining claim remains unpatented Crown land. All other uses commonly associated with Crown land continue, including any traditional harvesting rights described in Treaty 9.

64 Mineral production cannot take place on a mining claim. For this to occur, a mining lease must be obtained from the Crown. This is granted upon fulfillment of the requirements set out in the *Mining Act*.

65 The process of searching for a mine and bringing it to production is referred to as the "mining sequence", and may unfold over a period of several years. The sequence may include the following stages:

* Regional survey
* Land acquisition
* Early exploration
* Intermediate exploration
* Advanced exploration
* Development/production
* Closure/rehabilitation.

66 Currently, MNDM views Platinex as being in the early to intermediate stages of exploration. KI points to the lack of Crown oversight and protection in the early stages of the mining sequence and a seemingly uninterested view of any harm that may occur to Aboriginal interests.

67 KI's third party claim challenges the constitutionality of the *Mining Act*, stating that, without consultation with the particular affected Aboriginal party or knowing what is happening on the ground with exploration work, the Crown does not and cannot comprehend the nature and extent of the impact of exploration activities on Aboriginal land, rights, ways of life, and culture.

New Evidence since the June 2006 Hearing

68 In addition to the evidence that was available in June 2006, the evidence before the court includes new evidence, such as:

* the evidence of the consultation process;
* the affidavit of Roger Townshend dated along with attached exhibits including the report of Dr. Janet Armstrong;
* the transcript of the cross-examination of Roger Townshend (March 15, 2007);
* the letter dated March 17, 2007 from OSAA to KI Chief Donny Morris rejecting KI's TLE claim;
* the affidavit of Christine Kaszycki, Assistant Deputy Minister, MNDM; and
* the transcript of the examination of Christine Kaszycki (March 16, 2007).

69 MNDM and IFNA also filed comprehensive motion records and factums, and participated fully in the motion.

The Duty to Consult

70 KI has the right to be consulted when any of its rights protected by s. 35 of the *Constitution Act, 1982*, are likely to be affected by a proposed government action.[3]

71 The mining claims and leases granted by the Crown to Platinex, and that company's interest in drilling on land within the Treaty 9 boundary, gives rise to a potential adverse impact to KI. It is this potential adverse impact that has triggered the Crown's duty to consult with KI.

72 The scope of the duty to consult and the consideration of whether the Crown and by implication Platinex have fulfilled this duty is the question that more than any other lies at the heart of this case.

73 When considering the scope of the duty to consult and the potential impact or harm of an activity on Aboriginal rights, it is important to differentiate between established rights and asserted rights.

74 In this case, KI's harvesting rights are established by Treaty 9, whereas the TLE claim is an asserted right. Neither gives KI a proprietary interest in the tract of land in question, which is owned by the Crown under s. 109 of the *Constitution Act*, and which is unencumbered by Aboriginal title.

75 Both MNDM and Platinex submit that the potential harm to the land, and to KI's treaty harvesting rights, is minimal. The harm is capable of mitigation, especially when balanced against the Crown's right to take up land for mining and other purposes.

76 Second, they maintain that KI's TLE is weak or non-existent and should not preclude Platinex's exploratory drilling, for a variety of reasons:

(1) it has been rejected by Ontario/OSAA;
(2) the leases and claims in question pre-date the filing of the TLE claim in 2000;
(3) the exploratory drilling is transient, and could not possibly compromise KI's TLE claim;
(4) even if KI is entitled to more reserve land, it has no right to unilaterally select this land, especially land that is subject to pre-existing third party rights; and
(5) in the event that KI is entitled to more land, any such entitlement has already been satisfied.

77 KI does not agree that the harm proposed by the drilling is minimal, categorizing this position as an assumption unsupported by any evidence. Citing the *Mikisew* case, KI argues that minimal impact can be, and is, very serious from the Aboriginal perspective, especially when it infringes on hunting, fishing, or trapping.

78 Chief Donny Morris expressed KI's fear of harm regarding its TLE, when he stated that

> [s]hortly after the TLE claim was submitted, KI issued a moratorium on resource development on our traditional land. Until the TLE is settled and our Treaty rights are honoured, we are not willing to have parts of our traditional territory taken off the table by activities that create incompatible interests, such as mineral exploration.[4]

What Does Consultation Mean?

79 *Webster's Dictionary* defines the word 'consult' as "to deliberate, counsel, to have regard to, to ask the advice or opinion of."[5]

80 *Black's Law Dictionary* defines 'consultation' as "the act of asking the advice or opinion of someone; a meeting in which parties consult or confer; the interactive methods by which states seek to prevent or resolve disputes."[6]

81 The purpose of consultation is to promote reconciliation. As Lamer J. stated in *Delgamuukw*:

> Ultimately, it is through negotiated settlements, with good faith and give on all sides, reinforced by the judgment of this Court, that we will achieve ... the basic purpose of s. 35(1) - the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.[7]

82 Consultation does not mean that parties must reach an agreement. They must, however, deal with each other in good faith. This was addressed by the Supreme Court in *Haida*:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: ... Mere hard bargaining, however, will not offend an aboriginal people's right to be consulted.
>
> ...
>
> 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.[8]

83 In addition to fostering reconciliation, one of the primary purposes of the consultation process is to facilitate the exchange of information, and to allow each party to acquire a greater and deeper knowledge of the interests and position of the other. As information is shared, it may become apparent that modification of one party's position is appropriate. This has been described in various cases, including by the Supreme Court in *Haida*, as the stage of accommodation:

> 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 ...
>
> ... 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.[9]

The Consultation Process

84 In my reasons delivered on February 2, 2007, I stated:

> [33] Consultation is a multi-faceted concept. It serves many purposes including fostering the principle of reconciliation. It also is relevant when a court considers the

concepts of irreparable harm and the balance of convenience, two of the essential requirements for the grant of injunctory relief.

[35] In paragraph 91 of my judgment [released July 28, 2006] I wrote:

> [91] The duty to consult, however, goes beyond giving notice and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree but rather requires the Crown to possess a bona fide commitment to the principle of reconciliation over litigation. The duty to consult does not give first Nations a veto-they must also make bona fide efforts to find a resolution to the issues at hand.

[36] In paragraphs 110, 111 and 112 I commented on the relationship between the duty to consult and the balance of convenience test as follows:

> [110] A decision to grant an injunction to Platinex essentially would make the duties owed by the Crown and third parties meaningless and send a message to other resource development companies that they can simply ignore aboriginal concerns.
>
> [111] The grant of an injunction enhances the public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably.
>
> [112] Balancing the respective positions of the parties, I find that the balance of convenience favours the granting of an injunction to KI.

[37] Clearly at the time that the initial motion was heard (June 22 and 23, 2006) consultation with the Crown was minimal or non-existent at best. Platinex had unilaterally decided to terminate discussion and to move in its drilling crew.

[38] In view of my direction that consultation take place the question arises as to whether the risk of harm and balance of convenience that existed in June 2006 has changed. An applicant may be refused an interlocutory injunction if there are reasonable steps that could be taken to avoid the harm or to ensure that the harm is not irreparable. *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.); leave to appeal to the S.C.C. refused 39 C.P.R.

85 Since July 28, 2006, there have been ongoing discussions between KI and representatives of Platinex and the Crown. I do not propose to recite in detail the extent of the consultation process, save and except for a general review of the process and of the positions of the respective parties.

86 In my reasons of July 28, 2006, I commented at para. 139 on the failure of both the Crown and Platinex to consult with KI, and ordered KI to "immediately set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown".

87 Consultations have taken place since July and, although not successful in reaching an agreement, have been beneficial in identifying KI's fears and concerns, and in exchanging information.

88 The evidentiary record indicates that all parties have attempted to understand and address each

other's concerns, and that significant accommodations have been made.

89 Both MNDM and Platinex take the position that KI has unreasonably and effectively stalled the consultation process. In support of their position, they state that by the end of March, 2007, KI's consultation committee had been made available to meet only once with the Crown and Platinex. That single meeting was in September 2006, at Big Trout Lake, for the purpose of discussing the protocol and process. Further, they submit that:

> In the eight months since the court granted KI a conditional interim, interim injunction, the committee has not met once with the Crown and Platinex to consult on matters of substance with respect to the potential impact of Platinex's proposed drilling campaign on the KI community and its s. 35 rights, or to attempt to ... [develop] an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake.

90 Platinex summarized the difficulties that it has experienced in attempting to consult with KI in paragraph 49 of its factum:

> (a) funding required by KI to engage in substantive consultations has not been provided;
> (b) the scope of information sharing by Ontario has been limited;
> (c) the appropriate signatories to the protocol are unclear;
> (d) the scope of subsequent strategic land use consultations (separate and apart from the Platinex drill program) is undefined; and
> (e) the linking of a KI community health study to the commencement of the Platinex project has resulted in delay.

91 Platinex also alleges that part of the problem has been KI's refusal to allow Platinex and/or MNDM to meet directly with the KI community, and the insistence that all discussion take place with KI's litigation counsel. Another issue has been KI's insistence that a consultation protocol be executed by Chief Morris, Minister Bartolucci, Minister Ramsey, and James Trusler, before substantive discussions take place.

92 According to Platinex, it was willing on October 5, 2006, to proceed with draft #6 or #7 of the protocol, and it also agreed to execute draft #10 on October 31, 2006.

93 KI maintains that neither MNDM nor Platinex has any serious intent of effecting reconciliation with KI in respect of the Platinex project or otherwise, and that MNDM and Platinex believe that mining interests trump Aboriginal and treaty rights.

94 Further, KI submits that MNDM and Platinex's pre-determined position that KI's TLE claim is without merit, and that mining interests take up or remove such lands from selection by KI if the TLE is ultimately accepted, necessitate an injunction to protect KI's land claim and treaty rights until trial, as opposed to further consultation.

95 KI also argues that to require it to agree, at the outset, to allow the drilling project to proceed effectively means that the Aboriginal party is disentitled in all such cases to seek and obtain an injunction, which is contrary to the finding in the *Haida* case that Aboriginal parties are entitled to injunctive relief.

96 KI's consultation needs are summarized in paragraph 157 of their factum, as follows:

* the need for consultation protocol;
* the need for sufficient time;
* the need for funding;
* the need for land use study;
* the desire for a subsequent strategic-planning level consultations (not as part of the Platinex consultations); and
* the need for more information and analysis now as a "catch-up" (to understand what has already happened to the land, due to failure of Crown to consult in the past).

97 With respect to the funding issue, KI referred to the PDAC e3 standards, which Platinex had agreed to uphold, which state that "... you, as the proponent, will often be required to supply financial support to the First Nations with which you are in dialogue in order to allow them to develop comfort with the engagement process". Further, KI argues that there was no meaningful consultation with the Crown, since the Supreme Court's direction in *R. v. Sparrow* [1990] 1 S.C.R. 1075, requires funding to allow an Aboriginal community to be engage in a fair and meaningful way in the consultation process. KI, like many Aboriginal communities, is impoverished and cannot afford to hire the expertise that is needed to participate fully in the process.

98 A fundamental concern of KI's is the question of whether the duty to consult consists simply of the requirement of intent, with no requirement to effect the intent. If this is so, it argues that the concept of the honour of the Crown is meaningless, and Aboriginal rights are only afforded second class status and treatment.

The Issue of the Scope of the Consultation Process

99 The scope of the duty to consult varies with the circumstances of each case, the strength of the claim, the nature of the right that is affected, and the anticipated degree of impact of the activity.

100 Both MNDM and Platinex submit that the Crown's duty to consult with respect to KI's established or asserted rights is at the lower end of the spectrum described in the *Haida* and *Mikisew* cases.

101 The scope and content of the duty to consult may also change over time, as the potential impact of the activity evolves and changes. The shifting nature of this duty was addressed in *Haida* as follows:

> In this respect, 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 ...
>
> 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 ...
>
> 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.[10]

102 Whenever the rights of parties and the nature of the relationship are contained and described in a treaty, the wording of the treaty is relevant to determining the scope of the duty to consult. Treaty 9 provides the Crown with unencumbered title to the land in question, and with a limited right to displace traditional harvesting rights by taking up land to provide for a variety of activities, including mining. The treaty foresaw that the Crown might take up land at some point of time in the future, and that this would affect Aboriginal harvesting rights.

103 The Supreme Court has recognized in *Mikisew* that the duty to consult will vary depending upon the extent of the impact of the taking up of land on traditional harvesting rights:

> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (Delgamuukw, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.[11]

104 The focus of the consultation in the case before me appears to have been on process rather than on substantive issues, with the major difference between the positions of the parties being one of scope.

105 KI views exploratory drilling as the thin edge of the wedge that can only lead to further activity on the land that is increasingly more invasive. This difference of perspective was clearly articulated during the cross-examination of MNDM Assistant Deputy Minister Christine Kaszycki, when she said:

> I think the challenge with respect to the development of the [consultation] protocol has centred principally on the issue of scope in the agreement around what should be a reasonable scope of consultations associated with the order as directed by Justice Smith on July 28th. Ontario has taken a position that we would undertake discussions and consultation on issues related to mineral exploration and mine development, the spectrum of activities from a broader strategic perspective in addition to those which

would focus principally on the Platinex undertaking. And the community has positioned themselves to request broader base strategic land use planning in general and has not supported the narrowing of scope to mineral exploration and mine development.

So the challenges there are really with respect to scope. You know, at one end of the spectrum being focused specifically on the Platinex activities. At the other end of the spectrum, being focused on broad base land use planning. And Ontario, I guess, in the middle being focused on willing to expand scope in future discussions but limiting it and narrowing it to mineral exploration and mine development.

And associated with the scope issue are the issues of funding, et cetera. I mean, they are all inter-related to one another. So I think that has principally been the challenge, just defining what this consultation reasonably should be about given the nature of the Platinex activity and also the view of Ontario that we are willing to enter into discussions with the community on a broader base of activities related to mineral exploration and mine development.[12]

106 KI submits that Platinex and MNDM's view of the scope of consultations is directly related to their view of the impact of development as being minimal and inconsequential. That perspective, KI argues, is narrow and insensitive, since even a "minimal impact can be very serious from the Aboriginal perspective, if it includes the claimants' hunting ground or trap line."[13]

107 Platinex and MNDM believe that consultations have stalled because of KI's unrealistic view of the scope of the duty, and its attempt to expand this duty well beyond the boundaries that have to date been recognized in Canadian law. This position, they argue, translates into a veto of any activities on Crown land whenever Aboriginal consent is not obtained.

The Principles of Injunctive Relief

108 Rule 40 of the *Rules of Civil Procedure*[14] provides:

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

40.02(1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02(2).

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02(3).

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194,

r. 40.02(4).

> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

109 The principles governing the grant of an interlocutory injunction are well established. An applicant must meet three tests:

> (i) the applicant must show that the claim presents a serious question to be tried as to the existence of the right alleged and a breach thereof, actual or reasonably apprehended;
> (ii) the applicant must establish that without an injunction, irreparable harm will occur; and
> (iii) the balance of convenience must favour the grant of the injunction.[15]

110 All three components of the test must be proven to qualify for injunctive relief.

111 With respect to the first requirement, there is no issue that there is a serious question to be tried. This case has wide-ranging implications on any future development on First Nations traditional land.

112 The issue of irreparable harm is the central issue in this case, and for that reason I will address the evidence as it relates to this issue first.

113 The assessment of the issue of whether irreparable harm will occur, and the balance of convenience between the parties, must be conducted in relation to what right or interest it is entitled to protection. It is trite to observe that, for a court to order injunctive relief, the applicant must demonstrate that it has a recognizable legal right requiring protection.

Irreparable Harm

114 In paragraph 9 of its factum, KI summarizes its argument that it will suffer irreparable harm to its land and to its TLE claim:

> **Irreparable Harm - Connection to Lands:** No evidence on the record now challenges the evidence of irreparable harm to KI's connection to the land. New evidence further supports evidence of risks to KI in this way. Thus, the finding of this honourable Court of July 28, 2006 as to this type of irreparable harm must stand.
>
> **Irreparable Harm - TLE Claim:** The evidence supports the strength and validity of KI's TLE claim. Regardless, Ontario has now officially stated that it does not accept KI's TLE claim, based on an unsupportable proposition: that land Ontario officially insisted in the 1970s was *not* given to fulfil the TLE, nonetheless has fulfilled KI's TLE entitlement. Taken seriously, Ontario's argument means that Ontario's words, enshrined in an Order in Council, have no meaning. This is a dishonourable result; it has the appearance of sharp dealing. Given the patently unreasonable nature of Ontario's decision, KI intends to make further submissions to Ontario and take such further steps as are necessary. The TLE is still a live issue, and drilling activity by Platinex will result in further legal and practical impediments to KI's ability to select TLE lands. Thus the finding on July 28, 2006 as to this type of irreparable harm is

further supported, because the harm is worse than originally thought. Accordingly, the finding of July 28, 2006 must stand.

115 The new evidence that has been adduced since June 2006 has altered my finding of irreparable harm as it relates to both KI's TLE and its connection to the land at this point in time.

The Evidence of Harm to KI's Connection to the Land

116 KI's treaty rights are enshrined in Treaty 9, and are protected by Section 35 of the *Constitution Act, 1982*. These rights include traditional harvesting rights (hunting, fishing and trapping), subject to the rights of the Crown, which are also described in the treaty and which include the right to take up land for mining and other purposes.

117 The evidence presented to this court in June 2006, and also in April 2007, included affidavits from a number of KI band members, describing the impact that the drilling activity proposed by Platinex would have on their use of and connection to the land.

118 In paragraphs 79 and 80 of my Reasons of July 28, 2006, I commented on the special relationship that KI had with the land:

> [79] Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE Claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.
>
> [80] It is critical to consider the nature of the potential loss from an aboriginal perspective. From that perspective, the relationship that aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.

119 In 1983, as part of a self-government initiative, the Big Trout Lake First Nation released a report entitled "Keeping our Land in the Way That Has Been Handed On to Us From Our Ancestors". Part of that report described the Aboriginal view of their relationship to the land.

> 1. Natural resources - The concept of natural resources is foreign to the cultural world view of the Big Trout Lake First Nation. In the non-aboriginal world view of the governments in Ottawa and Toronto, natural resources defines a fundamental division or opposition between people and land.
>
> In this non-aboriginal world view "people" and "natural resources" are conceptually set against each other.
>
> This speaks to the deepest aspects of the relationship between non-aboriginal society and the land with everything that the Creator has placed in it. This relationship is one of estrangement.
>
> For our people of the Big Trout Lake First Nation, the land and all that the Creator has placed in it, is regarded differently. The non-aboriginal society

refers to "natural resources". But for our people, we approach what non-aboriginal people call natura resources firstly in relation to our identity with our land. The Creator made the land, and we were placed in it to be a part of it together with all things that constitute the land, we are a part of this creation. We have the responsibility of protection of the land. Therefore, in self-government negotiations concerning the land we wish firstly, that negotiations account for a holistic concept of lands to refer to the land. Then we can deal with what constitutes the land; trees, fish, animals, birds, plants etc. We must name what we are talking about when it involves the land. The white man must learn to begin this. The term natural resources implies that natural resources are objects. They are spiritually disconnected from human beings.

For the people of the Big Trout Lake First Nation what non-aboriginal society refers to as natural resources are the centre of the expression of the created order with which our people are in intimate relationship. They are a part of the land (aski) of which we are also a part.

These relationships are only possible within a community-based approach. The emphasis of the world view of our people at the Big Trout Lake First Nation is to maintain our special bonds with our land - which is the ground, the animals, the water, the fish, the trees, and us - all of what has been made by the Creator in our territories. The emphasis is on retaining an intimate named relationship with everything that the Creator placed in our lands. This is a character of dialogue between our people and our land. this is our love for our lands. We take our responsibility to protect the land given to us by the Creator as essential to our identity

...

2. ...

When we say this we do not mean that economic activity is not important for the people of the Big Trout First Nation. Non-aboriginal governments have divided this activity into subsistence and commercial categories. This reflects an attitude that our society is less civilized or less developed. But our people have always engaged in economic activity for both domestic and commercial (trading) purposes. We do not draw distinctions between them. The relationship to land is the same whether we fish for food or run a tourist operation for commercial purposes. All of these are for our livelihood. The land has been important for maintain the economic well-being of our Big Trout First Nation people. The problem in this regard has been that non-Aboriginal government have systematically attempted to dominate and control our relationships to land.

120 In paragraph 9 of his affidavit, sworn June 5, 2006, Chief Donny Morris described the KI community's fear that exploration will have a negative impact on his people's connection with the land:

9. Anything that may disrupt this fragile system, or sacred relationship with and stewardship of the land, the safety of our drinking water, or our ability to hunt, fish and trap, is of great concern to our people, who live in circumstances best described as marginal.

121 After conducting a survey to measure community response to mineral development, Chief Morris stated that the community was divided in its opinion; that:

> Slightly more KI people at the time were opposed to resource extraction. Reasons for opposition included lack of consultation, endangerment of waterways, destruction of the land, desecration of the land, and interference with traditional activities.[16]

122 Both the affidavit of Chief Morris and the KI Consultation Protocol make it clear that the community is not opposed to economic development:

> ... provided that such development is done in a way that respects our sacred connection with the land, and our duty to the Creator to protect and preserve the land. This, I am willing to discuss the possibility of exploration on our traditional territories, without prejudice to our right as KI people to act to protect the land, if necessary.[17]

123 The KI Consultation Protocol indicates that KI is interested in "... developing successful partnerships and working relationships with companies interested in development opportunities on KI lands."[18] Further, it goes on to state:

> Decision making processes which effect the health and well-being of Kitchenuhmaykoosib Inninuwug must involve the community in every step of the process. We want the consultation process to lead to decisions that are complementary to our values and processes, and recognize the cultural and traditional practices of our people.[19]

124 Several affidavits were filed by KI Band members, describing their fear of the impact that development would have on the health and cultural, societal, and spiritual fabric of the community. In her affidavit, sworn June 7, 2006, Mary Childforever described the connection between the loss of self-determination and control over the land, and the alarming suicide rates, health problems, crime, substance addiction, and family breakdown within the community.

125 In her affidavit, sworn June 5, 2006, Mary Jane Moonias expressed her fears that development would have a negative impact on traditional ways of life, including hunting, trapping, and fishing; and her fear that it could threaten the quality of drinking water on Nemeigusabins Lake.

126 Ms. Moonias stated that she believed that drilling would interfere with her family's hunting of beaver, geese, moose, and other traditional foods, because the noise and pollution would scare away animals. She concluded by stating: "I do not want money. I want what the land can give me. I want to live in peace and according to our traditional ways, in the lands that have been my home for my whole life, and my ancestors' home before that."

127 The drilling activity proposed by Platinex is restricted to 24-80 drill holes, measuring 2 inches in diameter, in an area of approximately 50 square kilometres. Platinex submits that the evidence demonstrates that its drilling program will have a minimal impact on the land; that any impact will be temporary; that proper environmental safeguards are in place; and that the evidence of harm is speculative and lacks credibility.

128 Platinex submits that there is no expert scientific evidence to dispute this conclusion. Both Platinex and MNDM argue that without reliable evidence that the land on which the drilling is to be done is off the table in the context of the TLE claim how can there be any finding of irreparable harm.

As well, both submit that as long as there is the opportunity to consult the possibility exists that any harm can be repaired and addressed by accommodation.

129 Because KI does not have the right to select land but only to participate in an discussion about which land will be selected, Platinex and MNDM argue that without proof of a right there can be no finding or irreparable harm.

130 Platinex hired AMEC Earth & Environmental ("**AMEC**") to assess the environmental impact of its proposed drilling program. AMEC's report is attached to the affidavit of James Marrelli, sworn March 14, 2007. That report states that the proposed program will have "minimal, if any negative impacts" and that "any negative impact will be low and temporary in nature."

131 The letter of James Marrelli, dated March 13, 2007, best describes Platinex's most recent position regarding how ongoing consultation can manage any harm that may result from its drilling program:

> Platinex has been urging the consultation committee to commence substantive discussions for months. Notwithstanding that no substantive discussions had taken place on the initial expiration of the interim interim order, Platinex agreed in January 2007 to extend the injunction for three months on the basis that good faith efforts to complete the consultation would allow the company to commence its exploratory program at the end of March 2007. Virtually nothing has happened in those three months and now KI seeks further delay. Ultimately, Platinex wants nothing more than to promote and achieve a healthy long-term relationship with the KI community and to commence its exploratory drilling with the support and blessing of the community. Just as KI insisted on a signed consultation protocol before substantive discussions could begin, the company requires assurances that true consultation will take place immediately and within a reasonable timeframe. Accordingly, Platinex is willing to delay the April hearing to May 22-25, 2007 on the execution of a Memorandum of Understanding ("MOU") and a band resolution endorsing the MOU. The broad terms of MOU should be as follows:
>
> 1. In principle, the KI community supports Platinex conducting its 24 to 80 hole exploration drill program based on the accommodation of KI's concerns as set out in the below table 2 and subject to the terms delineated in #2 through #7 below.

KI Community Concern

Platinex Accommodation

Potential burial sites in the vicinity of the Platinex claims.

(a) The burial site that has been identified will be marked as an area for no disturbance and a buffer of 100 metres kept around the site;
(b) Platinex will retain an archaeologist for the purpose of the exploratory drill program;
(c) The archaeologist will pre-screen any proposed holes;
(d) Platinex will follow any recommendations of the archaeologist;
(e) The archaeologist's findings will be shared with the KI Community
(f) Platinex will continue to seek KI local and traditional knowledge about potential burial or other archaeological-significant sites.

Environmental impact of the proposed drilling

(a) Platinex retained AMEC Earth and Environmental to conduct an independent review and provide an expert opinion of the proposed exploration program;
(b) Platinex will implement the AMEC - recommended or equivalent mitigation measures as set out in table 1 of the AMEC Report (attached);
(c) Platinex will obtain any necessary governmental permission or approvals for the proposed exploration program;
(d) Platinex will comply with its environmental policy;
(e) Platinex will comply with the E3 environmental standards; and
(f) Platinex is willing to retain from KI, or elsewhere, a qualified environmental monitor during the exploratory drilling.

Impact on hunting/trapping

(a) Platinex will seek input from the KI community respecting the goose and moose hunts when determining the timing of the drilling and the routing of helicopter activity;
(b) Platinex will seek input from Jacob Nanokeesic (who holds the only MNR-registered trapline on the lands of the Platinex claims) respecting his trapping activities;
(c) Platinex will implement the proposed mitigation measures respecting wildlife suggested by AMEC in its Report; and
(d) Platinex will attempt to address reasonable concerns raised by other identified section 35 rights holders concerning hunting/trapping activities on the lands of the claims.

The use of KI supplies and services/employment

(a) To the extent that they are available and cost competitive, Platinex will use the services and supplies from the KI community during the proposed exploratory drilling;
(b) Although employment opportunities are minimal at the early exploratory stage, Platinex will use KI community members where appropriate for transportation, etc.; and
(c) There is a possibility that Platinex will request to establish a field office during the exploration.

Participation in future decision making

(a) Subject to the execution of confidentiality agreements, Platinex will share the results of its exploratory drilling with KI; and
(b) Platinex will develop, in collaboration with KI and any other identified section 35 rights holder, a process for consultation during and after the exploratory stage.

Compensation

(a) Platinex will provide reasonable compensation to Jacob Nanokeesic for loss of revenue resulting directly from a disruption of his trap lines.

2. The KI consultation committee, in conjunction with Platinex's and Ontario's consultation representatives, will retain the appropriate technical expert to review the information produced by Ontario and Platinex, including the AMEC environmental report, and to conduct a peer review or provide other appropriate advice respecting potential cumulative environmental impacts. This review also may include advice respecting ecological issues (not duplicative of the report of Justina Ray). KI must look to Ontario for funding of this work.
3. The KI consultation committee may conduct a review to identify any other (currently unknown) KI, or other First Nation member, who may be affected directly by the Platinex exploratory drill program. KI must look to Ontario to fund principally this review. Platinex, however, will contribute a reasonable sum.
4. As a result of the activities of #2 and #3 above, the consultation committee will meet with the KI community in Big Trout Lake to discuss any additional concerns that have arisen and potential accommodation.
5. The consultation parties are committed to reaching, by mid-April 2007, an access agreement to allow Platinex to conduct its 24-80 hole exploration drill program.
6. The consultation parties will agree that additional consultation will take place in the event of any further exploration and/or development of the claims/leases beyond the 24 to 80 hole program. Such consultations could include the appointment of a KI Resource Development Officer.
7. As a term of a more formal access agreement between Platinex and KI supported by a band resolution, Platinex is committed to:

   (a) having KI participate in the company by:

      (i) investment through the issuance of warrants; and/or
      (ii) membership on the Platinex board of directors; and/or

   (b) establishing a fund to benefit the community calculated as a percentage of all monies spent on the exploration drill program.[20]

132 MNDM supports Platinex's approach and direction as contained in the proposed MOU, maintaining that the scope of accommodation must be directed, not at the details of a consultation protocol, but rather at how the drilling project is to proceed and how it should be managed, including the participation of the parties.

133 KI rejected the proposal in its entirety, stating that the position of MNDM and Platinex was unreasonable, and that the proposal represented a breach of the Crown's duty to consult in a bona fide and meaningful fashion. In view of KI's lack of trust, it believed that the first step was to reach an agreement on a consultation protocol.

134 With respect to how it has conducted the consultations, KI views the position that it has taken as being reasonable and accommodating,

> which taken as a whole shows KI engaging with Platinex and Ontario, trying to make its concerns known, addressing Ontario and Platinex's concerns, and offering over

and over again ways to make the consultations process work.[21]

135 KI views the insistence by Platinex (supported by MNDM) that it agree in advance to the drilling project, before any substantive consultations could be held and become enshrined in a consultation protocol, as patently unreasonable.

The Evidence of the Harm to KI's Treaty Land Entitlement Claim

136 It is not the purpose or task of this court to comment on or decide whether KI's TLE claim is valid, except to assess the strength of the claim as part of the balancing of the risks of the proposed activity in the context of whether injunctive relief should be granted.

137 The concern that Chief Morris has expressed, on behalf of KI, is that mining activity could take the land on which it is conducted off the table for selection purposes, assuming the claim is successful.

138 As mentioned above, KI's TLE claim was filed in 2000 and rejected by OSAA in March of this year, on the basis that KI's entitlement to land under Treaty 9 had already been met. Although this is a factor for this court to consider when assessing the strength of the claim, this does not mean that the claim has been finally adjudicated. KI may still pursue judicial review of the decision, persuade Ontario to change its position, or bring a lawsuit against the Crown. Additionally, the federal government has not yet indicated its position on the claim; if they decide it is meritorious, it is possible they may lobby Ontario to change their position.

139 On the April 2007 motion for an interlocutory injunction, KI supplemented the evidence that it relied upon in June 2006 with an affidavit sworn by Roger Townshend, one of its legal counsel. In his affidavit, Mr. Townshend provided opinion evidence on matters of history, policy, and law.

140 MNDM challenged the admissibility of Mr. Townshend's opinion. It was ultimately agreed between counsel, and accepted by this court, that his evidence was not being proffered as opinion evidence, but rather to show the nature of the TLE claim that KI presented to OSAA.

141 The report of historian Janet Armstrong was attached as an exhibit to Mr. Townshend's affidavit in support of KI's claim that it had an unfulfilled TLE entitlement. Dr. Armstrong was not cross-examined on the content of her report.

142 In considering and dismissing the merits of KI's TLE claim, OSAA reviewed and considered the affidavit of Roger Townshend and the attached report of Dr. Armstrong.

Discussion:

Irreparable Harm

143 While all parties share the belief that established and asserted rights trigger the obligation of the Crown to consult with Aboriginal groups when a Crown-sanctioned activity threatens Aboriginal rights held by those groups, it is readily apparent that the parties have very divergent views of the scope of this duty.

144 It is also apparent that these different viewpoints stem from a fundamental disagreement surrounding the legal rights that each party seeks to protect. The degree of harm that the taking up imposes is directly related to the question of whether all that is required of the Crown is consultation or whether the harm is so great that only injunctive relief will protect the right being infringed upon.

145 KI takes a broad and expansive view of the scope of the duty to consult; a view that justified the declaration of a moratorium on development until agreement was reached on a comprehensive protocol, along with appropriate levels of funding.

146 Platinex and MNDM agree that KI's established and asserted Aboriginal rights, protected by s. 35, trigger a duty to consult. However, they state that the duty is limited and has been adequately met, so that there is no legal rationale to prohibit the drilling project from continuing.

147 While it is completely understandable, in view of the Aboriginal relationship to land, why KI wishes to proceed cautiously and to have a consultation protocol in place before any drilling begins, the fact remains that the drilling is to take place on Crown land unfettered or unencumbered by Aboriginal title. The consultation process cannot be used in an attempt to claw back rights that were surrendered when Treaty 9 was signed.

148 From reading the many affidavits filed by KI band members, it appears that those affiants, including Chief Donny Morris, may not fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty 9 was signed. The right that remains is the right for KI to be consulted when there is a taking up of land that may have a harmful impact on the traditional harvesting rights, as described in the treaty.

149 When this court granted an interim, interim order in July 2006, it made the order conditional upon KI setting up a consultation committee **to develop an agreement to allow Platinex to conduct its drilling project.** (emphasis added) At that point in time, consultation had been minimal, and there was an incomplete and inadequate understanding of the interests, needs, and positions of the parties and of the potential harm that drilling could present.

150 My review of what has transpired since the release of my decision on July 28, 2006, is that all parties have made *bona fide* efforts to consult and accommodate. However, because of the fundamental differences regarding the scope of the duty to consult and the parties' legal rights, no agreement has been forthcoming and no consideration has been given to the possibility of Platinex proceeding with its drilling project.

151 The respective positions of the parties are understandable and reasonable when viewed from their perspectives.

152 The consultation process has been helpful, in that it has fleshed out the positions of the parties. This is evidenced by the fact that 13 drafts of a consultation protocol have been exchanged.

153 The record of the consultation process indicates that there were discussions and agreement on a number of issues, including some level of funding for KI.

154 It is apparent from reading the affidavits of the band members that the KI community wishes to have its integrity and honour respected. Community members want to be treated as full partners, and not as second class citizens. They want to have their fears and concerns heard and appreciated.

155 This court understands, respects, and acknowledges this perspective. This court accepts that, as an Aboriginal community, KI has a unique cultural and spiritual relationship to the land, and a need to carefully and responsibly carry out the Aboriginal imperative to act as stewards of the land. In 1854 Chief Norah Seattle [Sealth] in a memorable speech explained the Aboriginal dilemma inherent in the urge to develop the land and their spiritual and cultural perspective: "If all the beast were gone, we would idle from a great loneliness of spirit, for whatever happens to the beast, happens to us. All things

are connected. Whatever befalls the earth befalls the children of the earth."[22]

156 The grant of an injunction is an extraordinary remedy, in that it prevents a party from pursuing a course of action before a trial has been held on the merits. A court is called upon to predict that, without an order, harm will occur. Any prediction of risk must be based upon evidence that is reliable and relevant. Speculation, assumption, and fear cannot provide the foundation for such an order. The evidence must establish a probability that irreparable harm will occur.[23]

157 I find that the evidence of harm to the land, harvesting rights, and KI community and culture fails to meet the relatively high standard of probability required for the grant of injunctive relief. Much of this evidence was based upon assumptions and fear of what may transpire, and is not causally connected to Platinex's proposed drilling program.

158 The fear of cultural, environmental, and spiritual harm as described by Mary Childforever cannot reliably be linked to Platinex's proposed development.

159 There can be no doubt that many Aboriginal communities, including KI, have suffered, and continue to suffer, on many levels. Poverty, substance abuse, suicide, and depression are widespread. Aboriginal youth feel isolated and cutoff from their traditions, culture, and language. These problems are real, serious, and tragic, but there is insufficient evidence to satisfy me that the drilling project contemplated by Platinex will exacerbate these problems.

160 Platinex has agreed to proceed cautiously, in stages, with constant consultation and attention to community concerns, and under the supervision of this court. I find that the proposed MOU that Platinex and MNDM are prepared to sign represents, generally speaking, a reasonable and responsible beginning of accommodating KI's interests and, at this point in time, is sufficient to discharge the Crown's duty to consult.

161 Treaty 9 contemplates and foreshadows that there would be a taking up of land for mineral development, and that there would be consultation with First Nations. This is exactly what is now happening. This was commented on by the Supreme court in *Mikisew*:

> I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in Sparrow. In Sparrow, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". (Emphasis added.) The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.
>
> It follows that I do not accept the Sparrow-oriented approach adopted in this case by the trial judge, who relied in this respect on Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that any interference with the right to hunt is a prima facie infringement of the Indians' treaty right as protected by s. 35 of the Constitution Act, 1982" (para. 144 (emphasis in original)) which must be justified under the Sparrow test. The Mikisew strongly support the Halfway River First Nation test but, with respect, to the extent

> the Mikisew interpret Halfway River as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a Sparrow-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.[24]

162 The strength of KI's asserted TLE claim is also a concern. There is no reliable evidence that the exploration project will adversely affect it. Even if the TLE is successful, there is insufficient evidence that the activities proposed by Platinex will compromise KI's ability to select land to satisfy any entitlement. The treaty does not give First Nations the right to select land unilaterally, nor does it provide KI with a veto.

163 The presence of third party interests may limit the land that is available for selection should KI succeed with its claim. Platinex, for example, staked its claims and received mining leases with the exclusive right to work the claim prior to the filing of KI's TLE claim.

164 Ontario has an arguable case that KI has received lands in excess of what could be the most generous assessment of its entitlements under Treaty 9.

165 Ontario also has an arguable case that a band's treaty land entitlement must be calculated based on the population of the band at the date of the treaty, not on the basis of the present day population as proposed by KI.

The Balance of Convenience

166 The new evidence that has been adduced since June of last year, has changed my view of where the balance of convenience lies.

167 Assessing the balance of convenience involves balancing the harm that each party will suffer and whether that harm can be compensated for in damages.[25]

168 In my July 28, 2006, reasons I found that the balance of convenience at that point in time favoured KI, and that the financial harm to Platinex was outweighed by the harm to KI's spiritual and cultural connection to the land and to its ability to select lands in its TLE claim.

169 The harm that Platinex will likely suffer if it cannot conduct its proposed drilling operation is that it will go out of business, since the Trout Lake claims and leases are its major asset. It has managed to survive until now, but I am satisfied that there is a very strong probability that it could not survive until trial if an injunction were granted, even with an order expediting trial. Being put out of business is irreparable harm that cannot be readily compensated for in damages.[26]

170 The harm that KI will suffer as a result of damage to the land itself will relate to a maximum of 80 drill holes, of approximately 2 inches in diameter, in 12,080 square acres of wilderness. I have already commented that the evidence of harm to treaty harvesting rights, culture, Aboriginal tradition, and the community is inconclusive.

171 Aboriginal rights deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature.[27]

172 After balancing the respective interests of the parties in relation to the harm that each would

suffer, I find that the evidence supports a finding that the balance of convenience favours Platinex.

Disposition

173 For the reasons stated above, KI's motion for an interlocutory injunction is dismissed.

174 Section 97 of the *Courts of Justice Act*[28] provides that the Superior Court of Justice "may make binding declarations of right whether or not any consequential relief is or could be claimed."

175 In its notice of motion, in addition to its request for injunctive relief, KI has asked this court to consider "such further and other relief as this court deems just." A prayer for relief of this nature provides a court with the authority to issue a declaratory judgment.[29]

176 A declaratory judgment is a judicial statement confirming or denying a legal right, which is founded on the concept of judicial intervention. The inherent function of a court is to declare the rights of the parties seeking judicial intervention. The premise underlying the declaratory recourse "is that judicial recognition of certain rights should not be withheld from the parties for reasons relating strictly to the procedural obstacles characteristic of other judicial remedies."[30]

177 In order for a court to consider issuing a declaratory remedy, there must be evidence of harm that is more than remote. There has been a general reluctance of court to provide remedies "where the causal between an action and the future harm alleged to flow from it cannot be proven".[31] Courts do not have the jurisdiction to issue a declaration where there is no right in jeopardy.[32] In this case, Platinex and MNDM have acknowledged that the drilling project will have an impact on KI's Treaty rights, upon the land, and upon KI's TLE claim.

178 A declaratory order need not be final; it can be interim or temporary in nature, depending upon the facts and circumstances of the case.[33]

179 The Superior Court of Justice has a broad discretion in deciding whether or not to issue a declaratory order. While judicial discretion has boundaries, this remedy represents:

> ... an innovative tool; while the uses of the declaration cannot be said to be infinite, there is no reason to think that the final boundaries of the remedy have already been set. The impact on judgments lies not in their technical development of a point of procedural law, but rather in their alignment of the scope of the recourse with the actual function of the court: the evolution of the declaratory judgment is a direct reflection of the development of the court as a social institution, and a willingness or a reluctance to grant an order even as a matter of pure discretion is an indicator, especially in the field of administrative law, of the self-confidence, creativity and force of the judicial forum.[34]

180 As mentioned in my Reasons released July 28, 2006, the injunctive remedy can often be ill-suited to cases where Aboriginal rights and interest are at stake. In paragraphs 56, 57, and 58 of my July 28, 2006, Reasons, I made the following comments:

> The nature of the remedy of injunctive relief is often not suited to situations involving Aboriginal issues, particularly in view of the Crown's obligation of consultation and the importance of the principle of reconciliation.
>
> As noted by Allan Donovan and Mariana Storoni,

> When the Crown either consults and accommodates inadequately or fails to consult and accommodate at all before authorizing a third party to conduct land or resource-based activities that will adversely affect Aboriginal rights and title, First Nations are left with few options to protect their interests.

Similarly, in *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court stated:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts ... Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns ... Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise.

181 Should this court simply dismiss the motion by KI for interlocutory relief, this could exacerbate the conflict that already exists between the parties. Additional conflict could potentially create a situation where self-help remedies, civil disobedience, and confrontation occur. Respect for the rule of law may suffer.

182 In the proper case the grant of an injunction can be appropriate to protect Aboriginal rights that are at risk of harm. This case however, is not one of them. An injunction is an all or nothing remedy. The nature of the competing rights of the parties in this case do not fit into such a framework. Instead, those interests must be judiciously balanced on an ongoing basis with careful attention paid to the concerns and perspective of each party. Only in this way will reconciliation and a fair and just accommodation be achieved.

183 It is not in the interests of the parties or the judicial process to allow an environment of conflict and distrust to prevail. Such an atmosphere does not, and cannot, promote the fundamental principle of reconciliation that is at the very heart of balancing Aboriginal interests and rights with those of others. Once again the comments made by Lamer C.J.C. in *Delgamuukw* are important to repeat and remember:

> ... ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgment of this Court, that we will achieve ... the basic purpose of s. 35(1) - "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[35]

184 I am not convinced that Platinex should be given a *carte blanche* to proceed with its entire exploration drilling project at this time. Development should proceed slowly, with Ontario, Platinex, and KI fully engaged in the consultation process each step of the way, and with each prepared to make accommodations as the need arises.

185 The grant of an interim declaratory order allows this court to stay involved as development progresses, to allow the parties to return to court and seek whatever order(s) may be necessary whenever

agreement and accommodation cannot be reached. In this way, KI will know that their concerns and fears are being heard and respected, with the hope that ultimately development will be for the mutual benefit of all parties, and not just Platinex.

186 Ongoing supervision will serve to promote a more precise balancing of the rights of the parties, with the ultimate goal of with achieving fairness.

187 It is important to note that, while Ontario is a party to the motion, it is not a party to the main action. Even if it were a party, the *Proceedings Against the Crown Act* prohibits this court from making an order directly against it.[36] Nevertheless, the Crown is directly involved in this proceeding, because the honour of the Crown is in issue, and because its duty to consult has been triggered by the involvement of protected s. 35 rights.

188 In the interests of protecting the rights of the parties, respect for the rule of law, and the administration of justice, this court will exercise its discretion and issue the following interim declaratory order:

1. The motion brought by KI is dismissed;
2. KI shall have the right to ongoing consultation with respect to all aspects of the impact that Platinex's drilling project may have on its treaty harvesting rights and asserted Treaty Land Entitlement claim;
3. By no later than May 15th, the parties shall implement a consultation protocol, timetable, and Memorandum of Understanding. Failing this, after hearing further submissions from the parties, this court shall make whatever orders it deems appropriate. The consultation protocol shall address, but is not limited to, the following terms:

    * Potential burial sites in the vicinity of the Platinex claim;
    * Environmental impact of the proposed drilling;
    * Impact on hunting and trapping;
    * Participation in decision-making;
    * The use of KI supplies and services/employment; and
    * Compensation and funding.

4. Subject to this court being satisfied that a proper protocol is in place, either by way of agreement or by court order, Platinex shall be permitted to undertake Phase One of its exploration drilling program. Phase One shall commence on June 1, 2007, and shall consist of the drilling of 24 test drill holes;
5. The supervision of the court shall include, but is not limited to, a review of a proposed drilling timetable, the scope and content of a consultation protocol, all aspects of the Phase One exploratory drilling program, and provisions for compensation and funding;
6. In order to provide speedy access to the court, taking into account the fact that most counsel are resident in Toronto and not in northwestern Ontario, the parties shall forthwith consult with the Trial Co-coordinator to fix a timetable for no less than three teleconferences. The first teleconference shall take place before the drilling project commences, and the last shall take place after the completion of Phase One. If the parties require additional time to address any issues, they may make further arrangements with the Trial-coordinator.
7. Subject to whatever agreements are made by the parties, this court reserves the right to make whatever further orders it deems just including the right to make

an order that no further drilling take place.

189 The issue of costs is reserved to a date to be set by the court.

G.P. SMITH J.

cp/e/ln/qlgxc/qllkb/qltxp

1 *Indian Act*, R.S.C. 1985, c. I-5.

2 *Mining Act*, R.S.O. 1990, c. M-14.

3 *Haida Nation v. British Columbia (Minister of Forests)* 2004, 245 D.L.R. (4th) 33 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005), 259 D.L.R. (4th) 610 (S.C.C.); *Hiawatha First Nation v. Ontario (Minister of the Environment)*, [2007] O.J. No. 506 (Div. Ct.).

4 The affidavit of Chief Donny Morris, sworn May 16, 2006, at para. 20.

5 *Webster's Ninth New Collegiate Dictionary*, (Springfield, MA: Merriam-Webster Inc., 1987).

6 *Black's Law Dictionary, 7th ed.* (St. Paul, MN: West Group, 1999).

7 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 1123-24.

8 *Haida Nation, supra,* note 4, at paras. 42 and 48.

9 *Haida Nation, supra,* note 4, at paras. 47 and 49.

10 *Haida Nation, supra,* note 4, at paras. 43, 44, and 45.

11 *Mikisew Cree First Nation, supra,* note 4, at para. 55.

12 Question 779 from the transcript of the cross-examination of Christine Kaszycki held March 19, 2007.

13 *Mikisew Cree First Nation, supra,* note 4, at para. 47.

14 Rules of Civil Procedure, R.R.O. 1990, Reg. 1994.

15 *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

16 The affidavit of Chief Donny Morris, sworn June 5, 2006, at para. 27.

17 The affidavit of Chief Donny Morris sworn June 5, 2006 at para. 21.

18 The KI Consultation Protocol, para. 1.2.8.

19 The KI Consultation Protocol, para. 1.1.3.

20 The letter of James Marrelli dated March 13, 2007, attached as exhibit to his affidavit sworn March 14, 2007.

21 Paragraph 110 of the Factum of KI.

22 Chief Sealth, quoted in *Morris Berman, Coming to Our Senses* (New York: Bantam Books, 1990), p. 63.

23 *Operation Dismantle Inc. et al. v. The Queen et al.* (1985), 18 D.L.R. (4th) 481 (S.C.C.).

24 *Mikisew Cree First Nation, supra,* Note 4, at paras. 31-32.

25 *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.).

26 *Red Chris Development Co. v. Quock*, [2006] B.C.J. No. 2206 (S.C.); *674834 Ontario Ltd. (c.o.b. Coffee Delight) v. Culligan of Canada, Ltd.*, [2007] O.J. No. 979 (S.C.J.).

27 *Kruger inc. c. Première nation des Betsiamites*, [2006] J.Q. no 3932 (C.A.).

28 *Courts of Justice Act*, R.S.O. 1990, c. C-43.

29 *R. v. Bales et al., Ex parte Meaford General Hospital* (1971), 17 D.L.R. (3d) 641.

30 Lazar Sarna, *Law of Declaratory Judgments* (Toronto: Carswell, 1988), at p. 2.

31 *Operation Dismantle, supra,* note 27, per Dickson J. at pp. 456-58.

32 *Power v. Ough*, [1931] O.R. 184 (C.A.).

33 *Peralta v. Ontario (Minister of Natural Resources)* (1984), 46 C.P.C. 218 (Ont. H.C.).

34 Sarna, *Law of Declaratory Judgments, supra,* note 34, at p. 213.

35 *Delgamuukw, supra,* note 112, at paras. 1123-24.

36 *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 14.